INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 1. JANUARY/FEBRUARY 1983

The Right to Know

There are few less edifying sights than that of the mass-circulation newspapers adopting a holier-than-thou attitude in the cause of the public's right to know.

The collapse, after only two days, of the recent MacArthur trial must have come as a grevious blow to those newspapers who, at a time of increasing competition for sales and advertising, must have had hopes that a lengthy trial would have yielded a harvest of copy to boost flagging circulation.

Nonetheless, the point raised by the Press as to what details, if any, of the prosecution's case should be disclosed to the Court, where the Judge has no discretion as to the penalty which he can impose, is worthy of consideration; unfortunately, the level of contribution to the discussion, including at least one contribution from a prominent academic, has not been particularly high.

Our legislators have, for their own reasons, decided that on a jury bringing in a verdict of guilty of murder, a Judge will have no discretion to impose any sentence other than that of life imprisonment. He cannot, therefore, consider submissions about the accused's previous good character, family background, economic circumstances or, indeed, past convictions. If a Judge is not permitted to take any of these matters into consideration, then, as far as the Court is concerned, there is no point in the submissions being made.

In passing, it may be said that to restrict a Judge to a mandatory sentence in cases of this sort must be undesirable. The knowledge that a verdict of murder will bring a sentence of life imprisonment may well have almost as great an effect on a jury as, in the past, a knowledge that such a verdict could result in the imposition of the death penalty. Such knowledge must render it likely that, save in the gravest of circumstances, a jury will find a manslaughter verdict an attractive alternative. It must also put considerable pressure on defence lawyers to try to persuade the prosecution to accept a plea of guilty of manslaughter, rather than risk a conviction for murder if the trial proceeds. While this is not "plea bargaining", since it does not involve the participation of the Judge, it is suggested that negotiations leading to the acceptance of a plea to the lesser offence in such cases may be more open to criticism than in a lower Court, dealing with minor offences.

Several aspects of the MacArthur case call for comment. Is it appropriate that the contents of statements apparently made to the Garda Siochana, which have not been disclosed in open Court, should be divulged by the Gardai to the media? Whatever remote justification there arguably may be for disclosing the contents of a statement where the accused has pleaded guilty and been sentenced — and it is not clear that there is any — it is a most dangerous precedent. Is it impossible that the contents of a statement made by one who has not been convicted could be made public?

Most cases of murder in Ireland are saddening rather than titillating. It must be very doubtful whether the victim's families would wish to have more than minimal attention given in the media to the details of the crime or the character or personality of the victim. If the accused, having had the advice of experienced lawyers, decides to plead guilty then, in the great majority of cases, there is nothing to be said for any unnecessary exposition of the evidence which would have been offered by the Prosecution.

The most unusual and newsworthy feature of the MacArthur case was the location of the arrest of the accused. Accepting for the purpose of argument that this circumstance, or the widespread rumours in circulation about the various people involved (or, indeed, not involved) in the case, justified the great attention which was given to the case in the media and that a greater disclosure in Court of the prosecution's case would have been justified to allay public suspicions, would this justify the introduction of a general rule that a full disclosure of the prosecution's case should be made in all cases? We think not. □

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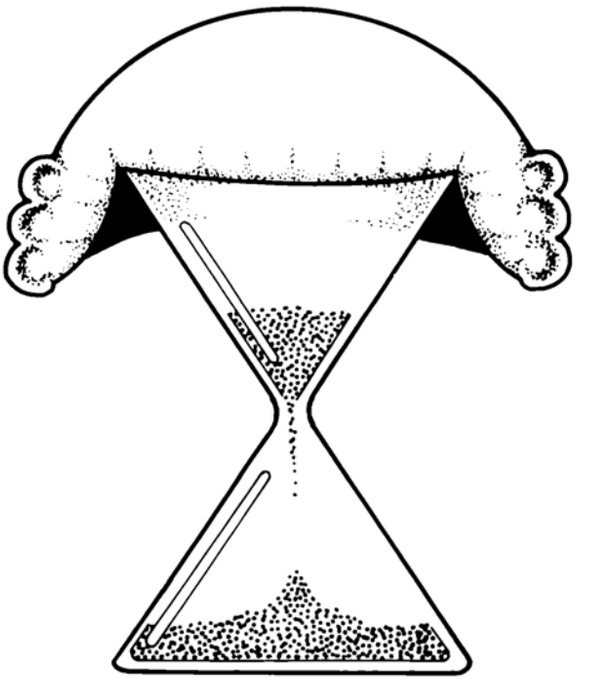

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GAZETTE

Vol. 77. No. 1. JANUARY/FEBRUARY 1983

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The views expressed in this publication, save where other-wise indicated, are the views of the contributors and not necessarily the views of the Council of the Society.

Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Keeping Better Company

THE recent statement by the Minister for Trade, Commerce and Tourism that his Department were preparing legislation to be introduced before the end of the year to reform Irish Company Law will not have assuaged the many critics from a broad spectrum of public and financial interest who have been pressing for reform with increasing urgency. The principal aim of the proposed legislation is apparently to protect the interests of workers in companies which fail — in implementation of an EEC directive. It is to be hoped that the legislation will, when it is introduced, be seen to be of a more comprehensive nature than this. Whatever pressure the Department may be under to implement EEC directives it is more urgent to try to cure the more obvious defects in our present Company Law. Lack of opportunity will be no excuse as the Department will be introducing Bills to implement both the second and fourth company law directives within the next twelve months.

The protection of the interest of workers in failed enterprises is clearly a laudable aim. So too would be enhanced protection for ordinary creditors even if this means the dilution of the rights of secured creditors or the State in its capacity as a preferred creditor. It has been argued before in these pages that the protection given to secured creditors has encouraged such creditors to take too little interest in the day to day running of their debtor companies. It also appears that the Revenue Commissioners have been less than zealous in their collection of taxes, including V.A.T. and P.R.S.I. contributions in particular, from companies which have subsequently failed. Reliance on their preferred status has proved misplaced in many cases, only the secured creditors recovering anything.

"Using the Revenue as an extra Bank", has become too common a saying about failed Irish companies.

Another great mischief which requires to be tackled is the ease with which those who control companies which have collapesed under suspicious circumstances leaving substantial debts are able to set up again in business through the medium of a new company. Persons who have had a significant element of control over companies which have so collapsed, should not be permitted to play any significant part in the promotion of or serve as a director to any new company for a period of, say, 5 years afterwards.

It was disappointing to hear Mr. Lawrence Crowley the well known Receiver and Liquidator in advocating

(Continued on P. 18)

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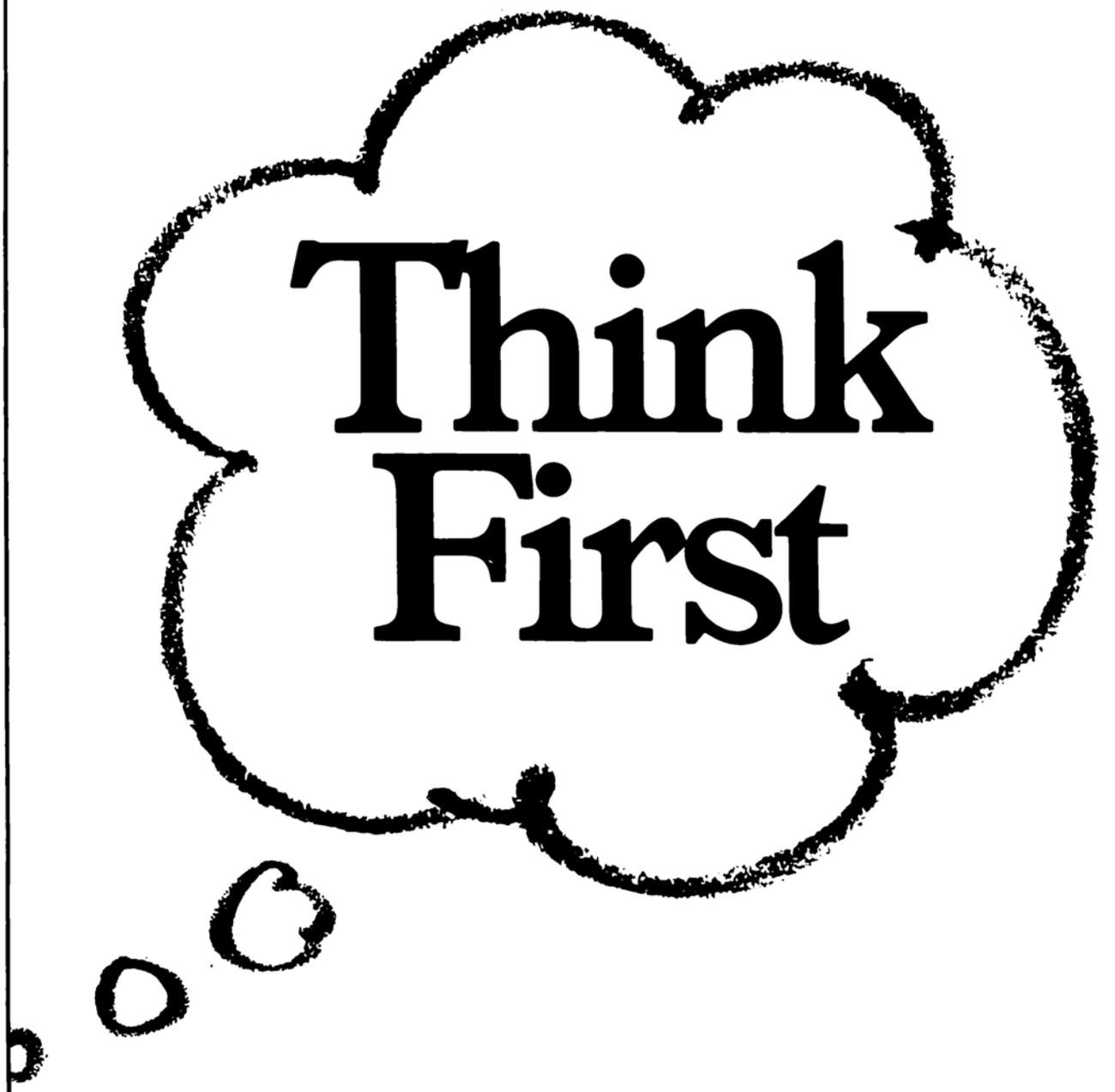

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Compulsory Registration and the Irish Church Act, 1869

by
Robert D. Marshall, Solicitor

WE all live in conditions which are a legacy from the past. For lawyers, this is undoubtedly true, but particularly so for conveyancers, the basic principles of whose craft are regulated by ancient statute laws such as *De Donis Conditionalibus* and *Quia Emptores.*

In recent years, the extension of the categories of title which are compulsorily registerable in the Land Registry under the Registration of Title Act 1964 has begun to rear its ugly head in urban and rural conveyancing, with the result that conveyancers shudder when they hear of the Irish Church Act of 1869 some, perhaps, wishing that the Church of Ireland had never been disestablished.

The purpose of this article is to examine the circumstances leading to the passing of that Act and the Sections of the Registration of Title Act 1964 which give rise to the conclusion that the title to large areas of land hitherto unregistered is compulsorily registerable. It is not proposed to go into the Redemption of Rent (Ireland) Act of 1891. Many of the consequences of that Act for modern conveyancers are the same as those of the Irish Church Act of 1869. In the writer's opinion it would be better to deal with it under a separate heading.

The Historical Background

The period of almost thirty years between the passing of the Act of Union and "Catholic Emancipation" in 1829 was the only period in Irish history of which it can safely be said that the country was ruled from Westminster on Westminster's terms. Thereafter, the degree of integration between the two countries was gradually reduced, starting with the religious issue, before turning to the land question and independence. Strangely enough, it was the resolution of the religious and land questions which was to have the most profound effect on Land Law rather than independence itself.

Catholic Emancipation did not prove to be the panacea that people expected. During the 1830s, agrarian violence forced O'Connell to return repeatedly to the question of the tithe. The tithe was an incorporeal hereditament, originally in the nature of an ecclesiastical tax, amounting to one-tenth of the produce of the land, payable in kind, to support the Church of Ireland.

The tithes were of two types, lay and ecclesiastical, but in political terms they were regarded as a tax payable to support the established Church, to which the majority of the people did not belong.[1]

A policy of converting the tithe into a monetary payment began with the Tithe Composition Act of 1823 and was continued by a series of Acts until 1836. This policy of composition was abandoned in 1838 in favour of a system of rent charges under the Tithe Rent Charge Act of 1838.

Five years previously, the Ecclesiastical Commissioners had been established under the Church Temporalities Act of 1833. Their powers were to concur in the making of fee farm grants by fixing a purchase price and to supervise the variation of rent charges in accordance with the terms of that Act. Under the Act, persons holding land from the Church corporations became entitled to expand their short leases to come into effect *in futuro* and the akin to the procedure for converting leases for lives renewable for ever into fee farm grants. The amount of the rent charged under such leases was related to the average price of corn which was grown in the area.

For our purposes, the legislation of the 1830s had the following effects:-

1. the Ecclesiastical Commissioners were established;
2. land was granted under statutory fee farm grants at a rent payable to the Church;
3. tithes were converted into monetary payments, for which the landlord was responsible.

Despite the Church Temporalities Act of 1833, many ecclesiastical corporations continued to grant short leases to come into effect *in futuro* and the writer has seen one dated the 29th December 1870[2] made by the Vicars Choral of the Cathedral Church of St. Patrick Dublin for a term of twenty years commencing on the 1st October 1910.

Disestablishment

The next development did not occur until the passing of the Irish Church Act in 1869 and this, strangely enough, although stemming from Gladstone's desire to pacify Ireland, was passed partly as the result of Fenian agitation in drawing attention to Ireland's woes and partly as the result of a political ploy whereby Gladstone forced a dissolution of Parliament and a general election which Disraeli, the Prime Minister, lost. The election was fought specifically on the question of disestablishment of the Church of Ireland.[3]

The primary aim of the Irish Church Act was to dissolve the union between the Church of Ireland and the Church of England and to sever the connections between Church and State in Ireland. Other

than the fact that the Act established a body to be called the Representative Church Body (RCB) the actual method by which this was done need not concern us here.

In addition, the Act set up a body called the Commissioners for Church Temporalities in Ireland and vested all Church of Ireland property in that body from the 1st January 1871. The Act provided that until the 31st December 1874, this body could exercise the powers of the Ecclesiastical Commissioners under the Act of 1833, a point to which we shall return later.

The brief of the Commissioners for Church Temporalities was to realise the assets of the Church of Ireland which had been vested in them under the Irish Church Act. In doing this, they had to deal, broadly speaking, with three types of property:—

1. property which the Church of Ireland wished and was empowered to reacquire under Sections 25 to 28 of the 1869 Act;
2. tenanted land;
3. rent charges —
   (a) rents under the Ecclesiastical Commissioners' fee farm grants created under the 1833 Act;
   (b) tithe rent charges under the 1838 Act.

The Act provided a system whereby both tenanted land and rent charges could be purchased, either by payment of the entire purchase price, or by the payment of not less than 25% of the price, with the balance being secured by way of mortgage in favour of the Commissioners. The Act contained no provisions requiring registration in the Land Registry, the entire concept of which was at the time in its infancy.[4] Both the purchase deeds and the mortgages were registered in the Registry of Deeds. None of the orders vesting property in the RCB under Sections 25 to 28 of the Act were registered in the Registry of Deeds.

The Commissioners for Church Temporalities replaced the Ecclesiastical Commissioners and took over both their functions and their premises, 24 Upper Merrion Street. In due course, when they were in turn replaced by the Land Commission, under the Irish Church (Amendment) Act of 1881, that august body took up residence in Upper Merrion Street.

The Registration of Title Acts

So far, we have used the word land quite loosely, but what was "land" for the purposes of the 1891 Act and what was the situation where rents and rent charges were concerned? Lawyers being the same then as they are now, it was not long before it fell to the Court to decide whether the title to a property on which a rent was charged was or was not compulsorily registerable. The case concerned was *Keogh Grantor: Kettle Grantee*[5] and the issue revolved, not around the Irish Church Act, but around the Redemption of Rents (Ireland) Act of 1891. The question to be determined was whether or not a fee farm rent was "land" within the meaning of the 1891 Local Registration of Title Act.

Madden J, who had been Attorney General for Ireland and had piloted the Registration of Title Act through Westminster, held that the rent was land within the meaning of the Act and that, as such, the title to the freehold land was compulsorily registerable. Having decided the point, he commented that:

"Public money to a large and increasing extent has been advanced on the security of holdings and it became a matter of public and financial importance that the title to those holdings should be kept clear from doubt or complication."

By Section 51 of the Land Act of 1927, the categories of freehold land which were compulsorily registerable were extended to cover cases in which:—

1. the purchase annuity has been redeemed;
2. the land had been vested by the Land Commission for cash.

In 1946, the issues discussed in *Keogh Grantor* came before Martin Maguire, J. in the case of *In re Reeves Estates.*[6] Here, the issue related to a rent purchased under the Irish Church Act. The facts were that, in 1835, the Bishop of Kildare and the Ecclesiastical Commissioners granted land toTuthill and Reeves and their heirs and assigns for ever, subject to a perpetual yearly rent which might be increased or diminished under the 1833 Act. In 1894, the rent was purchased from the Land Commission for £153.13s.4d. with £790.5s.0d. being secured by way of an instalment mortgage, which was duly paid off. Maguire, J., relying on *In re Keogh,* held that the rent was land within the meaning of the Registration of Title Act and that, as such, the title to the lands granted by the 1835 Fee Farm Grant was compulsorily registerable.

In his book, "Registration of Title", Mr. McAllister points out that land registered under Section 51 of the Land Act 1927, while it was in force, was not subject to the provisions of Section 23 and Section 25 of the 1891 Act. The point was not argued at all before Maguire, J. in the *Reeves Case* and there is no reference to it in his judgment. The logic of the practice to which Mr. McAllister refers appears to be that Section 51 of the 1927 Act did not amend Section 22 of the 1891 Act. Rather it says that certain land was compulsorily registerable and then went on to provide that, after registration, the 1891 Act would apply to such land.

And so the topic rested until 1964, when Mr. C. J. Haughey, then Minister for Justice, secured the passing by the Oireachtas of the Registration of Title Act. This Act came into operation on the 1st January 1967 and, for convenience, this date is referred to as the Operative Date. A comparison of Section 23 of the 1964 Act with Section 22 of the 1891 Act is interesting, for the 1964 provisions are considerably wider than the 1891 provisions. Following Section 51 of the 1927 Act, no reference is made in the 1964 Act to the land being subject to a charge for the security of an advance. The 1964 Act continued to define the Irish Church Act as a land purchase act. However, the definition of "land" was widened to include incorporeal hereditaments. The loophole referred to by Mr. McAllister has been closed since 1st January 1967 by bringing the provisions of Section 25 of the 1891 Act. The point was not argued Act into the one Act.

The Consequences

The effect of these Sections of the 1964 Act was to require that where land, including rents, whether supported by a right of ejectment or not, and rent charges, has been sold under the 1869 Act by the Commissioners for Church Temporalities or the Land Commission, the title to that land is compulsorily registerable in the Land Registry. The test to be applied to conveyances on or after the Operative Date is:—

> was the land at any time sold and conveyed to or vested in any person in pursuance of the Act and, if so, has any conveyance on sale taken place since the 1st January 1967?

If the answer to both limbs of this test is in the affirmative, then the title to the property should be registered forthwith.

The best way of seeing the consequences of this legislation is by looking at the various types of property which could be sold by the Church Temporalities Commissioners or, after 1881, by the Land Commission.

Church Lands Reacquired

Many of the assets which the Church of Ireland was empowered to reacquire continue to be used by that Church down to the present and, although the RCB as a statutory body is required under Section 23 (1)(b) and Section 25 of the 1964 Act to register any property which it has acquired[7] since the Operative Data within six months of acquisition, assets acquired before that date are not compulsorily registerable, since Section 51 of the 1927 Act appears never to have applied to such land. A property sold by the RCB since the Operative Date, which was vested in it on disestablishment and the title to which is unregistered, has a good title but no interest will vest in the purchaser unless the title is registered by him within six months of the closing of the sale. If the property was conveyed by the RCB before the Operative Date, the interest will have vested in the purchaser but, on being conveyed by that purchaser or a subsequent purchaser after the Operative Date, the property is registerable by any purchaser after 1st January 1967.

Tenanted Land

Where a tenant of ecclesiastical land purchased his freehold under the Irish Church Act 1869 from the Church Temporalities Commissioners or the Land Commission, the situation is complex and technical, but it is important as it may determine whether or not a vendor or a purchaser must be responsible for the registration and, thereby, for the costs and delays involved in registration. The analysis must be carried out by reference to the date of the conveyance and the method by which the sale under the Irish Church Act took place:-

1. Cash Sales by the Commissioners

The registration of the title to such land was voluntary until 1927. From 1927 until 1st January 1967, registration was compulsory but no method of enforcing registration appears to have been available. Since 1st January 1967, the title to such land became registerable within six months of the land being conveyed on a sale.

2. Sales by the Commissioners, with part of the purchase money secured on a mortgage.

So long as money was secured, the title to the land was compulsorily registerable and the Land Commission could enforce registration under the 1891 Act. If the land was sold subject to the charge at any time before 1st January 1967, the title was registerable forthwith. Since 1st January 1967, it is registerable within six months of a conveyance sale. Once the charge had been paid off, then, provided that there had been no conveyance of the property during the period of the charge, the title to the land was not registerable until 1927. From 1927 until 31st December 1966, the title to the land would be registerable but no enforcement procedures appear to have been available. Since 1st January 1967, the title to the land is registerable within six months of a conveyance on sale.

Rent Charges and Fee Farm Rents

To turn to rent charges, the purchase under the Irish Church Act of an ecclesiastical tithe rent charge created under the Tithe Rent Charge Act of 1838, whether from the Church Temporalities Commissioners, in the past, or from their successors the Land Commission, at any time, will, following the decision in *In re Reeves Estate,* give rise to a requirement that the title to the entire freehold interest in the land should be registered and not just the title to the rent charge. The tithe rent charge is an incorporeal hereditament but, as such, it is "land" as defined by the 1964 Act. Likewise, the purchase under the Irish Church Act 1869 of a Fee Farm rent created under the Church Temporalities Act 1833 will give rise to compulsory registration. Such rents, being supported by rights of ejectment or distress, are corporeal in character and therefore "land" within the definitions in both the 1891 and 1964 Acts.

The foregoing analysis of the occasions on which registration is required in respect of tenanted land is applicable to the situation created by the purchase of a rent charge or fee farm rent under the Irish Church Act. Redemption of the rent charge or fee farm rent may have taken place very recently. Some conveyancers do not call for a conveyance or release from the Land Commission, but it is not clear whether or not payment of the purchase money will trigger the registration requirement. The better opinion would appear to be that it will not.

Care must be taken to draw a distinction between an Ecclesiastical Commissioners' fee farm grant, which is not registerable in the Land Registry *per se* and a Church Temporalities Commissioners' conveyance or a conveyance from the Land Commission, which is; e.g. a release of the rent under an Ecclesiastical Commissioners' fee farm grant. An Ecclesiastical Commissioners' fee farm grant was entered into in pursuance of a policy designed to release land and conveyancing from the burden of a succession of short leases, while the Church Tempor-

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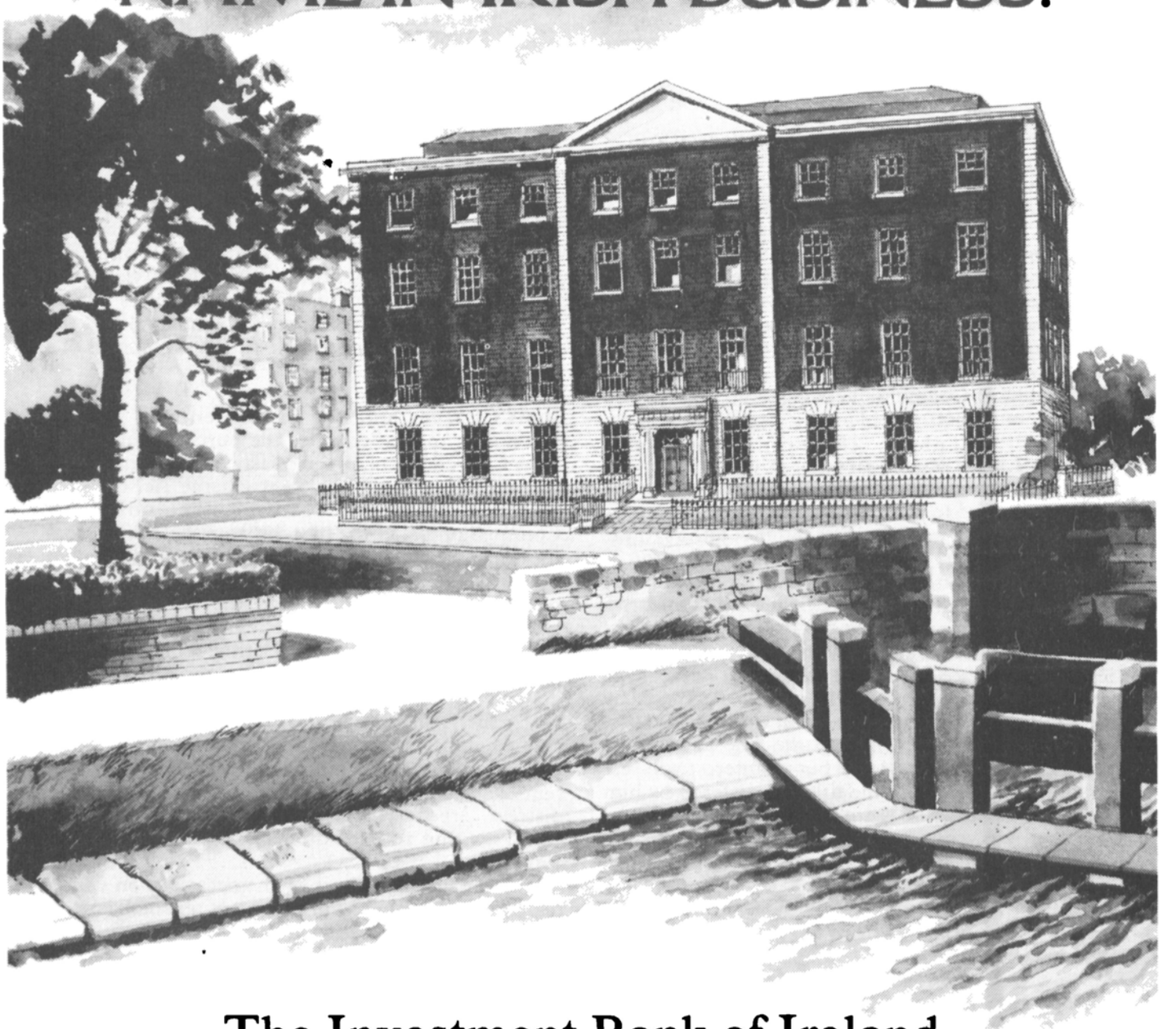

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alities Commissioners' conveyances were made in pursuance of a policy designed to realise, for the benefit of the country generally, the assets of the Church of Ireland, initially by the sale of the land to the tenants. If the tenant did not wish to buy the land, it could then be sold publicly.

There is one area where the situation is ambiguous, that is, in the transitional period from the 1st January 1871 to the 31st January 1874, when the Church Temporalities Commissioners exercised the powers of the Ecclesiastical Commissioners. In such cases, the Church Temporalities Commissioners would have sold and conveyed or vested land not under the Irish Church Act but under the Church Temporalities Act of 1833. On the other hand, since the ecclesiastical corporations had been dissolved and their property vested in the Church Temporalities Commissioners, the corporations could not join in the fee farm grant and their place would have been taken by the new Commissioners. In this way, it could be argued that a sale took place under the Irish Church Act, 1869. The practical solution is to save one's breath and register.

With many titles, the conveyancer will not have access to the title documents between 1871 and 1891 and, if this is the case, care should be taken to ensure that none of the recitals in any of the deeds give notice of a possible defect.

Conclusion

Once a title appears to be registerable, the conveyancer should investigate the vendor's situation and satisfy himself that the title is not registerable in the vendor's hands. Under clause 15 of the 1978 edition of the Law Society Particulars and Conditions of Sale, it is only if registration becomes compulsory on the completion of the sale that the registration must be effected at the purchaser's expense. In other cases, the issue will fall to be decided on the basis of pre-contract requisitions and notice, as is the case with any other objection or requisition.□

Footnotes

1. For a summary of the development of the distinction, see extract from the Judgement of Mr. Commissioner McCarthy in the case of "*In re the Estate of Watson and Another*" in Bowen, Statutory Land Purchase in Ireland at page 399.
2. Two days before its dissolution as a body corporate under the provisions of the Irish Church Act.
3. See F.S.L. Lyons, Ireland Since The Famine, and R.B. McDowell, The Church of Ireland 1869-1969, Chapters 2 & 3.
4. See The Record of Title (Ireland) Act 1865 under which persons obtaining a conveyance from the Landed Estates Court of any land or lease or interest therein were entitled to have that conveyence recorded in the "Record of Title". Approximately 800 titles were involved all of which are registerable under S.126(3) of the Registration of Title Act, 1964.
5. [1896] 1 IR p. 285.
6. [1946] IR. p. 56.
7. It should be remembered that property was acquired by the RCB between 1871 and 1964 otherwise than under the Irish Church Act. Such property would not be compulsorily registerable unless it had been purchased under the Land Purchase Acts. Section 25 of the 1964 Act only affects land acquired on or after 1st January 1967.

General Valuation Department

The Minister for Finance, in exercise of the powers conferred upon him by section 9 of the Annual Revision of Rateable Property (Ireland) Amendment Act, 1860, as adapted, has approved the scale of fees specified below for the supply by the Commissioner of Valuation of certified extracts from and copies of valuation documents in the General Valuation Office.

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Number of tenements	For current or last year	For any previous year	
	£	£	
1 to 5	3.00	7.20	Plus £1.50 per alteration when a certified extract showing alteration in a valuation is required.
6 to 10	6.00	11.40	
Every additional 10 or fraction thereof	4.50	9.00	

Copies of Valuation Maps
(not including cost of Ordnance Sheets)

Number of lots	For current year	
1 to 5	£6.60	Plus 50% for conversion to a scale other than the scale of the current valuation map.
6 to 10	£13.20	
Every additional 10 or fraction thereof	£6.60	

Certified apportionments of valuation will be charged for at rates based on the expense of their preparation.

Department of Finance.

I hereby prescribe the following fees to be charged as from 1st January 1983 for the services performed by the staff of the Valuation Office for members of the public consulting Valuation Lists and Valuation Maps at the Valuation Office:—

For production of one volume of the Valuation Lists and/or one Valuation Map relating to a hereditament described therein; cancelled documents relating to a period more than 15 year's previous to be the subject of a further similar charge; this fee to cover the right to make excerpts relating to the item under investigation and a freehand sketch of the hereditament.	75 pence
Alternative attendance fee (to be applied at the Commissioner's discretion where several extracts are required or the time spent in examination of the documents is considerable) without restriction on the number of documents produced.	£4.50 per hour or part thereof.

Commissioner of Valuation □

Solicitors' Remuneration General Order 1982

We, the body in that behalf authorised by the Solicitors'Remuneration Act, 1881, as adapted by the Solicitors' Remuneration Act, 1881, (Adaptation) Order, 1946 (S.R. and O. 1946 No. 208) made pursuant to the Adaptation of Enactments Act, 1922, do hereby, in pursuance and execution of the powers given to us by the said Statute as so adapted, and after due compliance with section 3 of the Solicitors' Remuneration Act, 1881, make the following General Order.

1. This Order may be cited as the Solicitors' Remuneration General Order, 1982, and this order and the Solicitors' Remuneration General Order, 1884, the Solicitors' Remuneration General Order, (No. 1) 1920, the Solicitors'
Remuneration General Order, 1947, the Solicitors' Remuneration General Order, 1951, the Solicitors' Remuneration General Order, 1960, the Solicitors' Remuneration General Order, 1964, the Solicitors' Remuneration General Order, 1970, the Solicitors' Remuneration General Order, 1972, the Solicitors'

Remuneration General Order, 1978 shall be read together and may be cited as the Solicitors' Remuneration General Orders, 1884 to 1982.

2. The following fees chargeable under Schedule II of the said General Order of 1978 shall be increased as follows:

Item		
2.	£0.58 shall be increased to	£0.75
3.	£0.24 shall be increased to	£0.30
4.	£0.19 shall be increased to	£0.25
5.	£0.10 shall be increased to	£0.15
6.	£0.06 shall be increased to	£0.10
7.	£0.28 shall be increased to	£0.35
8.	£1.88 shall be increased to	£2.50
9.	£0.06 shall be increased to	£0.10
	£0.66 shall be increased to	£0.90
10.	£0.06 shall be increased to	£0.10
11.	£0.70 shall be increased to	£0.95
12.	£1.88 shall be increased to	£2.50
13.	£1.42 shall be increased to	£1.90
14.	£1.88 shall be increased to	£2.50
15.	£35.56 shall be increased to	£47.40
16.	£5.65 shall be increased to	£7.55
	£35.56 shall be increased to	£47.40
17.	£0.70 shall be increased to	£0.95
	£0.94 shall be increased to	£1.25
18.	£0.58 shall be increased to	£0.75
	£0.19 shall be increased to	£0.25
19.	£0.24 shall be increased to	£0.30
20.	£6.58 shall be increased to	£8.75

This Order shall apply only to business transacted after the 1st day of July 1982.

Dated this 1st day of July 1982. □

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SYS SPRING SEMINAR

The Spring Seminar will be held on 23/24 April, 1983, in the Great Southern Hotel, Killarney.
Programme and Registration Forms will be issuing shortly.

Annual General Meeting of the Society, Blackhall Place, Dublin 7. Friday, 12 November, 1982

The President, Mr. W. Brendan Allen, took the Chair. At the outset he welcomed Mr. David Edwards, Mr. Michael Park, Professor Philip Love, Past Presidents, Mr. Patrick Riddell, Senior Deputy Secretary, and Mrs. Caroline Slator, Education Officer, of the Law Society of Scotland. He also welcomed the members of the Society to the meeting.

Notice

The adoption of the notice convèning the meeting was proposed by Mrs. M. Quinlan, seconded by Mr. W. Beatty and agreed. The attendance at the meeting was recorded in the Attendance Book. 46 Members attended.

Minutes

On the proposition of Mr. P.C. Moore seconded by Mr. J. Carrigan, the minutes of the Half Yearly General Meeting held in Ashford Castle Cong, County Mayo, on 7 May 1982, were taken as read and signed by the President.

Scruitineers' Report

The Scrutineers' Report was adopted on the proposition of Mr. D. Moran seconded by Mr. E. Margetson. The result of the Council Election was as follows:—

Candidates — Elected	Total Votes
1. Quinlan, Moya	1,106
2. Buckley, John F.	1,024
3. Allen, W. Brendan	934
4. Ensor, Anthony H.	904
5. Shaw, Thomas D.	897
6. Binchy, Donal G.	894
7. O'Mahony, Michael V.	881
8. O'Donnell, Roderick (Rory) D.	860
9. Bourke, Adrian Patrick	809
10. O'Donnell, Patrick Frank	802
11. Collins, Anthony E.	787
12. O'Connor, Patrick	787
13. Daly, Francis D.	779
14. Beatty, Walter	768
15. Margetson, Ernest J.	763
16. Curran, Maurice R.	760
17. Smyth, Andrew F.	753
18. Shields, Laurence K.	720
19. Cusack Connellan, Clare	719
20. Kelliher, Donal	714
21. Cullen, Laurence	705
22. Monahan, Raymond T.	705
23. O'Hagan, Donal P.	701
24. Pigot, David R.	699
25. Killeen, Carmel S.	697
26. Blake, Bruce St. John	694
27. Glynn, Patrick A.	676
28. McCague, Eugene	669
29. Reidy, John C.	642
30. Donnelly, Andrew J.O.	620

The following other candidates received the number of votes placed after their names:—

1. Lynch, John R.	598
2. Breen, Maeve T.	587
3. Malone, Paul L.	587
4. O'Neill, Raymond St. John	537
5. Hooper, John	482
6. Brunker, Eric	446
7. O'Doherty, Patrick Hugh	425
8. Griffin, Gerard F.	380
9. Horgan, Anne Moore	240
10. Murphy, Anthony	141

Provincial Delegates — Returned unopposed:

Connaught:	Patrick J. McEllin, Claremorris, Co. Mayo.
Leinster:	Michael J. Hogan, 21 Patrick Street, Kilkenny.
Munster:	Joseph Dundon, 101 O'Connell Street, Limerick.
Ulster:	Peter F.R. Murphy, Ballybofey, Co. Donegal.

Council Report for the Year 1981/1982

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

Compensation Fund

Mr. L. Mellon referred to an unfortunate situation which had arisen in the case of a particular solicitor. The man concerned had been approved by the relevant Committee of the Society for a limited practising certificate but it would not be issued until he got a job and he could not get a job because he had no certificate. It was wrong that such a catch 22 situation should exist. Further, when, an application to the President of the High Court, the President in 1980 ordered that he be issued with a full practising cetificate, his name did not appear in the Society's Law Directory in the following year. More unfortunate still the solicitor's accounts were frozen in 1973 and unfrozen in 1975, but at that stage in 1975 the banks were not told of the action taken and subsequently continued to act as if his accounts were frozen. In his view, it was wrong that such a situation should have arisen. In another situation Mr. Mellon said that he was acting for an accountant who was regarded by the Society as having issued an incorrect certificate. He reported a deficit of £40,000, whereas the Law Society on inquiry in the Solicitor's Office, contended that the deficit should have been £175,000. The difference was in executors' accounts which the auditor could not check as they

were not part of the solicitor's designated clients' account. He felt that the Compensation Fund Committee should make it quite clear that a solicitor acting as an Executor, should place funds received in the course of administration in or through the designated client account. Supporting Mr. Mellon, Mr. Q. Crivon said there should be a practice direction by the Society in the matter. Mr. J. Donovan asked what policy the Society would follow if the claims on the Compensation Fund were to increase. In his view, especially in the present recession, the members could not afford to go on increasing their contributions to the Fund. Mr. E. Margetson for the Compensation Fund Committee commented that this was the price which had to be paid if the profession wished to remain as a self-governing body. Mr. G. Doyle endorsed Mr. Margetson's comments. Mr. Q. Crivon referred to the problem likely to be created for the Fund by young solicitors setting up on their own with very limited experience. The Society should get power to deal with this situation. Mr. D. Moran urged the Society to put criminal proceedings in hand in the case of those auditors who had given false accountant's certificates. Mr. E. Margetson commented that civil proceedings had already been put in hand but that he had some doubts about being in a position to take successful criminal proceedings.

Education

In reply to Mr. T.C.G. O'Mahony, Mr. F. Daly for the Education Committee indicated that the surplus arising from the C.L.E. Courses was retained in the Education Department to improve equipment and other teaching aids. Mr. D. Pigot asked that a fresh look be taken at the limitation to two attempts on the Entry Examination to the Law School.

He said that the existing arrangement was putting extreme pressure on candidates. He asked that the matter be referred to the incoming President with a view to a re-examination of the situation.

Costs

Mr. Q. Crivon commented that the report at paragraph 2.7 was almost verbatim that of previous years. No progress had been made in adjusting court and other costs and at the same time the profession was seeing audit fees rising at a rapid rate. The Director General reported in detail on the overall costs situation. Mr. T.C.G. O'Mahony asked why the profession should allow itself to be tied to statutory scales which were long outdated. He advocated Solicitors drawing up their own bills on a time or other more realistic basis. His suggestion received general support.

Courts

In reply to Mr. D. Moran, the President explained that quite an amount of time over the year had been spent on efforts to break the existing deadlock in the District Court Clerks Dispute. Representations had been made and recently he had issued a further hard-hitting letter to the Minister for Justice. Mr. Q. Crivon asked if the Society's Public Relations Committee had considered the situation. The President commented that the Galway Bar Association had advertised in the local papers in relation to the dispute. Mr. J. Buckley replying to Mr. Crivon's question said that the dispute had been going on for so long that the media and the general public appeared to accept that it existed as a normal state. He understood that Mamdamus proceedings had been brought by the Bar. Mr. Crivon urged that as with any other industrial dispute at the present time, the Society should consider informing the public by way of advertisement in the public press.

Concluding the discussion Mr. L. Mellon said he would like to follow up his earlier remarks on the Compensation Fund by complimenting the Committee on its activities over the year. The Report of the Council was adopted on the proposition of Mr. J. Maher seconded by Mrs. M. Quinlan.

Audited Accounts and Balance Sheet

Mr. M. Curran said that as Chairman of the Finance Committee, he was proposing the adoption of the accounts subject to further discussion with the auditors. Mr. T. Shaw seconded the proposition. Mr. G. Doyle commented on the various items of expenditure in the Report and asked that the incoming Council take note that there should be a cut back in expenditure. Mr. G. Glynn, thought that the Council and the Committees were doing an excellent job with the limited resources available to the Society. Mr. Curran and the Director General, Mr. J.J. Ivers dealt with detailed queries from Mr. Q. Crivon on deferred subscriptions, auditors fees and staff costs. In reply to Mr. M. Murphy, the Director General said that the accounts of the Law Club of Ireland were being audited and that a general meeting would be held in April. Mr. D. Moran suggested that the particular general meeting might be held in conjunction with the half yearly meeting of the Society. The President noted the recommendation. On the Law School account, Mr. J. Glynn, suggested that there should be a subsidization of the students by the older members since, with the present level of law school fees, that was the only way in which the potential recruits to the profession would come from a broad spectrum of social origin. The accounts and balance sheet were then put to the meeting and adopted subject to the further discussion with the auditors.

Election of Auditors

The President said that this item could not be taken pending the final clearance of the accounts. The item would be dealt with by the Council in accordance with the Bye Laws.

Bond Scheme Draw

Mrs. Caroline Slator, with the approval of the meeting, supervised the draw and the following bonds were drawn.

4 Prizes of £1,000 each	6 Prizes of £500 each
Bond 1610	Bond 1567
Bond 1282	Bond 2708
Bond 1958	Bond 1051
Bond 1898	Bond 1541
	Bond 1731
	Bond 2177

6 Prizes of £250 each	5 Prizes of £100 each
Bond 1591	Bond 2171
Bond 1094	Bond 1441
Bond 1396	Bond 1742
Bond 1752	Bond 1625
Bond 1314	Bond 1640
Bond 2177	

Council Business

The Council did not put forward any business for discussion.

Date of Next Annual General Meeting

The date of next meeting was fixed for Friday 18th November, 1983.

Other Business

At this point the Senior Vice-President Mr. M. Houlihan took the Chair and called on Mr. Q. Crivon to propose a vote fo thanks to the President, Mr. W. Brendan Allen. Mr. Crivon said that in a difficult year the President had carried the profession well. If one were to judge by his handling of the Annual General Meeting he undoubtly dealt with Council Meetings expeditiously. The Wills Week was a worthwhile venture in his year of office. He had no doubt that the profession would be most grateful to Mr. Allen for his personal sacrifices on behalf of the members. It was unfortunate that when things go wrong the profession blames the Council but the vast bulk of the profession takes no part in the affairs of the Society. He felt that the profession's thanks were due to the President, the Council and the various Committees of the Society and he expressed his own and their grateful thanks to the President. Seconding Mr. Crivon's vote of thanks Mr. D. McLoughlin commented that the attendance at the meeting was a commentary on the fact that the members generally regarded the Society as being well run. He supported fully the remarks of Mr. Crivon in regard to the personal effort and sacrifice by the President during his strenuous year of office. The Senior Vice President conveyed the vote of thanks to the President amidst the acclamation of the members.

The Senior Vice President then declared the meeting closed. □

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The Tax Implications of Marital Breakdown

by Fergus Gannon A.C.A.*

*Mr Gannon is a chartered accountant practising in Dublin.

IN the U.K. case of *Lewis v. Lewis* [1977] 3 ALL E.R. 922 the Court of Appeal emphasised that, where a court is being requested to approve financial provisions for inclusion in a Court Order, it is essential that the tax implications of the proposals be worked out and presented to it. The purpose of this article is to outline the tax implications in the Republic of Ireland that arise on Marital Breakdown.

There is no provision in the Income Tax Acts whereby an individual is permitted to deduct from his taxable income payments made for the support of his spouse. However, where a Separation Agreement provides for payments the payer (almost invariably the husband) is entitled (subject to the use of the correct form of words in the maintenance clause, as considered below) to deduct the amount of the payment from his taxable income in arriving at his tax liability. In such circumstances the amount received under the maintenance agreement is taxable in the hands of the recipient.

Maintenance Clauses come within the ambit of Sections 433 and 434 of the Income Tax Act 1967. Under these Sections the payer is obliged to deduct tax at the standard rate (35%) and account to the Revenue for the tax deducted. The recipient will be taxable on the gross amount and granted a credit against tax liability for the tax deducted by the payer.

For example, if A agrees to pay Mrs. A. £10,000 per annum for the rest of her life under a Separation Agreement the tax position will be as follows:

1. A will be allowed a deduction of £10,000 each year from his taxable income.
2. A will deduct £3,500 from the £10,000 — paying £6,500 to Mrs. A and £3,500 to the Revenue Commissioners thus discharging his liability to his wife in full.
3. Mrs. A will be taxable on the gross amount (£10,000) less her allowances, etc. and she will be entitled to deduct £3,500 from her tax liability. If her liability is less than £3,500 she will be entitled to a repayment.

For ease of administration for Mrs. A it would be as well if she had incorporated in the Separation Agreement an undertaking by her husband to supply her with a Form R. 185 within, say, 21 days of the end of each Income Year. A Form R. 185 is a Revenue Form in which the husband sets out the gross amount of the payment and the tax he has deducted.

Wording of Maintenance Clauses:

This brings us to the wording used in maintenance clauses, which are of two types — one which provides for payment of a gross amount from which tax will be deducted, the other provides for a net amount. It is important that the payer is aware of the implications of and difference betweeen them.

In one type the payer agrees to pay a stated sum without mention of tax. In the other the payer convenants to pay "such sum as after deduction of tax at the standard rate amounts to £x per annum."

The Agreement should not contain a provision whereby the sum will be paid "free of tax" or any similar wording.

If for example A agreed to pay Mrs. A £10,000 without mention of tax the position is as outlined in the above example. If, however, A agrees to pay Mrs. A (wife) such a sum as after deduction of tax (at the standard rate) will amount to £10,000 per annum he will have to pay £5,385 to the Revenue Commissioners as well as £10,000 to Mrs. A (i.e., it is construed as an agreement to pay £15,385 less tax at the standard rate (35%) amounting to £5,385, leaving a net £10,000 payable to Mrs. A).

In summary the situation is as follows:—

Agreement Type	1	2
	£	£
Payable to Mrs. A	6,500	10,000
Payable to Revenue Commissioners	3,500	5,385
Total Payable by A	£10,000	£15,385

A person considering making a "net" payment should add on approximately 50% to arrive at the true gross figure. In Agreement type 2, A will be allowed write off £15,385 against his taxable income.

Covenants and Irregular Amounts:

Sections 438 and 439 of the Income Tax Act 1967 are the statutory provisions dealing with the payment of tax effective covenants. To be tax effective, the following conditions must be fulfilled:

(1) the husband must have no power of revocation,
(2) the husband must have divested himself absolutely of the capital if there is a capital settlement, and
(3) if there is an income settlement, then unless the disposition is made for valuable and sufficient consideration, the income must be payable to or for the benefit of an individual for a period which exceeds or can exceed six years.

The reference to a period which exceeds or may exceed six years is important. A settlement taking the form of a covenant to pay an annual sum is usually made for seven years but if there is a provision under which the period may be less, e.g. in the event of a death or marriage, it is still covenant for a period which may exceed six years.

If the covenant is effective for tax purposes the annual amount (subject to what follows below) can be deducted by the husband from his taxable income and will be assessed on the wife. If the husband and wife are liable to tax at different rates, the tax saving by using a covenant will broadly be the difference in the rates of tax multiplied by the annual amount of the covenant. For example, if the husband is liable to tax at 60% and his wife is liable at 35% and an annual sum of £1,000 is paid by the husband then the effective cost to him is £400 (because he may reduce his taxable income liable at 60% by £1,000, thereby saving £600 tax which he would otherwise have to pay). The wife is liable on £1,000 at her rate of tax, 35%, leaving her with net income of £650. Therefore, at a cost of £400 to the husband, he has put £650 in his wife's hands. The saving of £250 represents the gross amount of the covenant, £1,000, at the difference between the spouses respective tax rates, i.e. 60% minus 35% = 25%.

If the proposal is to pay an annual sum which can vary from year to year great care is needed. The circumstances in which this might arise would include:

(a) where the annual sum is to be agreed annually between husband and wife,
(b) where the agreement provides for a different amount each year, e.g. £1,000 in the first year, £1,100 in the second year, £1,200 in the third year, etc.,
(c) where the annual amount is to be increased by a fixed percentage, say 10% each year,
(d) where the annual amount increases in relation to the Consumer Price Index,
(e) where the annual amount or part of the amount is to be calculated by taking a percentage, say 40% of the husband's income or profits.

The difficulty that can arise in these payments is that to be effective for tax purposes there must be some constant element in the yearly payments for the period of the convenant. Where different sums which have nothing in common are to be paid year by year it is probable that only the smallest amount would be regarded as payable for the seven year period. For example, if the covenant provided for £1,000, £1,500 in the second year, £2,000 in the third year, and so on increasing by £500 each year, the only sum which is payable for a period which may exceed six years is the £1,000. The payment in year 3 of £2,000 in a seven year covenant is only payable for four years. Accordingly, the tax effective transfer of income from husband to wife would, in the circumstances, only be £1,000 per annum. The excess over £1,000 each year would be regarded as the husband's income and could not be deducted by him in computing his tax liability. The relevant U.K. cases are *D'Ambrumenil v. IRC* (1940) 23TC440, *IRC v. Prince-Smith* (1948) 25TC 84 and *IRC v. Mallaby-Deeley* (1938) 23TC153. In view of these decisions a covenant which provided that the annual sum would be as agreed annually between husband and wife would probably be effective for the seven year period only in respect of the lowest amount so agreed.

In *IRC v. Black* (1940) 23TC715 it was suggested that the constant element introduced by the promise of some fraction of the husband's income each year would be sufficient and that the whole of the variable amount annually paid by reference to the formula would be effective for tax purposes. There have been no Irish decisions similar to the *Black* case.

Assuming the Irish Revenue applied the principles laid down in the U.K. cases the tax treatment of the amounts payable in the five circumstances listed above would be as follows:

(1) Where the annual amount is to be agreed annually between husband and wife, then only the lowest figure is effective for tax purposes.
(2) Where different amounts are stated for each year in the covenant then only the lowest amount will be effective for tax purposes.
(3) Where the covenant provides that a fixed sum will increase by 10% per annum I understand the Revenue's view is that the sum each year is effective for tax purposes. I find this a surprising decision in view of the decided cases. Stating that a fixed sum will be increased by 10% each year is scarcely different from actually applying the percentage and putting the sums so arrived at in the covenant yet the tax treatment is different.
(4) No Revenue practice has been established in relation to a covenant where the fixed sum increases in relation to the Consumer Price Index. In view of the Revenue practice at (3) it would seem logical that they should accept that the total sum as calculated each year by the increase in the Consumer Price Index would be effective for tax purposes.
(5) The Revenue will follow the practice laid down in *IRC v. Black* (above). That is, they will treat as tax effective the sum arrived at each year by applying to the husband's profits or income a certain percentage.

It is clear that great care is needed in the wording of these provisions in the covenant as the law and practice in Ireland is uncertain. In cases where a substantial doubt about the tax effectiveness of the

provision is present, the draft agreement could be submitted to the Revenue for confirmation that the provision will be effective for tax purposes.

Separation Agreement made a Rule of Court:
In a case where a Separation Agreement is made a Rule of Court, other than by reference to the Family Law (Maintenance of Spouses and Children) Act 1976 ("the 1976 Act"), the tax treatment is not altered and is as described above.

Where, under Section 8 of the 1976 Act, a Separation Agreement is made a Rule of Court the tax treatment is the same as where maintenance is determined by the Court, viz:

1. The payment shall be made without deduction of Income Tax (Section 24) of the 1976 Act).
2. The payment is not deductible for tax purposes against the payer's income.
3. The recipient is not taxable on the amount received.

For example, if A agreed to pay Mrs. A £10,000 per annum for the rest of her life under the terms of a Separation Agreement without mention of tax the position is as outlined above, viz:

1. A pays £6,500 to Mrs. A.
2. A pays £3,500 to the Revenue Commissioners.
3. A writes £10,000 against his taxable income (thereby bringing his taxable income, upon which his income tax liability is calculated, to a much lower figure with resultant saving in actual tax payable).
4. Mrs. A is taxable on £10,000 less allowances, etc.
5. Mrs. A is entitled to a deduction of £3,500 from her tax liability.

If Mrs. A applied and was successful in having the maintenance agreement made a Rule of Court under Section 8 of the 1976 Act the position would change to the following:

1. A pays Mrs. A £10,000.
2. A makes no deduction or payment to the Revenue Commissioners.
3. A is not allowed write-off the payment against his taxable income.
4. Mrs. A is not taxable on the £10,000 received.

Clearly in these circumstances A might have to apply to the Court pursuant to Section 6 of the 1976 Act for a variation downwards of his maintenance obligation, which application should be presented on the basis of A's net (after tax) income.

Maintenance Orders:
Where the Court makes a maintenance order under Section 5 of the 1976 Act the tax treatment is that as described for maintenance agreements which have been made a Rule of Court under Section 8 of the 1976 Act (see *Brolly v. Brolly* [1939] I.R., 562).

Personal Allowance:
There are two circumstances in which a man is entitled to a marriage allowance:

1. Where he is living with his wife and he is assessed to tax on her income as well as his own, or
2. where he is not living with his wife but she is wholly or mainly maintained by him and he is not entitled to write-off any maintenance for tax purposes. (See Sections 138 and 192/195, Income Tax Act 1967.)

The usual situation in which a husband who is separated will be granted the marriage allowance is where he is making payments under a maintenance order and these payments are his wife's main means of support.

Where the maintenance payments are only a small part of the wife's income or where the husband is allowed a tax deduction for payments under a maintenance agreement he will only rank for the single allowance.

The marriage allowance is £2,900 for 1982/83 and the single allowance £1,450.

Section 192 of the Income Tax Act 1967 treats a wife as living with her husband unless:

(a) they are separated under an Order of a Court of competent jurisdiction, or
(b) they are separated pursuant to a Deed of Separation, or
(c) they are in fact separated in such circumstances that the separation is likely to be permanent.

Rates of Taxes:
In accordance with Section 8 of the Finance Act 1980 a separated couple are both taxable at the single rates. This arises by virtue of the fact that only those taxable in accordance with Section 194 of the Income Tax Act 1967 are entitled to the "Double" rate bands and to be taxable under Section 194 a husband and wife must be living together.

Child Allowance:
Section 141 of the Income Tax Act 1967 entitles a taxpayer to an allowance for each child living with him/her at any time during the year of assessment. Where two persons claim for the same child the allowance shall be granted in the proportion that they maintain the child. Maintenance payments that are allowed for tax purposes are not taken into account. The child allowance for 1982/83 is £100.

Single Parent Allowance:
Under Section 138A Income Tax Act 1967 a separated taxpayer, entitled to the child allowance, will also be entitled to a Single Parent Allowance. The Single Parent Allowance is £1,450 for 1982/83.

Capital Gains Tax: No Capital Gains Tax arises on transfers between spouses provided they are living together. (Section 13 (5) Capital Gains Tax Act 1976.) The term "living together" is defined in Section 192 Income Tax Act 1967 (above).

This can cause problems in practice as a couple will in most cases have separated at the time assets are transferred between them, and a Capital Gains Tax liability may arise for the transferor.

It should also be noted that to get the full exemption on the sale of a private residence under Section 25 of the Capital Gains Tax Act 1975 the seller must have resided in the residence for the full

period of ownership but this requirement does not apply to the last 12 months of ownership.

Summary/Conclusion

This situation is best summarised by comparing a hypothetical Mr. A's net income for 1982/83:

(i) A married man living with his wife.

(ii) A person separated under a separation and maintenance agreement which is not a Rule of Court.

(iii) A person separated under a maintenance agreement which is made a Rule of Court under Section 8 of the 1976 Act.

Assume while married Mr. A's cost of maintaining his wife is £5,000 per annum, and the same amount is agreed for maintenance.

		(i)		(ii)		(iii)
	£	£	£	£	£	£
A. Income		15,000		15,000		15,000
Less:						
Personal Allowance	2,900		1,450		1,450	
P.A.Y.E. Allowance	600		600		600	
P.R.S.I. Allowance	312		312		312	
Mortgage Interest	4,800		2,400		2,400	
Maintenance	Nil	8,612	5,000	9,762	Nil	4,762
Taxable Income		(i)£ 6,388		(ii)£5,238		(iii)£10,238
Tax Payable	(i)		(ii)			(iii)
£2,000 at 25%	500.00	£1,000 at 25%	250.00	£1,000 at 25%		250.00
£4,388 at 35%	1,535.80	£3,000 at 35%	1,050.00	£3,000 at 35%		1,050.00
		£1,238 at 45%	557.10	£2,000 at 45%		900.00
				£2,000 at 55%		1,100.00
				£2,238 at 60%		1,342.80
Total Tax	2,035.80		1,857.10			4,642.80
P.R.S.I.	767.00		767.00			767.00
Maintenance of Spouse	5,000.00		5,000.00			5,000.00

	(i)	(ii)	(iii)
B. Total Tax and Maintenance	£7,802.80	£7,624.10	£10,409.80
Net Disposal Income (A-B)	£7,197.20	£7,375.90	£ 4,590.00

In the case of number (iii), Mr. A would not have sufficient income (£4,590.00) to meet his Mortgage Interest (£4,800). It is clear therefore that in the case of number (iii) Mr. A, in presenting evidence of his income to the Court, *must* present his net (after-tax) income, as below, so that the Court can properly assess what proportion of that net income should be ordered to be paid to Mrs. A for herself and any dependant children.

	£
Gross Income of Mr. A	15,000.00
Less Taxable (as above)	(4,642.80)
Less P.R.S.I.	(767.00)
Net disposable income of Mr. A	9,596.20 □

Comment. . . (Continued from P.3)

changes in Company Law arguing for heavier penalties for "fraudulent trading". Both "fraudulent" and "trading while insolvent" should be removed from the lexicon of Company Law. Each require too high a degree of proof and prosecutions can rarely be successfully mounted against those who are suspected of such activities.

The recent Cork Report on Insolvency Law in the United Kingdom recommended the introduction of the concept of "wrongful trading" but on examination it appears that the Committee still proposes the retention of the words "with intent to defraud creditors" or carrying on business "for any fraudulent purpose". What is needed is not a retention of the unsatisfactory doctrine of fraud but the introduction of a new concept which will not require proof that the Defendant had any intent to defraud creditors but merely that his actions were carried on in a reckless manner without regard for the potential effects on creditors.

The protection of limited liability is, as we have argued before, given too lightly and too cheaply. Companies should be required to pay substantial annual fees for the right to retain the protection of limited liability. Part of such revenue could be used to bring the operations of the Companies Office to an acceptable level. The rest could perhaps be put into a fund to assist the victims of dishonest trading by limited companies. □

Correspondence

The Editor,
Incorporated Law Society Gazette,

4.11.82

Planning Acts - Appeals

Dear Sir,

We have recently come across a case where an objector has been effectively deprived of his right of appeal, by circumstances outside his control; in the case in question, the objector received on 19th January by post from the local Planning Office, a notification of their intention to grant Planning permission, which notice although dated 18th December, had been posted in an envelope franked 8th January 1982. He immediately on 19th January, sent an appeal to An Bord Pleanala. Subsequently, on 28th January, he received from the Planning Office, a copy notification of the final Planning permission, which notice was dated 23rd January 1982; the attention of An Bord Pleanala was at once drawn to this fact.

Subsequently, by letter of 4th February 1982, An Bord Pleanala wrote to the effect that as the appeal had not been posted or delivered by 7th January 1982, they could not accept it.

This situation was referred to the Department of the Environment, but despite several letters, it was only on 13th May 1982 that the Secretary to the Minister confirmed the ruling of An Bord Pleanala, and that the Minister had no function in the matter and could be of no assistance.

The situation therefore is that where for some reason a letter from the Planning Office, as in the case in point, is not delivered within the appropriate time, the objector has lost his right of appeal. It would appear therefore that all objectors should in their own interests, check repeatedly in the Planning Office whether a decision has been issued.

Yours faithfully,
David Wilson,
Solicitor,
Raphoe,
Lifford,
Co. Donegal.

Editorial Note:

The above letter draws attention to the anomalous position of persons who make representations to a planning authority in relation to an application for a permission under Section 26 or 27 of the 1963 Planning Act while the planning authority is considering such application. Such persons have no formal status under the Act and are not "notice parties". Most, if not all planning authorities do in fact, as a matter of courtesy, notify the persons who have made representations to them in writing of the decision of the Planning Authority on the application. The danger of relying on the authorities' practice of giving notice of decisions to persons who made representations is highlighted by the unfortunate series of events narrated above.

The Editor,
Incorporated Law Society Gazette,

Dear Sir,

It is unacceptable that a Solicitor acting in a fiduciary capacity defrauds his clients of £150,000.00 and goes on to receive a suspended sentence of two years and another Solicitor (lately deceased) defrauds his clients of more than £750,000.00 This was far worse than the Erin Foods scandal owing to the privileged Solicitor-Client relationship, together with the fact that in the cases of Solicitors the offence was against individuals rather than a corporate entity.

Each of us bears a certain amount of responsibility for these frauds and the writer supports our Representative Body (i.e. the Law Society) in taking further steps to supervise the accounts of it's members and in carrying out additional spot checks on Solicitors Accounts. In particular there is an onus on every firm of Solicitors to furnish to the Society an Accounts Certificate within six months of the end of its financial year and when this is not done the Society should have a 'trouble-shooter' Accountant to vet the accounts of the offending firms. No Practising Certificate should be issued to firms which are more than one year in arrears with their Accountant's Certificate.

If such a step is not taken then the Profession will continue to number embezzlers among it's fold.

Further, the writer recommends that the Society introduces compulsory courses in accounts and management for Solicitors and that every practice be required to have a partner or principal attend at least one such course during the year. Further, there is no reason why Professional Indemnity Insurance should not be compulsory for every practice.

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

In the matter of Gordon J. Ross a solicitor (formerly practising as Ross & Co., at 29 Pearse Street, Mullingar, Co. Westmeath) and in the matter of the Solicitors' Acts 1954 and 1960.

By Order of the President of the High Court dated the 24th day of January, 1983 (1982 Numbers 10SA, 11SA, 12SA and 13SA), the name of the above named solicitor has been struck off the Roll of Solicitors.

James J. Ivers
Director General

Revised Income Tax Appeal Procedures

Mr. J.J. Ivers,
Director General,
The Incorporated Law Society of Ireland.

25.10.82

Dear Mr. Ivers,

The Chairman has asked me to write and correct an apparent misunderstanding which has arisen of his remarks at the discussion on 16 June, 1982, concerning revised procedures being introduced by the Revenue Commissioners in connection with the consideration of further proceedings by High Court action following a determination given by the Appeal Commissioners in favour of a taxpayer. The Chairman wishes to emphasise that decisions made by Judges of the Circuit Court on the re-hearing of tax appeals were specifically excluded by him from the new operating procedure.

The principle behind the new procedure is that the Revenue accept the position of the Appeal Commissioners as the arbiters of disputes between the Revenue and the taxpayer as to the taxpayer's liability. The Revenue will not, therefore, seek to have the Appeal Commissioners' decisions upset by taking an appeal to the High Court (except in special types of cases, primarily tax avoidence cases). Where, however, *the taxpayer* refuses to accept the Appeal Commissioners' decision and seeks to have it upset by calling for a rehearing by the Circuit Court Judge, the Revenue reserve the right — in the event of the Judge giving a decision contrary to that of the Appeal Commissioners — to take the case to the High Court with a view to having the decision of the Appeal Commissioners restored.

Yours sincerely,

S. M. O'Ceallachain,
Oifig na gCoimisinéirí Ioncaim,
Caisleán Bhaile Átha Cliath,
Baile Átha Cliath 2.

Mr. J. Ivers,
Director General,
Incorporated Law Society of Ireland.

9.11.82

Dear Mr. Ivers,

I am directed by the Chairman to refer to the discussion on 16 June, 1982, at which representatives of your Society were present concerning the introduction of revised procedures by the Revenue Commissioners in relation to determinations of appeals by the Appeal Commissioners.

During the discussion the Chairman undertook to advise your Society of determinations made by the Appeal Commissioners and accepted by the Revenue Commissioners which were of general application. A promise was also made by the Chairman that notification of High Court and Supreme Court judgments would be supplied in advance of the printing of a tax leaflet.

A summary of the material issues in three cases where Appeal Commissioners determinations have been accepted by the Revenue Commissioners is attached. I am also enclosing a short note on a Supreme Court judgment handed down on 4 December, 1981, on the question of the scope of a tax charge on the profits of a "dealer in cattle".

Yours sincerely,

S.M. O Ceallachain,
Oifig na gCoimisinéirí Ioncaim,
Caisleán Bhaile Átha Claith,
Baile Átha Cliath 2.

Appeal Commissioners' determinations accepted by the Revenue Commissioners

1. *Lump sum payments made by a bank to employees of a branch where an armed raid had taken place.*
The taxpayer, a bank official, received a payment of £100 from his employer in accordance with a practice whereby such payments were made to officials of a branch who had been involved with armed raiders. It was claimed on behalf of the taxpayer that the payments made by the bank in such cases were voluntary and in the nature of testimonials on personal grounds to employees who had suffered distress and that such sums were not chargeable emoluments for Schedule E purposes.

The Appeal Commissioners upheld the taxpayer's contentions.

2. *Relief for certain bridging loan interest - Section 32 of the Finance Act, 1974.*

The point at issue concerned the amount of additional interest relief allowable under the provisions of section 496, Income Tax Act, 1967 (as amended by section 29, Finance Act, 1974) by virtue of section 32, Finance Act, 1974.

The Appeal Commissioners determination of the effect of the statutory provisions was as follows:—

(1) Additional relief is allowable under section 496 of the Income Tax Act, 1967, in accordance with the provisions of section 32, Finance Act, 1974, up to the appropriate ceiling on relief as set out in section 496.

(2) Where the period of twelve months in respect of which the additional relief is due extends over two income tax years the ceiling figure is to be apportioned on a time basis over the two years.

(3) The excess of any interest paid during the period of twelve months on any loans to which section 32, Finance Act, 1974 apply over the relief allowable by virtue of the section is not available for any further relief under section 496.

(continued on p. 22)

Professional Information

Land Registry —
Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 25th day of February, 1983

W. T. MORAN (Registrar of Titles)

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

1. REGISTERED OWNER: Eileen Carroll, Ballyglass, Kiltimagh, Co. Mayo. Folio No.: 1003; Lands: Oxford; Area: 187a.2r.21p. County: **MAYO.**

2. REGISTERED OWNER: Terence P. O'Connor and Eileen O'Connor; Folio No.: 2483F; Lands: Moanmore; Area: Oa.2r.Op. County: **KERRY.**

3. REGISTERED OWNER: Michael Freeley and Mary J. Freeley, Pollagh, Kiltimagh, Co. Mayo. Folio No.: 1006; Lands: Oxford; Area: 28a.1r.-p. County: **MAYO.**

4. REGISTERED OWNER: James Meaney, Creevagh More, Quin, County Clare. Folio No.: 609; Lands: Creevagh Beg; Area: 3a.1r.33p; County: **CLARE.**

5. REGISTERED OWNER: Ruth Mitchell Quill; Folio No.: 20068; Lands: Ballycannon; Area: 3a.1r.14p. County: **CORK.**

6. REGISTERED OWNER: of Property Nos 1 & 2 Patrick Joseph Cunningham; REGISTERED OWNER: of Property No. 3 Patrick Cunningham; Folio No.: 14148 now closed to Folio 3671F; Lands: (1) Aghadreenan, (2) Aghadreenan, (3) Aghadreenan; Area: (1) 15.563a, (2) 6,700a, (3) 9,406a; County: **MONAGHAN.**

7. REGISTERED OWNER: John Brophy and Mary Patricia Brophy; Folio No.: 4283F Co. Kildare. Lands: Cloney; Area: 0.544 Acres; County: **KILDARE.**

8. REGISTERED OWNER: John J. Murphy; Folio No.: 1749; Lands: Moneycusker; Area: 7a.2r.11p; County: **CORK.**

9. REGISTERED OWNER: Mary Fitzgerald, Garna House, Sixmilebridge, County Clare. Folio No.: 17393; Lands: Sixmilebridge; Area: 12a.2r.22p. County: **CLARE.**

10. REGISTERED OWNER: Denis Jordan; Folio No.: 5658F; Lands: Knockreagh; Area: 1.651 Acres; County: **WEXFORD.**

11. REGISTERED OWNER: Mary O'Malley; Folio No.: 1491; County: **GALWAY.**

12. REGISTERED OWNER: Sheila Burke, Kilglass, Ahascragh, County Galway. Folio No.: 26979; Lands: Kilglass, Derrymore, Lattoon, Ballyboggan, Killaderry; Area: 82a.1r.7p; 104a.3r.9p; Oa.1r.9p; 1a.Or.31p; 2.919 acres. County: **GALWAY.**

13. REGISTERED OWNER: John F. Hanratty (Junior); Folio No.: 12641; Lands: Drumacon; Area: 14a.Or.Op. County: **MONAGHAN.**

14. REGISTERED OWNER: Thomas Dwyer; Folio No.: 6458; Lands: Foilduff; Area: 7a.3r.22p. County: **TIPPERARY.**

15. REGISTERED OWNER: Liam Slevin; Folio No.: 6027; Lands: Mullenmeehan; Area: 32.005 acres; County: **WESTMEATH.**

16. REGISTERED OWNER: James McCabe; Folio No.: 404 (now closed to 3798F); Lands: (1) Slievenaveagh, (2) Tullyunshin, (3) Clogstuckagh; Area: (1) 8.888 acres, (2) 3.000 acres; (3) 1.994 acres; County: **CAVAN.**

17. REGISTERED OWNER: Edward Hill & Son Ltd.; Folio No.: 4763; Lands: Kilmacthomas; Area: Oa.Or.24p. County: **WATERFORD.**

18. REGISTERED OWNER: Melvin Securities Ltd.; Folio No.: 11291; Lands of the Townland of Maynetown and Barony of Coolock; Area: 192a.3r.9p. (O.S. No. 15/16, 15/17); County: **DUBLIN.**

19. REGISTERED OWNER: Liam and Breda O'Connor; Folio No.: 16409F; Lands: at 386 Tirellan Heights, Headford Road, Galway; County: **GALWAY.**

20. REGISTERED OWNER: Patrick Connelly; Folio No.: 23751; Lands: (1) Glancrough, (2) Glancrough; Area: (1) 19a.2r.25p; (2) 78a.3r.30p. County: **CORK.**

21. REGISTERED OWNER: Hazel Langrell & William Ambrose Langrell; Folio No.: 23520; Lands: Annagh Central; Area: 125a.Or. 24p. County: **WEXFORD.**

22. REGISTERED OWNER: John Fox; Folio No.: 10526; Lands: Mullyash; Area: 15a.3r.27p. County: **MONAGHAN.**

23. REGISTERED OWNER: Stephen D. McCormack, c/o J. Delaney, Gannon & Co., Solicitors, Mohill, County Leitrim. Folio No.: 2040; Lands: Roscommon; Area: 27a.1r.38p. County: **ROSCOMMON.**

24. REGISTERED OWNER: The Most Reverend John Healy, Tuam, County Galway and the Reverend James Corbett, Partry, Ballinrobe, County Mayo. Folio No.: 2645; Lands: Gorteenmore; Area: - Oa. 2r. 17p. County: **MAYO.**

25. REGISTERED OWNER: David Waldron, Conagher, Milltown, Co. Galway. Folio No.: 764; Lands: (1) Dawros Lower (2) Dawros Lower (3) Dawros Lower (4) Dawros Lower (5) Dawros Lower (6) Kilnaslieve; Area: (1) 15a.2r.22p; (2) 3a.Or.13p; (3) 14a.3r.8p; (4) 3a.Or.13p; (5) Oa.3r.4p; (6) 1a.Or.10p. County: **GALWAY.**

26. REGISTERED OWNER: Michael Anthony Tierney, Drumcliffe, Ennis, Co. Clare. Folio No.: 15617; Lands: Drumcliff; Area: 74a.1r.Op. County: **CLARE.**

27. REGISTERED OWNER: Dubber Farms Limited; Folio No.: 17869; Lands: Part of the Townland of Ward Upper and Barony of Castleknock containing 17a.Or.Op. shown as Plan O.S. No. 11/13. Area: 17a.Or.Op. County: **DUBLIN.**

28. REGISTERED OWNER: Michael Forde, Coogaquid, Kilnamona, County Clare; Folio No.: 15554; Lands: Erin Agh More; Area: 3a.Or. 22p; County: **CLARE.**

Lost Wills

Johnston, Arthur Cecil, deceased, late of 102 Haddington Road, Dublin 4 and formerly of 10 Lower Mount Street, Dublin 2. Will any person having knowledge of the whereabouts of a Will of the above-named deceased who died on or about the 27th December, 1982, please contact Mason Hayes & Curran, Solicitors, 6 Fitzwilliam Square, Dublin 2.

Hyland, Cornelius or Con, deceased, late of Kildanogue, Ardfinan, Cahir, County Tipperary, Bachelor. Would any person having knowledge of a Will of the above named deceased, who died on the 8th December, 1982, kindly contact Patrick J. Durcan & Company, Solicitors, Castlebar, Ref: C/TD.

Farrell, Patrick, deceased, late of Turloughlanger, Athenry, County Galway. Will any person having knowledge of the whereabouts of the last Will and Testament of the above named deceased, who died on the 18th day of October, 1982 please contact Messrs. V.P. Shields & Son, Solicitors, Athenry, Co. Galway.

Browne, Mary deceased late of Glassdrum Cappawhite County Tipperary, widow, formerly of Main Street, Cappawhite. Will any person having knowledge of the whereabouts of the Last Will and Testament of the above-named deceased who died on the 30th October 1982 please contact Brendan J. Jones Solicitor St. Michael Street, Tipperary.

McGinty, John, deceased, late of Ballybobaneen, Cloghan, Lifford, County Donegal. Will any person having knowledge of the Will of the above-named deceased who died on the 7th day of November, 1981 and who was a patient in Merlin Park Hospital, Galway in the mid 1970's and in Altnagelvin Hospital, Derry, in 1978, please communicate with James Boyle & Co., Solicitors, Stranorlar, County Donegal.

Miscellaneous

Recent U.S. law graduate seeks short-term volunteer law clerk position. Main interests in comparative and criminal law. Require only small stipend for room and board. J. Packer, 2845 North Park Blvd., Cleveland Heights, Ohio 44118 U.S.A.

For Sale: Three volume, 1982 edition of Company Law by Palmer Publisher Stevens & Co. Price IR£130.00. Knocknagow Bookshop, 11 Mitchell Street, Clonmel, Co. Tipperary. Tel. 052-23060.

1982 B.C.L. (U.C.D.) graduate entering Blackhall Place in March 1983 seeks apprenticeship. Dublin preferred. Phone 977840.

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Former legal secretary will type in own home. Dublin 4. Box No. 048.

Revised Income Tax Appeal Procedures

(Continued from p. 20)

3. *Wear and Tear Allowance - Section 26, Finance Act, 1971.*
   The Appeal Commissioners have determined that in the case of a refrigerated container Unit the relief available under section 26 of the Finance Act, 1971, may be allowed on the motorised equipment which controls the temperature of the unit but which is detachable from and is not an integral part of the unit.

Tax Charge on "Dealer in Cattle"

The taxpayer was assessed to income tax for the years 1965/66 and 1966/67 under rule 4, Case III of Schedule D, Income Tax Act, 1918 and for the year 1967/68 under section 78, Income Tax Act, 1967, as a "dealer in cattle" in respect of the activity of intensive pig production on a holding of twenty seven acres. An average of 2,000 to 2,500 pigs were kept on the holding. The taxpayer did not breed pigs on the land; he bought them in, fattened them and sold them.

The Circuit Court Judge affirmed the assessments, holding that the term "cattle" included pigs and that the taxpayer was a "dealer in cattle". The High Court ruled that "cattle" did not include pigs and this decision was upheld by the Supreme Court.

In the Supreme Court the decision in the English case of *Phillips v. Bourne* [1947] 1.K.B. 533 which decided that "cattle" in the Income Tax Act, 1918 included pigs was considered but not followed.

(P. De Brun (Inspector of Taxes) v. Patrick J. Kiernan)

This case will be the subject of a tax case leaflet at a later date. □

List of Measures enacted by the Oireachtas during the year 1982.

Title of Act	Number	Title of Act	Number
Foir Teoranta (Amendment) Act, 1982	1 of '82	Gas (Amendment) Act, 1982	17 of '82
Social Welfare Act, 1982	2 of '82	Fuels (Control of Supplies) Act, 1982	18 of '82
Transport (Tour Operators and Travel Agents) Act, 1982	3 of '82	Sugar Manufacture (Amendment) Act, 1982	19 of '82
Rent Restrictions (Temporary Provisions) (Continuance) Act, 1982	4 of '82	National Community Development Agency Act, 1982	20 of '82
Prevention of Electoral Abuses Act, 1982	5 of '82	Local Government (Planning and Development) Act, 1982	21 of '82
Housing (Private Rented Dwellings) Act, 1982	6 of '82	Electricity (Supply) (Amendment) Act, 1982	22 of '82
International Common Fund for Commodities Act, 1982	7 of '82	Social Welfare (No. 2) Act, 1982	23 of '82
Irish Shipping Act, 1982	8 of '82	Agricultural Credit Act, 1982	24 of '82
British & Irish Steam Packet Company Limited (Acquisition) (Amendment) Act, 1982	9 of '82	Exchange Control (Continuance) Act, 1982	25 of '82
Companies (Amendment) Act, 1982	10 of '82	Kilkenny Design Workshops Limited Act, 1982	26 of '82
Litter Act, 1982	11 of '82	Housing Finance Agency (Amendment) Act, 1982	27 of '82
Sea Fisheries (Amendment) Act, 1982	12 of '82	Control of Exports (Temporary Provisions) Act, 1956 (Continuance) Act, 1982	28 of '82
Irish Steel Holdings Limited (Amendment) Act, 1982	13 of '82	Appropriation Act, 1982	29 of '82
Finance Act, 1982	14 of '82		
Trade Disputes (Amendment) Act, 1982	15 of '82		
Gas Regulation Act, 1982	16 of '82		

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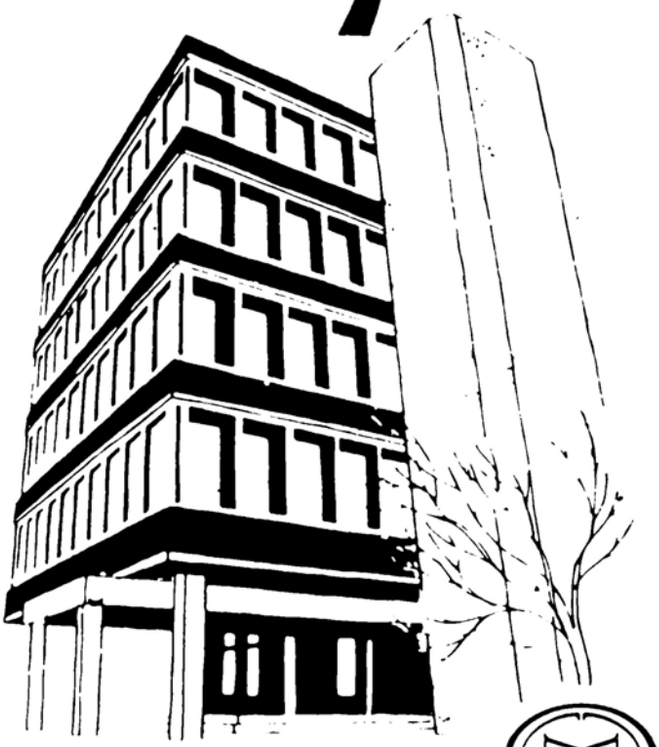

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 2. March 1983

The Parliamentary Committee meets with Solicitor Members of the Oireachtas, 3 March 1983

Among those present were Mervyn Taylor, T.D., Patrick Cooney, T.D., Minister for Defence, Michael P. Houlihan, President of the Law Society and George Colley, T.D.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 2. March 1983

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Published at Blackhall Place, Dublin 7.

Comment . . .

Civil Legal Aid Scheme — — an Update

THE 1981 Report of the Legal Aid Board makes depressing reading. It follows the commendable example of the previous Report, by including comment on developments after the end of the year under review. Unfortunately, the most significant developments in 1982 seem to have been negative — insufficient funding, unacceptable strings attached to a particular offer of funding, an embargo on replacing professional staff who resigned.

In 1981 itself, three law centres had to close temporarily for periods, because of excessive work loads. An early criticism of the scheme was that it could not provide adequate service in rural areas. The Report notes that the Board's aim of establishing three further provincial centres had to be abandoned because funds would not be provided on an acceptable basis.

It is pleasing to note that there has been an improvement in the cost of handling each case, from the very high 1980 figures. Unfortunately, the administration required to process the applications on eligibility grounds will almost certainly result in the cost per case remaining high. The Report notes that, as there has been no change in the means test since February 1981, the proportion of the population eligible for legal aid services has declined. This factor, coupled with the restrictions on staff numbers, suggests that the service will contract, rather than expand.

The scheme is increasingly a Family Law scheme, 75% of the cases in 1981 falling into this category, compared with 68% in 1980. More significant perhaps, is the fact that the percentage of family law cases which require the provision of representation in Court, as opposed to advice only, was 40%, whereas in all other categories of cases, it was a mere 8%. The volume of such cases going to Court, — 1,500 — raises again the need for a system to enable those whose marriages have irretrievably broken down to settle their affairs other than through the adversarial process of a Court. While the Report rightly urges the value of marriage counselling, there is also a need for a service for those for whom counselling fails. The type of conciliation service operated in the Bristol Courts, which provides the service of trained social workers to assist the unhappy couple to disentangle their domestic and financial affairs, is one which deserves study here. □

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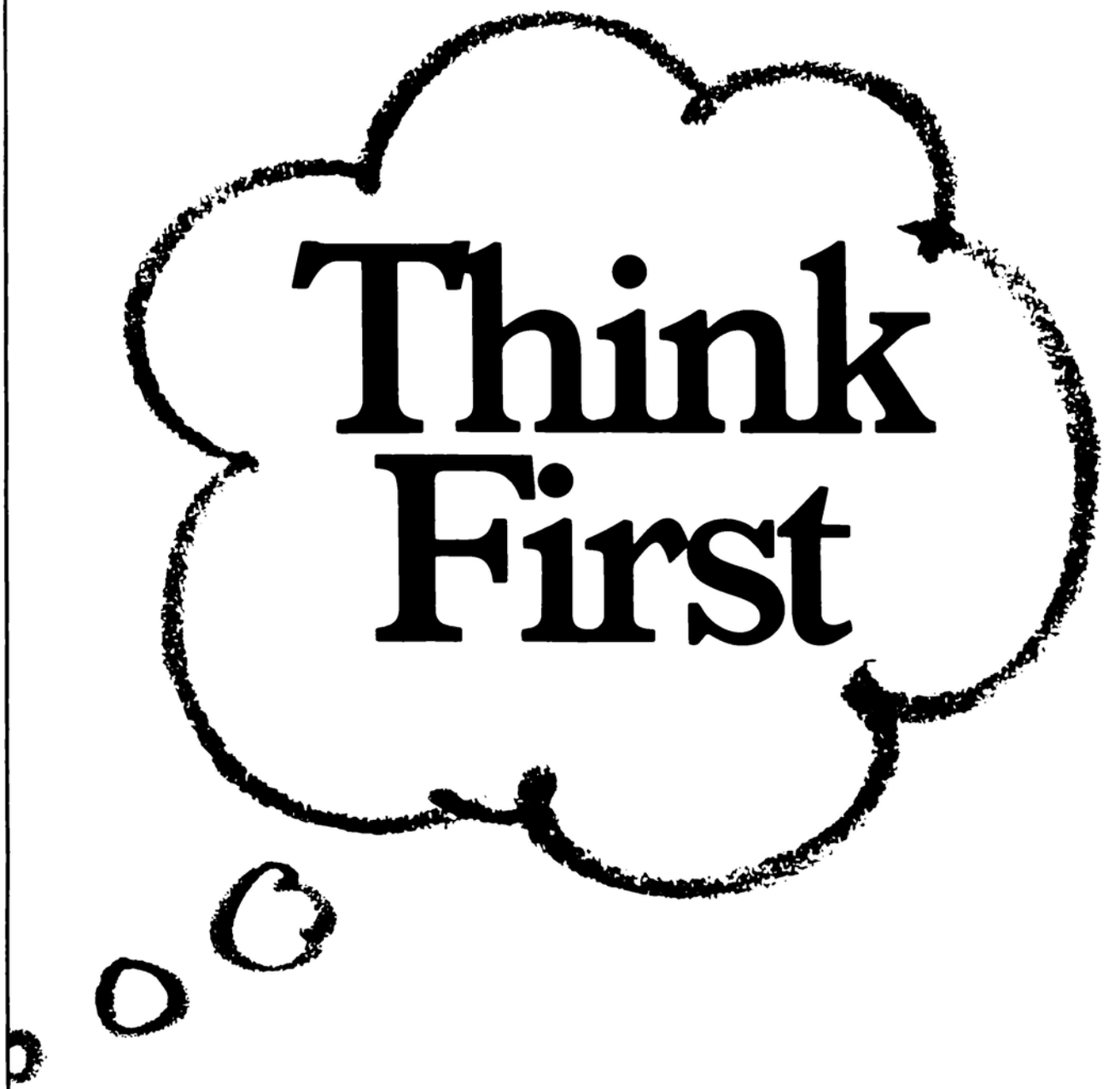

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The Power of the Prosecution to Appeal Acquittals

by
Michael Staines, Solicitor

"THERE is nothing more settled in our law that . . . if a person be once in peril in a criminal case, that is, if he be once tried before a Court having jurisdiction to hear and determine, then if there be a determination of acquittal, the matter cannot be brought up a second time for adjudication."

This pronouncement by Palles C.B in *G. S. & W. Railway Company v. Gooding*[1] succinctly sets out a fundamental rule of Criminal Law that has been accepted without question in all common law jurisdictions. Accepted, that is, until the 2nd November 1982. On that date in a case of *D.P.P. v. O'Shea,*[2] the Supreme Court overruled the precedents of over a century, and held that it had jurisdiction to hear an appeal brought by the Director of Public Prosecutions against an acquittal in the Central Criminal Court.

There can be no doubt that all of the judicial precedents and decisions on the point up to 1975 heavily favoured the view propounded by Palles C.B. In *R. v. Duncan,*[3] Lord Coleridge observed that such a practice "has been settled for centuries". Other English and American decisions quoted by Henchy J. in his dissenting opinion in "O'Shea" point to the fact that the principle originated in Greek and Roman times and has been followed in common law jurisdictions ever since. Finlay P. in his dissenting judgment in "O'Shea" pointed out that there is not a single instance of a decision over a period of a hundred years allowing the prosecution to appeal an acquittal.

The respect for this principle is shown very clearly in the case of *The State (A.G.) v. Judge Binchy.*[4] In this case, the Trial Judge directed the jury in a criminal case to find the accused not guilty on the grounds that the Prosecution had failed to prove the Order returning the accused for trial. This decision was, in fact, an incorrect interpretation of the law. The High Court nonetheless refused to grant an absolute Order of Certiorari quashing his decision. The Attorney General appealed this order to the Supreme Court. It accepted that the Trial Judge had incorrectly directed the Jury but nonetheless, held that it had no jurisdiction to, in effect, overrule the verdict of acquittal. This was despite the fact that the "acquittal" was on (incorrect) jurisdictional grounds and not on the facts. As O'Dalaigh J. stated (at page 416) ". . . Where the jury's verdict as recorded is a verdict of "not guilty" simpliciter, this Court should act on the verdict for what it says. It is entirely without precedent to go behind such a verdict, and it is now too late to create one".

People (A.G.) v. Conmey

Despite this injunction, a later Supreme Court took the first steps towards creating such a precedent in the case of *The People (A.G.) v. Conmey.*[5] Conmey had been convicted of manslaughter before a Judge and Jury in the Central Criminal Court, but had been allowed leave to appeal to the Court of Criminal Appeal. His appeal to that Court was dismissed. He did *not* then apply to the Court for a Certificate under Section 29 of the Courts of Justice Act 1924, which, if granted, would have allowed him to appeal to the Supreme Court. However, three years after his original conviction and one year after his appeal was refused, Conmey applied to the Attorney General for such a certificate. His application was refused. He then applied to the Supreme Court seeking an enlargement of time to serve a Notice of Appeal to the Supreme Court. All five members of the Supreme Court held that such enlargement of time should not be granted. However, despite the fact that the Court in effect decided that they had no jurisdiction to decide on the Appeal (as initially it was out of time), they went on to rule on the various points contained in his Notice of Appeal. In order to do this, they had firstly to decide on the question of whether an accused person could appeal directly to the Supreme Court. The majority, O'Higgins C.J., Walsh and Doyle J.J. held that he could, and in so holding, prised open a gap in the fundamental rule expounded by Palles C.B.

The Judgments of the majority were based on Article 34.4.3° of the Constitution. Under this sub-section, the Supreme Court has "with such exceptions and subject to such regulations as may be prescribed by law" appellate jurisdiction "from all decisions of the High Court". The Central Criminal Court is, in fact, the High Court exercising its criminal jurisdiction.[6] The Court must be regarded as consisting of the Trial Judge and Jury. Any verdict, therefore, is a decision of the High Court, and therefore, under the sub-section, appealable. The Legislature had, the majority conceded, enacted statutory regulations governing the appeal process (for example the setting up of a specific Court to deal with appeals) but they held that these regulations did not have the effect of excepting from the appellate jurisdiction of the Supreme Court. Indeed if these regulations did so except, they would be in danger of being declared unconstitutional or violating the constitutional right of appeal to the Supreme Court. O'Higgins C.J. was of the opinion that the establishment of the Court of Criminal Appeal served merely to provide an accused convicted in the Central Criminal Court with a choice. He could avail of a direct

appeal to the Supreme Court or he could appeal to the Court of Criminal Appeal. He could not do both (unless, of course, he obtained the Section 29 Certificate mentioned earlier). Walsh J. had a more jaundiced view of the jurisdiction of the Court of Criminal Appeal. He saw it as being a Court of limited appellate jurisdiction. Article 34.4.4° provides that no law must be enacted excepting constitutional questions from the appellate jurisdiction of the Supreme Court. Therefore, argued Walsh J., a decision of the Court of Criminal Appeal in a case which involved a constitutional point cannot be final and such decision could be appealed again to the Supreme Court.[7] The Court of Criminal Appeal therefore has concurrent jurisdiction with the Supreme Court only in relation to appeals which do not involve constitutional points.

Conmey decision and the Appeal process

Both of these judgments (with which Doyle J. concurred) are, I submit, based on a narrow interpretation of one sub-section in the Constitution. Each constitutional provision ought, I submit, to be read in the light of all of the other constitutional articles, especially when other constitutional rights may be in conflict with it. Secondly, though less importantly, each article ought to be examined in conjunction with existing laws and judicial precedents. As Henchy J. has stated[8] "any single constitutional right or power is but a component in the ensemble of interconnected and interacting provisions which must be brought into play as part of a large composition, and which must be given such an integral interpretation as will fit it harmoniously into the general constitutional order and modulation." He continued "No single constitutional provision (particularly one designed to safeguard personal liberty or the social order) may be isolated and construed with undeviating literalness". Apart from conflicting with several other constitutional guarantees (this aspect will be dealt with later), the Conmey decision was the source of some confusion in the whole appeal process.[9] As neither the Circuit Criminal Court nor the Special Criminal Court are part of the High Court the decision had no application to cases tried before those Courts. This resulted in a total anomaly as at that time, the Circuit Court was empowered to try exactly the same types of cases (with a couple of exceptions) as the Central Criminal Court. These exceptions related to murder, attempted murder and treason. The Special Criminal Court could in certain circumstances try cases of murder. Therefore, two accused persons charged with the same offence arising from the same incident could find themselves before different Courts, and if convicted, were subject to a different appeal process. For example, an accused convicted in the Central Criminal Court could appeal directly to the Supreme Court, whereas an accused convicted in the Special Criminal Court could only get his appeal before the Supreme Court if he obtained the so-called "Section 29 Certificate". These certificates were rarely given[10] and could only be granted if the Court of Criminal Appeal or else the Attorney General (or now the Director of Public Prosecutions) certified that a decision involved a point of law of exceptional public interest and *also* that it was desirable in the public interest that an appeal be taken to the Supreme Court. For these reasons it was generally hoped that the Supreme Court would clarify the position as soon as possible.

Succeeding cases showed that the Court was prepared to continue in its new direction. The case of *D.P.P. v. Walsh*[11] was the first direct appeal to the Supreme Court since "*Conmey's* " case. The legal representatives of all the parties concerned had furnished submissions to the Court contending that the Court had jurisdiction to hear the appeal and each of the Judges gave his judgment on the basis that they had jurisdiction. Similar judgment was given in *D.P.P. v Byrne*[12] on the same day. The position was somewhat different in the case of *D.P.P. v. Christopher Anthony Lynch.*[13] O'Higgins C.J. reiterated his judgment in "Conmey". Walsh J. did not deal with the jurisdictional issue. Kenny J. however specifically reserved his views on the point. The existance of a right of direct appeal logically necessitated that the D.P.P. would have a right to appeal against an acquittal in the Central Criminal Court. This would be "remarkable" and would in his opinion "result in a far reaching change in our law which I am convinced those who enacted the Constitution never envisaged".[14] Finally, in D.P.P. v. Shaw[15] Griffin J (with whom Henchy, Parke and Kenny J.J. concurred) cast doubt over the new departure.

D.P.P. v O'Shea

It seemed inevitable therefore that the D.P.P. would attempt to appeal an acquittal in the Central Criminal Court to the Supreme Court. Notices of appeal were duly filed in several cases.[16] It is ironic that the D.P.P. was prepared to file such appeals as in "*Conmey*," Counsel for his predecessor, the A.G., described such right of appeal as being both "novel and undesirable".[17] However, one of the appeals came up for judgment and in *D.P.P. v. Patrick Leo O'Shea*[18] the Supreme Court by a majority of 3 to 2 upheld the D.P.P.'s power and held that they had jurisdiction to hear such appeal.

O'Shea had been acquitted by direction in the Central Criminal Court of various charges relating to the alleged possession of firearms, ammunition and the controlled drug, cannabis. There had been a great deal of public interest in the case and the acquittal by direction caused surprise in many quarters. The Supreme Court initially gave judgment on the preliminary issue as to whether it had jurisdiction to hear the appeal. O'Higgins C.J., Walsh and Hederman J.J. held that it had. Dissenting judgments were delivered by Henchy J and Finlay J.

O'Higgins C.J. relied heavily on the judgments delivered in "*Conmey*". He accepted that these judgments were not directly concerned with appeals against acquittals, but the "plain words"[19] used in Article 34.4.3° must be read as granting that right. He referred also to the decision in the *State (Browne) v. Feran*[20] where, on the basis of Article 34.4.3°, the Supreme Court had held that an absolute order of Habeas Corpus could be appealed despite the fact that there was a long established practice that no such appeal could lie. It follows, he said, "that existing laws or formerly accepted legal principles or practices cannot be invoked to alter, restrict or qualify the plain words used in the Constitution unless the authority for so doing derives from the Constitution itself".[21]

Walsh J. based his decision almost wholly on "*Conmey*". However, like O'Higgins C.J. much of his judgment dealt with the arguments against the new departure. Hederman J. while agreeing with the judgments of his two colleagues, specifically limited his concurrence

to the matters raised on the preliminary issue. There remains, he said, "important matters of substance and procedure which can only be decided by this Court upon the subsequent hearing of that appeal".[22]

Both the dissenting Judges pointed out that the judgments in Conmey could only be read as mere *obiter dictae.* Henchy J. in a scathing attack on "*Conmey*" pointed out that (a) the judgments delivered were on a matter not then before the Court (as it had refused Conmey's application for enlargement), (b) Conmey did not, in fact, appeal directly to the Supreme Court, and (c) his "appeal" was not against an acquittal. Their judgments should then be seen, said Henchy J., as ". . . no more than peripheral observations desiring of course of all due respect but not binding on this or any other Court".[23] Notwithstanding this, the majority were prepared to base their judgment on the authority of "*Conmey*". It is difficult, I submit, not to sympathise with the view of Henchy J. in this instance. Reading "*Conmey*" one is immediately struck by the fact that one is witnessing not only "judicial legislation", but judicial legislation in a vacuum. The decision is based on hypothetical facts. Despite recommendations contained in the Seventh Interim Report of the Committee on Court Practice and Procedure (chaired by Judge Walsh)[24] the Oireachtas had failed to seriously interfere in the appeal process. The Supreme Court utilised their half opportunity in "*Conmey*" to bring about the changes they desired.

Right to trial by jury

Finlay J based his dissent on the grounds that the putative right of direct appeal seriously conflicted with another constitutional right — the right to trial by jury under Article 38.5. This right had been discussed at length in De Burca's case[25] where some of the essential ingredients of such form of trial were enumerated. Finlay P. saw one of these "essential ingredients"[26] as being ". . . the immunity of the verdict of "not guilty" arrived at within its jurisdiction and without corruption from appeal to any appellate tribunal".[26] He extracted this ingredient from a century of rules and precedents. Henchy J. agreed. In a long passage[27] he sets out the arguments and reasons underpinning the right of trial by jury and later stated "If a jury's verdict of acquittal were held to be . . . inconclusive, the constitutional right to trial by jury would be an unreliable weapon in the armoury of personal liberty".[28] Neither O'Higgins C.J. nor Walsh J. were in agreement with these viewpoints. Both of them initially pointed out that the instant case was an appeal against an acquittal by *direction.* In practical terms therefore, the jury were not free to make up their own minds — they were bound to follow the direction of the trial Judge. However, neither Judge was prepared to confine his decision to appeals against acquittals by direction. Walsh J. submitted that an acquittal by a jury obtained by improper means such as corruption or coercion of the jury should not be allowed stand. Therefore, he stated, (arguing of course from extreme examples), it cannot be said that "non-appealability" is one of the essential characteristics of Jury trial. O'Higgins C.J. declared that even if the jury were completely free to decide on guilt or innocence, their decision could be overturned.

It is this insistance by the majority that all acquittals are possibly liable to reversal that will cause practitioners and their clients a great deal of worry. Judges on appeal merely read the evidence from a typed transcript. The jury, on the other hand, have the opportunity of seeing the various witnesses and of assessing their veracity and disposition. A transcript cannot record the demeanour of a witness and yet this is often of vital importance in enabling a decision to be made. Notwithstanding this, the Supreme Court have now taken to themselves the power to, in effect, overrule the decision of 12 jurymen. As such a situation was never contemplated, there are no procedural rules and, more importantly, no procedural safeguards to govern the exercise of this power. Have the Supreme Court the power to order a re-trial?[29] Will they take unto themselves the power to substitute a verdict of guilty for one of acquittal? O'Higgins C.J. attempted to allay these fears. "From a practical viewpoint" he stated, "this Court will not be concerned with verdicts of acquittal properly arrived at by a jury on the merits. Its jurisdiction will only be invoked where a mistrial or a non-trial has taken place as a result of an erroneous ruling or direction by a judge."[30] However, as earlier stated, the basis of the judgment of the majority was that *all* acquittals could be appealed. Therefore, this statement amounts to a self imposed limitation on a wider power — there is nothing to prevent the Court in a suitable case relaxing or suspending the limitation. Secondly the decision of the jury must be arrived at "properly" and "on the merits" — this can only mean that the Supreme Court will be empowered to reverse a decision of a jury if the Supreme Court feel that the Jury did not act "properly" or if they feel the accused should have been convicted. All criminal practitioners have met cases where accused persons have been acquitted by juries where there seemed to have been overwhelming evidence against them. It would, I submit, be the very antithesis of the constitutional right to trial by jury if the Supreme Court could reverse such decisions. The substitution by the Supreme Court of a verdict of guilty for one of acquittal is not as far-fetched as it might seem. In a case of *Morgentaler v. The Queen*[31] the Canadian Supreme Court did just that in a jurisdiction where the Legislative had enacted that the Supreme Court could hear appeals against acquittals.

Criticisms of majority decision

Henchy J. also criticised the decision of the majority on other grounds. He gave examples of other decisions of the High Court which are not appealable. He quoted English and American judgments acknowledging the age-long existence of the concepts of "double jeopardy" and "autrefois acquit". Like Finlay P., he argued that this putative constitutional right conflicted with other constitutional rights. Apart from the right to trial by jury, he also discussed the equality provisions of article 40.1. and personal rights provisions under article 40.3. Since the passing of the Courts Act 1981, the only offences which can be sent forward for trial to the Central Criminal Court are murder, attempted murder and treason.[32] All other offences are triable on indictment before the Circuit Criminal Court or in certain circumstances, the Special Criminal Court. It is difficult to point to any "differences of capacity, physical and moral, and of social function" between different accused convicted in each of the three different courts which would bring their differences in

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treatment on Appeal within the ambit of the "saving clause" in Article 40.1. Furthermore, how can the life and person of an acquitted accused be protected and vindicated as is required by Article 40.3. if, as Henchy J. states, he can be vexed with the question of his guilt or innocence again and again? For that reason alone, an acquittal ought to be final.

Article 34.4.3°

The final criticism of the "O'Shea" decision is based on the very wording of article 34.4.3° itself. The Legislature is empowered under that sub-section to prescribe exceptions and make regulations curtailing the appellate jurisdiction of the Supreme Court. The original Court of Criminal Appeal was set up in 1924.[33] The present Court was established in 1961.[34] Its decisions are expressed to be final and unappealable. Until "*Conmey*", with possibly two exceptions[35] neither the Attorney General nor defence practitioners ever sought (or perhaps ever thought) to by-pass this Court and proceed directly to the Supreme Court. In some circumstances, it was felt that the Supreme Court ought to have jurisdiction to rule on a particular point and so the Legislature had enacted Section 29 of the Courts of Justice Act 1924. If a Certificate was granted under this Section, an appellant could appeal on to the Supreme Court. There was nothing specific in this section preventing the A.G. appealing against an acquittal in the Court of Criminal Appeal, but in *People (A.G.) v. Kennedy*[36] the Supreme Court, following the principles earlier outlined, held that such appeal did not lie. The rule in "*O'Shea*" now renders Section 29 obsolete in relation to decisions of the Central Criminal Court. The Legislature also enacted Section 34 of the Criminal Procedure Act 1967 in a conscious effort to remove a problem associated with the sanctity of acquittals. If a trial judge directed a jury to acquit an accused on a point of law, the .A.G. was empowered under this Section to refer that point of law to the Supreme Court for their decision, but without prejudice to the verdict of acquittal. The Supreme Court could therefore lay down the correct interpretation of the law for future cases. The Legislature therefore recognised that a problem existed but they were not prepared to enact legislation allowing for an appeal against acquittals based on an erroneous view of the law. This section is now redundant in relation to trials before the Central Criminal Court. None of this legislation was expressed to be for the purpose of excepting from or regulating the appellate jurisdiction of the Supreme Court, but it is difficult to imagine the Legislature creating a new Court administration and new rules and procedures governing that administration unless that is what the Legislature intended to do. Not all legislation that impinges on constitutional provisions is expressed to be for that purpose, and I would submit that the main reason the legislation and regulations do not mention the constitution is that for a period of fifty years, nobody had adverted to the fact that the enactments might conflict with Article 34.4.3°.

The *O'Shea* decision therefore reverses over one hundred years of precedent and almost eighty years of legislation. It interferes drastically with the constitutional right to trial by jury, and it may eventually lead to the substitution of a decision of a non-jury court for the verdict of a jury. It will cause confusion in the whole appeal procedure, and relegates the status of the Court of Criminal Appeal. It will cause discrimination on an arbitrary basis between accused persons tried in the different Courts. It imposes, I submit, an unfair burden on an accused who has been acquitted in the Central Criminal Court. For these reasons, I would submit that the strong dissenting judgments of Henchy J. and Finlay P. are to be preferred. However, the majority decision is now settled law, and it is to be hoped that when the Court eventually comes to give its judgment on the substantive issue, it will set out proper detailed safeguards which will go someway to alleviate some of the problems associated with the decision. □

Footnotes

1. [1908] 2 IR. 431.
2. D.P.P. v. O'Shea. On the 19 January, 1983 the Supreme Court heard the appeal of the DPP on its merits and dismissed it without reserving judgment. Mr. O'Shea was discharged.
3. 7 Q.B.D. 198.
4. [1964] IR. 395.
5. [1975] IR. 341.
6. Section 11 Courts (Supplemental Provisions) Act 1961.
7. In this part of his judgment Walsh J. appears to indicate that an appeal can be taken to the Supreme Court from a decision in the Circuit Criminal Court which involved a constitutional matter. This point was not taken up by any of his colleagues and to date, there has been no attempt to lodge such an appeal.
8. D.P.P. v. O'Shea. Supreme Court unreported 2/11/82 at page 17. Henchy J.
9. See generally J. P. Casey "Confusion in Criminal Appeals — The Legacy of Conmey" 1975 Irish Jurist N.S. page 300.
10. See footnote 17. J. P. Casey op. cit Page 301.
11. [1980] IR. 294.
12. D.P.P. v Byrne. 29th November 1979 Supreme Court. Unreported.
13. [1981] ILRM. 398.
14. D.P.P. v. Christopher Anthony Lynch [1981] ILRM 389 at 402.
15. Shaw v. People (D.P.P.) Supreme Court. Unreported 17/12/80.
16. D.P.P. v. McCann. Supreme Court reference 163/80. D.P.P. v. Coffey. Supreme Court reference 181/80. D.P.P. v. O'Shea. Supreme Court reference 190/80.
17. The People (A.G.) v. Conmey. [1975] IR. 341 at page 348.
18. D.P.P. v. Patrick Leo O'Shea. 2/11/82. Supreme Court Unreported.
19. D.P.P. v. Patrick Leo O'Shea. at page 15. O'Higgins C.J.
20. [1967] IR. 147.
21. D.P.P. v. Patrick Leo O'Shea at page 10. O'Higgins C.J.
22. D.P.P. v. Patrick Leo O'Shea at page 1. Hederman J.
23. D.P.P. v. Patrick Leo O'Shea at page 15. Henchy J.
24. This Committee, which reported in 1966, advocated by a large majority, the abolition of the Court of Criminal Appeal and the transfer of its jurisdiction to the Supreme Court.
25. De Burca v. The Attorney General. [1976] IR. 38.
26. D.P.P. v. Patrick Leo O'Shea at Page 12. Finlay P.
27. D.P.P. v. Patrick Leo O'Shea at Page 34. Henchy J.
28. D.P.P. v. Patrick Leo O'Shea at Page 62. Henchy J.
29. Cf. Casey op. cit. Page 306. He is of the opinion that there is no statutory power enabling the Supreme Court to order a new trial. O'Higgins C.J. stated in "O'Shea" that inherent in the power to hear appeals was the power to order a new trial.
30. D.P.P. v. Patrick Leo O'Shea at Page 27. O'Higgins C.J.
31. 1975 53 D.L.R. (3d) 161. See Casey op. cit. page 311.
32. This part of the Courts Act 1981 has now come under challenge in the High Court, but the cases have not yet come to hearing.
33. The Courts of Justice Act 1924.
34. Section 3. Courts (Establishment and Constitution) Act 1961.
35. Cf. The People (A.G.) v. Cullen. Supreme Court unreported 18/8/71, The People (A.G.) v. Bell [1969] IR. 24.
36. [1946] IR. 517.

National House Building Guarantee Scheme

Practitioners will remember that when the Guarantee Scheme was originally introduced, its success was assured by the fact that the main Building Societies declined to give loans unless a Builder was registered with the N.H.B.G.S. This effectively forced all the larger builders to join the Guarantee Scheme. Exception was made at that time for "once off" houses, whether built by builders or by direct labour.

The Law Society understands that the Guarantee Scheme has now concluded discussions with the Irish Building Societies Association which will, in effect, require all houses built by builders, whether speculatively or on a "once-off" basis, to be registered with the Guarantee Scheme.

Many people are having "once off" houses built by builders in rural areas, on sites transferred from some member of their family, or purchased independently. Solicitors would be well advised to warn clients at the earliest stage possible that, if they hope to obtain a Building Society loan on the house in due course, that they must deal with a builder registered with the Guarantee Scheme. □

Conveyancing Notes

Releases of Mortgages and Charges
V.A.T. on Lending Institutions Solicitors Fees

It has been brought to the attention of the Conveyancing Committee that some Solicitors acting for lending institutions are quoting their fees for the taking up of documents, and for preparation and completion of Releases of Mortgages, inclusive of V.A.T.

Having checked with the Revenue Authorities, the Committee is satisfied that this is not a correct practice, and that Solicitors should issue a note of their fees and the V.A.T. thereon in the form of a V.A.T. Invoice. □

Professional Indemnity Insurance

At the meeting of the Council of the Society held on 18th February 1983, the President reported on the likelihood of an increase in premium in the coming year, commencing 1st May, 1983 and on the discussions which had taken place with Minets in Dublin and London and with the Underwriter of the American International Insurance Company. The main problem was in the valuation of outstanding claims. The Society' representatives had persuaded Minets that the claims be reviewed and assessed by Senior Counsel and this was now being put in hand. In addition, Committee members were making their own inquiries. At the end of the day, it could well be that the Society could still be dealing with Minets and, possibly, with the American International Insurance Company, but the Committee considered that every avenue should be explored, in view of the level of increase in premium which had been suggested. As decisions could be required before the next meeting of the Council, the President asked that discretion be given to the Committee to deal with the matter. This was agreed. □

Education Note

Final Examination — First Part 1982 — A Report

The Society held its Final Examination — First Part (the "Entry" Examination) in December 1982. The provisional results were announced by the Education Committee on January 27th, 1983.

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

Subject	Internal Examiner	External Examiner
Tort	Mr. Patrick McGovern, Solicitor	Professor Bryan M. McMahon, (U.C.C.)
Contract	Mr. William Binchy B.L.	Dr. Henry Ellis, (N.I.H.E. Limerick).
Property	Ms. Mary B. P. O'Mahoney, Solicitor.	Professor J. C. Brady, (U.C.D.).
Constitutional Law	Mr. Eamonn G. Hall, Solicitor	Professor R. F. V. Heuston, (D.U.).
Company Law	Mr. Owen O'Connell, Solicitor.	Mr. Patrick Ussher, (D.U.).
Criminal Law	Mr. Brendan Garvan, Solicitor.	Professor Kevin Boyle, (U.C.G.).

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

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

226 Candidates sat the full examination in 1982. 146 of them were declared to have passed the examination. 89 of the Candidates passed all the subjects which they sat (Law Graduates are exempt from Criminal Law). 57 Candidates were allowed compensation from other subjects.

The following compensation rules were applied on this occasion.

1. No Candidate who failed to reach the Pass mark (50) in three subjects or more was allowed to compensate.
2. No Candidate who achieved less than 40 marks in any subject was allowed to compensate.
3. Any Candidate who had achieved less than 50 marks in two subjects was only entitled to compensate if that Candidate had achieved more than 45 marks in one of those subjects.
4. Candidates who had not achieved a total of over 250 marks were not entitled to compensate (marks in Criminal Law were not taken into account in computing this total). □

Special General Meeting of the Law Society

The Special General Meeting of the Law Society called 'to consider what economies and/or re-organisation (if any) are expedient to help lighten the financial burden of members of our Society without impairing its proper functioning in the best interests of the profession was held in Blackhall Place, Dublin 7, on 27th January, 1983.

The President welcomed both the purpose of the meeting and the attendance, which he noted was larger (83) than at the Annual General Meeting.

Mr. T. C. G. O'Mahony circulated notes regarding the Society and said that the demand by the Society on members had increased by £176 between 1982 and 1983. He queried some expenditure, given that a deficit had been forecast, and referred to various heads of expenditure which he had taken into account in arriving at a total of £1,150,430. If the Council had undertaken economies, could the membership be informed of the results? He feared that a bureaucratic monster had been created and asked if consultants should be called in, or whether a separate Committee of non-Council members should be constituted to review the situation.

Mr. J. Sheehan supported Mr. O'Mahony. Mr. T. Jackson and some other speakers considered that the way to deal with queries put by Mr. O'Mahony was to raise them at the Annual General Meeting.

Mr. A. Curneen said that members were concerned with the Compensation Fund and hoped that they could be given some guarantee that demands would not be unlimited. There was a fear amongst the more established practitioners of younger members setting up in practice on their own. The general view, he added, was that the Law Society was doing a good job, but he suggested that the profession's interests would not be well looked after until the Society formed a Trade Union.

He also inquired why the Society did not leave the training of solicitors to the Universities, but accepted that the Society might have to exert control over the entry to the profession.

Mr. Q. Crivon endorsed Mr. Curneen's remarks and said that he was worried about future years, rather than the current year. As he saw it, the Society was being maintained by a paying profession of about 2,500 people, with about 500 unemployed or otherwise not in a position to pay the Society. He would like to see a breakdown of the costs of running Blackhall Place and the salaries and expenses in relation to the services provided by individuals. It might then be possible to say where economies could be made.

Mr. M. Browne felt that there was an absence of reporting back to Bar Associations. In his own Bar Association, (Mayo), they had the attendance of the Director General twice a year, and the President visited them to fill them in fully as to what was going on. The situation was a complex one, and money would have to be provided to give a service.

Mr. Crivon said it appeared that the Bar Association liaison with the Society was better in the country than in Dublin.

Mr. P. Murphy said that the young solicitors who had qualified in the last five years now represented more than one-third of the profession and they had a feeling of alienation because the Law Society had done nothing for them. Pay scales were very poor, the employment situation was bad and getting worse. The general feeling among his colleagues was that the profession and, in particular, the Law Society, was doing little for the younger members. Mr. M. Farrell said that what worried him was not the running of Blackhall Place, but the Indemnity Fund and he asked if the time had come when individuals would have to take out insurance cover to protect themselves. What was happening at the moment was that people with 'good track records' were bailing out those who did not conduct themselves.

The President said that the members of the Council were extremely concerned over the increasing level of expenditure and, before there was any mention of a Special General Meeting, the Policy Committee had considered all aspects of the Society's activities and the areas where it might be possible to prune expenditure. The Society was faced with the dilemma of trying to curtail expenditure and, at the same time, increase services. In its examination, the Society had come up with a number of possible approaches, which included the non-replacement of staff, an examination of cheaper methods of preparing Law School and company Formation documentation and curtailing travel expenses. The approaches also include increasing the level of investigations, with a view to ascertaining and pursuing solicitors who have not taken out Practising Certificates, to ensure that they do so and, where appropriate, to collect arrears. Contact is also to be made with those who had not already contributed towards Blackhall Place, with a view to increasing the funds from members and thereby reduce bank interest.

Speaking of Blackhall Place, the President pointed out that it might be necessary to spend additional money on improving security.

The Council, he continued, was prepared to circulate information to members, but no matter what precautions it took there were leaks. Consequently, the Council was against the circularisation of documentation and favoured conveying information by word of mouth.

Dealing with comments about the Law School, the President said that up to now the arrangement was experimental. Now that a fixed situation had been established, the Education Committee intended to review the entire scheme.

It would also take a fresh look at an approach to the Higher Education Authority for funding. So far as numbers were concerned, the Society was indicted for limiting the number entering the profession. It found itself on a 'no win' situation. The Society was now in discussion with representatives of the students and those who

recently qualified, with a view to reviewing the content of the course.

He was conscious of the employment problems and the younger members had their own Committee within the umbrella of the Council. A suggestion had been made that there should be a minimum salary for persons entering into employment in the profession. While excellent in theory, the suggestion might result in disemployment in the present climate.

To Mr. Farrell, the President pointed out that there was a statutory obligation to have a Compensation Fund. Last year, there had been a major claim and the Council was watching others. The Society has an insurance cover on the Compensation Fund and, in the case of the present claims, the cover saved the profession approximately £800,000. It was obvious that after the major claims the level of premium and of cover would have to be reviewed.

Mr. O'Mahony complimented the President on the detailed figures which had been circulated, but he asked if it would be a good idea to adjourn the meeting for a month to get further information and think out ideas to help the Council.

Mr. Curneen thanked the President for his approach to the meeting. To him, it appeared that the situation was in good hands and he did not want anything more done.

Mr. Curneen's remarks were greeted with applause. Mr. Crivon agreed with Mr. Curneen and said that the meeting had produced information which had never before been put before members in General Meeting.

A list of those members who attended the Special General Meeting is filed with the Minutes of the meeting, together with Mr. O'Mahony's notes circulated to the attendance and the information circulated by the President. □

U.C.G. Graduates Association

At a meeting of UCG graduates in Dublin recently it was decided to form an association of graduates with the support of UCG. Further branches of this Association — Cumann Céimithe na Gaillimhe — will be set up in Limerick, Sligo, Athlone, Cork and Galway within the next few months. The primary aim of Cumann Céimithe na Gaillimhe is to foster and maintain closer links between UCG and her graduates and between the graduates themselves.

If you require further information about Cumann Céimithe na Gaillimhe in general please contact Cathleen Cunningham at the Development office, UCG, phone 091/24411 ext. 721/722. □

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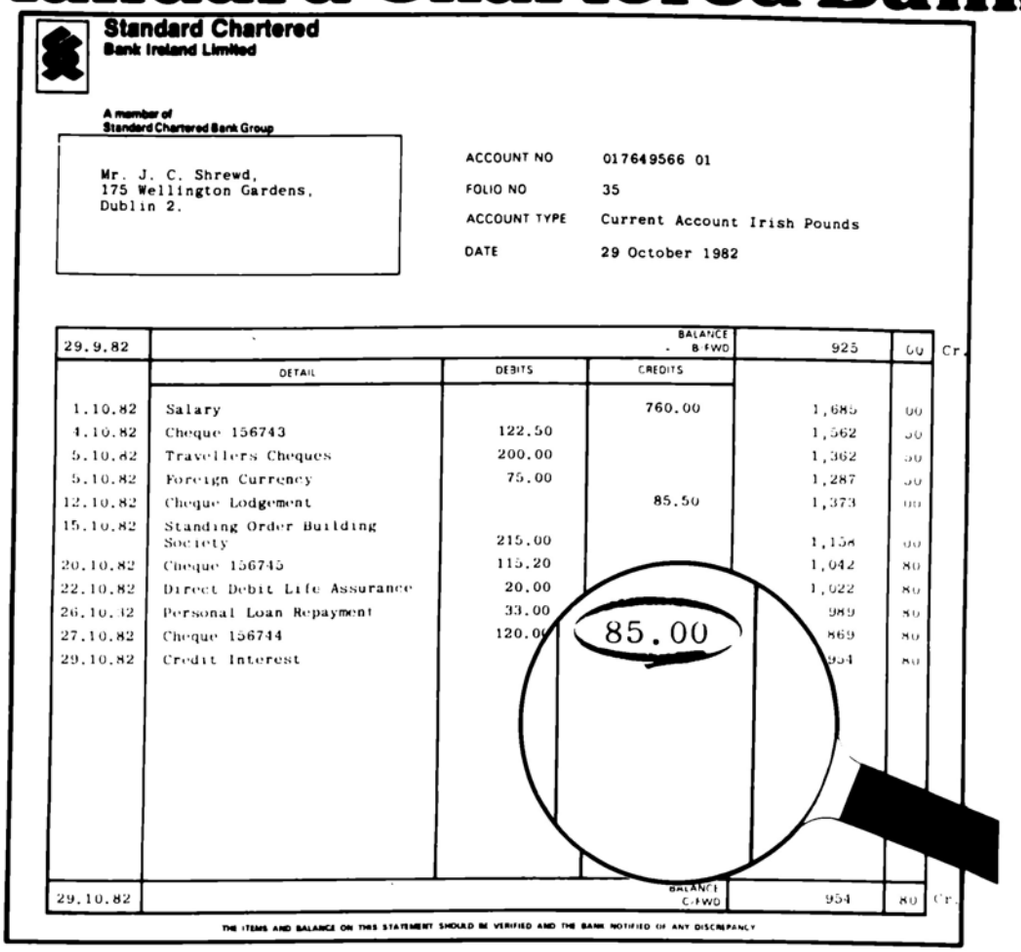

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1.10.82	Salary		760.00	1,685 00	
4.10.82	Cheque 156743	122.50		1,562 50	
5.10.82	Travellers Cheques	200.00		1,362 50	
5.10.82	Foreign Currency	75.00		1,287 50	
12.10.82	Cheque Lodgement		85.50	1,373 00	
15.10.82	Standing Order Building Society	215.00		1,158 00	
20.10.82	Cheque 156745	115.20		1,042 80	
22.10.82	Direct Debit Life Assurance	20.00		1,022 80	
26.10.82	Personal Loan Repayment	33.00		989 80	
27.10.82	Cheque 156744	120.00	85.00	869 80	
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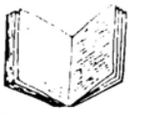
BOOK REVIEW



Compensation for Criminal Damage to Property by D.S. Greer and V.A. Mitchell, Belfast. SLS. Legal Publications (N.I.) 1982. IR£24.00.

Statutory provisions for the payment of compensation from public funds for criminal damage to property, essentially similar to those now in force, have existed in Ireland at least since the time of that Monarch of pious, glorious and immortal memory. At present the matter is governed in Northern Ireland by the Criminal Damage (Compensation) (N.I.) Order, 1977 and in the Republic by the Malicious Injuries Act, 1981.

The Book under review sets out to be a detailed exposition of these two pieces of legislation and the associated body of law, largely developed from the decisions on earlier similar statutes, and the Authors have written an impressive and valuable guide, covering the whole field with great lucidity, accuracy and skill.

Professor Greer is Professor of Law at Queens University, Belfast, and Mrs. Mitchell is Senior Lecturer in the same faculty, so that the Book is primarily an exposition of the law in Northern Ireland. The treatment of the subject however is completely comprehensive and, the principles involved being very similar in both jurisdictions, the resulting book is as valuable and as welcome south of the border. I have no doubt that it will be very well received and used extensively in the Republic.

All the relevant case-law is quoted and referred to, North and South. Musical Marie and Count Hamon and the marauding schoolboys in *Re Burrowes* duly make their appearance. The number of cases cited and the adroit manner in which they are treated make this a most comprehensive and effective treatment of the law as developed in the Courts.

There is a clear and valuable historical account of the development of the law of compensation for criminal injuries covering both jurisdictions. A most useful feature of the book is the detailed consideration of the correct assessment of the claimants loss which is often a matter of some difficulty and one which other text-books have tended to ignore. Many of the rules and principles for quantifying loss derive from other areas of the law as, For example, *Harbutt's Plasticine Ltd. -v- Wayne Tank and Pump Co. Ltd.*, [1970] 1. Q.B. 447, but the Authors are ready to pursue enlightenment wherever it is to be found and they treat their material with great discretion and skill and with a striking gift for tidy arrangement and effective exposition.

While there are substantial differences between what is compensatable in the North and what is compensatable in this jurisdiction, there is also enough similarity to make this book an indispensable aid to the practitioner in either jurisdiction.

The book is clearly and accurately printed in readable type and handles well. It should have a wide sale.

William Dundon

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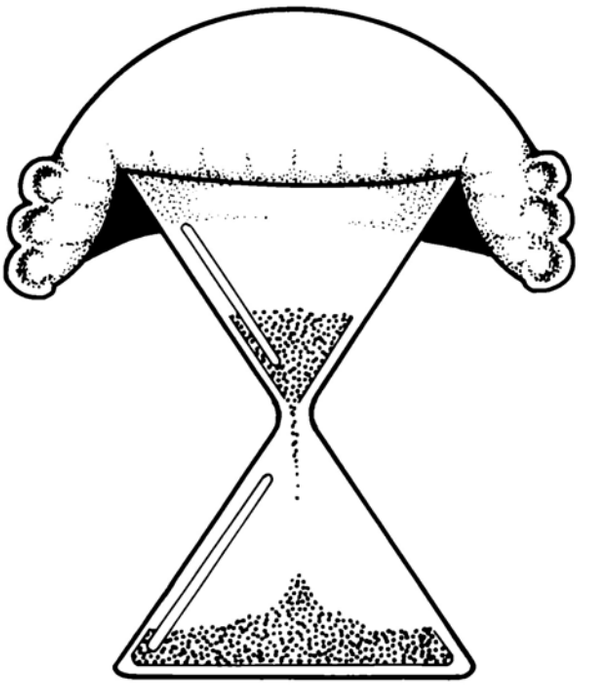

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European Community Law, Irish Law and the Irish Legal Profession

(Extract from Second Frances E. Moran Memorial Lecture.)

by
John Temple Lang

Implications for the Legal Profession

I do not think that the fact that Community law has many and important implications for Irish law has been adequately realised by Irish lawyers in general.

I base this opinion on the subjective impressions of a number of people, and also in the ten years since January 1973 the fact that, compared with other Member States of the Community, there have been in Ireland, relatively:

— few complaints to the Commission from Irish companies about technical barriers to trade;
— few cases referred to the Court of Justice from Irish courts;
— few restrictive agreements notified to the Commission by Irish companies;
— few cases in which points of Community law have arisen before Irish courts (see Murphy, Community law in Irish Courts 1973-81, 1982 European Law Review 331);
— few lectures and conferences on Community law subjects held in Ireland;
— few Irish lawyers who have attended advanced courses on Community law outside Ireland;
— few articles and notes on questions of Community law in the Gazette of the Incorporated Law Society;
— few Irish firms of solicitors supplying their clients on a regular basis with information on developments in Community law;
— and Irish legal textbooks written since 1973 have devoted relatively little space to issues of Community law.

Why has the influence of Community law in Ireland, direct indirect, not been more widely understood? There are several reasons.[1]

— Community measures causing reforms usually are directives, and Irish lawyers are not always aware that the Irish implementing legislation is based on Community principles;
— some of the implementing legislation which should have been enacted e.g. to give effect to certain company law directives, has not been enacted when it should have been;
— Irish lawyers have accepted Community law very easily and in a very matter-of-fact way. They have almost taken it for granted. Practitioners preparing themselves to plead in Luxembourg have been disconcerted by how readily and simply Irish judges decided to refer questions of Community law to Luxembourg — in particular as there is still nothing in the Irish Rules of Court on the subject (the power given by the European Communities (Rules of Court) Regulations 1972 has not been exercised);
— some of the Irish civil servants working on EEC legal matters are not lawyers, and they sometimes tend to underestimate the importance of the changes which are being considered, and do not always consult professional bodies about them adequately or in an appropriate way;
— there is no CELEX facility (computerised information retrieval system on Community law) in Ireland;
— although Ireland has standing to intervene in every case before the Court of Justice, and the Attorney General's Office automatically receives the papers in every case under Article 177, Ireland has seldom intervened. Indeed, as far as I have been able to discover, Ireland has intervened at the oral stage in only ten cases. This has meant that few Irish lawyers are required to appear in Luxembourg, and therefore to inform themselves about the latest cases on Community law;
— neither House of the Oireachtas has ever adequately discussed the reports and recommendations of the Oireachtas Joint Committee on the secondary legislation of the European Communities. (Indeed between the 1981 and the first 1982 elections, no such committee was in operation);
— in my opinion, Irish lawyers are too busy trying to operate an inefficient legal system to have the time to inform themselves adequately about new developments, however important;
— Irish bodies such as the Incorporated Law Society have not given as much detailed consideration to draft Community legislation as similar bodies in other countries. As a result, the implications of Community measures have not been as fully discussed and are not as clearly seen in Ireland as they are elsewhere;
— the Irish Reports have not reported any of the twenty Irish court cases in which points of Community law have arisen during the years 1973-1981.

Economic consequences for the legal profession

The practice of Community law has certain economic implications for the Irish legal profession.

Both Irish barristers and solicitors are now directly faced with competition for clients, in Community law

cases, from lawyers in other countries. Irish clients can, and do, go direct to non-Irish lawyers for advice on questions of Community law. Clients in general are more willing to go to different lawyers for different kinds of problems. If the clients go to lawyers on the Continent, or to English or Scottish counsel practising outside Britain, they need not go through solicitors. If they find themselves parties to a case before the European Court, they do not need junior counsel. Irish solicitors with a case for the Community Court do not need counsel at all, and if they want to use counsel they do not need to use an Irish counsel. Companies in other EEC countries often get advice from lawyers of different countries, so it is natural to expect that Irish client companies will continue to do so.[2] These facts, combined with the fact that certain lawyers have already established reputations in Community law, put Irish lawyers at a certain disadvantage. In Northern Ireland, English barristers have been brought in to argue points of Community law. In fact, Irish clients need not go to the continent for specialised advice on Community law: at least one Irish company already employs a full-time Irish lawyer as a specialist in Community legal questions.

Under the directive on freedom of lawyers to provide services, non-Irish lawyers are free to provide legal advice in Ireland and to appear in Irish courts, on certain conditions. Irish lawyers are free, if they wish, to do the same in Northern Ireland and in Britain and the other Member States. (Free movement for lawyers is not, of course, confined to Community law cases).

To deal with Community law requires a certain investment of time and money. It is important that a sufficient number of Irish lawyers should choose to make that investment. Community law is emphatically not to be regarded as if it were merely a new topic of Irish law which can be mastered ad hoc when the need arises.

Most cases, in practice, are not purely Community law cases: they are cases which involve both points of national law and points of Community law. So they cannot be handed over to a few specialists (whether Irish or not), even if the legal profession in general was willing to hand over an expanding and lucrative sphere to others. There is no real "Community Bar", although a few lawyers have appeared many times in the Court: *all* lawyers in the Community may find themselves at any time in a case which may go to Luxembourg.

So far, in Ireland and Britain, solicitors have taken more interest in Community law than the Bar has done. Irish solicitors have appeared many more times before the Court in Luxembourg than have Irish barristers, if one includes, as one must, Irish lawyers representing the EEC Commission. In cases before the Court, most of the arguments are in writing, and witnesses are unusual. A good knowledge of Community law and of the facts of the case are more valuable than the other skills traditionally associated with barristers.

I have a clear impression that the legal profession in Ireland is *less* prosperous than the legal profession in other countries in the Community, even making allowances for national differences in average income per capita. I think I know why.

I believe that Irish lawyers are less prosperous because of the amount of their own time and of the ever increasing salaries of assistant solicitors and employees) which are spent on working with an old-fashioned, cumbersome, inadequately staffed and inefficient legal system. Irish lawyers are now more and more often in a situation in which they cannot charge enough for what ought to be (but is not) a simple transaction. They cannot charge enough to pay for the time and the staff they need to carry it out, and to give themselves a reasonable profit as well. This problem cannot be solved by raising fees. If I am right, the economic situation of the Irish legal profession as a whole will continue to deteriorate until the legal system (courts, court offices, conveyancing, etc.) is modernised and streamlined and made less wasteful of time and manpower for practitioners.

This economic pressure is not due to the EEC. However, it certainly makes it more difficult for Irish lawyers to take advantage of the opportunities and overcome the difficulties which the Community presents. A profession must be reasonably prosperous if it is to have time for improving its own legal system, and for investing in the study and practice of such a big, new and difficult field as Community law.

Consequences for the handling of cases

To deal adequately with a Community law problem one must have a grasp of Community legal reasoning as well as legislation and case law. New techniques of legal reasoning cannot be worked up for the purposes of a brief: they have to be carefully and thoroughly acquired.

To deal with a Community law problem a lawyer must have a knowledge of the whole field of Community law and procedure. Analogies may occur to the judges of which he must be aware: he must be able to answer questions which may be outside his immediate brief. His problem may have to be considered in the light of broad principles laid down in judgments in other areas of Community law. If he is not familiar with these principles, or does not know how to argue from them, he is handicapped.

Professor Kahn-Freund has written:

> "There is . . . as between common law and civil law countries, a difference in the method of legal reasoning and — more important — of organised fact finding, in the outward form of legal rules, in legislative and judicial styles . . .
>
> As regards methods of law making . . . there is prima facie a gulf which separates the common law from the civil law world . . .
>
> the existence of non-existence of codifications is irrelevant in this context: French administrative law is no more codified than the English law of contract or tort . . .
>
> What is . . . relevant is the role of the courts as law making agencies, the systematic and casuistic methods of legal reasoning, the style and treatment (interpretation) of legislation, and the dichotomy of methods of adjudication in matters of public and private law in continental countries, and its absence in (Ireland) . . .
>
> The (EEC) Treaty . . . prevails over the common law principle of the binding force of precedent . . . Lawyers trained in the common law will have to adjust to systematic, and lawyers trained in the "civil law" to casuistic, reasoning . . .
>
> The thought processes of the common law are based on analogical and not on deductive reasoning . . .

> These differences in methods of legal education . . . produce, or contribute to, the instinctive inclination of lawyers to argue "from principle" or "from precedent . . ." The need for lawyers in . . . (Ireland) to adjust to the style of continental legislative texts and — even more difficult — judgments, is very great."

He also wrote:

> "The reason why I consider the legislative style to be a more formidable obstacle than the judicial style is that this difference in styles reflects differences in interpretation, and the differences in interpretation reflect differences in judicial attitudes towards the purposes and functions of legislation . . ."

He went on later:

> "The doctrinal distinction between "public" and "private" law . . . is . . . apt to create a real obstacle (because) it reflects a difference in the role of the courts . . . the use of private law concepts for the analysis of public law relationships . . . has until very recently been a characteristic of English law . . . This is by far the most important contrast between the "common law" and the "civil law".[3]

The Community lawyer needs a knowledge of civil law, of administrative law and of private international law as well as Community law. If he has not got this knowledge, he is at a disadvantage in comparison with lawyers who have.

This is not as bad as it may seem. "Bíonn gach tosnú lag" — The principles of economics are similar in all countries: the underlying principles of economic law are surprisingly similar. Because so much of the pleading before the Court is in writing, the lawyer has time to look up points raised by the other parties. There is a convention (not always observed) that cases from other jurisdictions are not cited without warning to one's adversary.

An increasing number of rules of Irish law are already derived from Community law. This proportion is increasing, and will continue to increase.

An increasing proportion of Irish lawyers have studied civil law, private international law, administrative law and, of course, Community law.

Irish judges, when the occasion arose, have dealt with questions of Community law very readily and incisively.

Just as there is no Community Bar, there are no "European" law schools in the way that there are "national" law schools in the United States. Community law is, and can be, studied in ordinary universities.

But it demands a greater effort than it has received so far here. It demands the kind of imagination and breadth of vision which the new Constitution demanded in 1937 — and received only later. But, with Community law, Irish lawyers cannot afford to wait. A conservative approach to the Irish Constitution could not cause Irish lawyers to lose business to foreign lawyers. A conservative approach by Irish lawyers to Community law will certainly do so. Irish lawyers were able largely to avoid questions of private international law for many years: they are not in a position to avoid questions of Community law now.

For example, as a result of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, new rules will be introduced giving courts of other Member States jurisdiction over Irish companies, and judgments against Irish companies obtained anywhere in the Community will be immediately and automatically enforceable in Ireland. This is probably the most important single legal change, from a practical standpoint, resulting from the Community. Indeed, it is so important that I seriously considered devoting the whole of this lecture to it. □

Footnotes

1. Chubb, The Constitution and Constitutional Change in Ireland (1978) 80 says the reception of Community law into Irish law has been "dragged out" by transitional arrangements, derogations and "simple inertia" and on p. 85 he says "the impact of Community law upon Irish law and the actions of the Irish government is considerable though, as yet, largely unrecognised". He quotes the 55th Report of the Joint Committee on the Secondary Legislation of the European Communities, p. 9. At p. 88 Chubb says "most Irish lawyers are still in the process of becoming familiar with a large body of new law. So far, most are not accustomed to look at it or invoke it: it is only a matter of time before they do." See also Senator Robinson, How EEC Law affects you, Society of Young Solicitors, 1982.
2. Irish patent agents, who find themselves in an analogous situation as a result of the European Patent Convention, were quick to see the possible undesirable consequences for themselves.
3. Kahn-Freund, Common Law and Civil Law Imaginary and Real Obstacles to Assimilation, in Capeletti (ed.) New Perspectives for a Common Law of Europe (1978) 137 at p. 138, 149, 150, 151, 152, 153-154, 156, 158, 160. Tunc, a French Lawyer looks at British pany Law, 45 Modern Law Rev. (1982) 1, at pp. 7-8: Scarman, English Law — The New Dimension (1974) pp. 25-26.

ROYAL COLLEGE OF SURGEONS IN IRELAND

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

Research in the College includes work on cancer, thrombosis, high blood pressure, heart and blood vessel disease, blindness, mental handicap, birth defects and many other human ailments. The College being an independent institution is financed largely through gifts and donations. Your donation, covenant or legacy, will help to keep the College in the forefront of medical research and medical education. The College is officially recognised as a Charity by the Revenue Commissioners.

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Enquiries to: The Registrar, Royal College of Surgeons in Ireland, St. Stephen's Green, Dublin 2.

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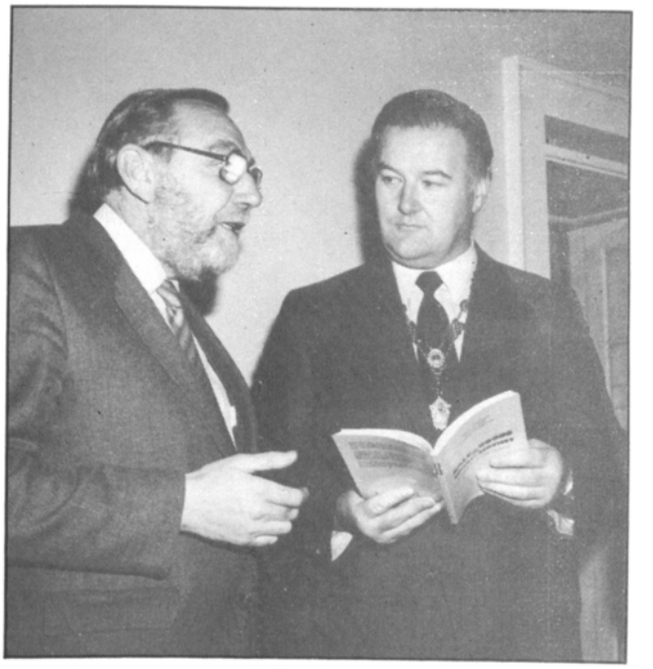

Launching of *Sale of Goods and Supply of Services: a Guide to the Legislation* published by the Law Society **17th February '83.**

Attending the launch were (from left) Mr. Frank Cluskey, T.D., Minister for Trade, Commerce and Tourism and Mr. Michael P. Houlihan, President of the Incorporated Law Society of Ireland.

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Correspondence

The Editor,
Incorporated Law Society Gazette.

15th March '83

Dear Sir,

I recently received the following Requisition on Title requesting that the Purchaser's Solicitor be furnished with Documents on closing, to include the following:

"Transfer to Purchaser duly executed by the Vendors, P.D. impressed and a Judge duly stamped."

Unfortunately I could not find one slim enough to fit into the stamping machine in the Castle.

Yours sincerely,
Thomas P. O'Connor,
Solicitor,
77 Lower Leeson Street,
Dublin 2.

Director-General,
The Law Society.

23rd March '83

Dear Mr Ivers,

Further to our letter of February 2nd we can now advise that, with effect from March 1st, the price of a large-scale map will be IR£18.75. Large-scale maps are those generally utilised by your professional members and include 25-inch to 1 mile, 6-inch to 1 mile and 1:1,000.

Royalty charges have increased in line with map prices and the per capita fee for an Annual Licence is now IR£20.00. The minimum Permit fee for copying large-scale maps is now IR£7.00, e.g. up to 12 copies at A4 size.

The post and packing charge is IR£1.25 per order irrespective of whether the order is for one or several maps.

Please contact this Office if you wish any further prices, information or clarification.

Yours faithfully,
M.C. O'Gorman,
A/Supt. Administration.
Ordnance Survey Office,
Phoenix Park,
Dublin

AGENCY

Dublin firm of solicitors adjacent to Law Society and Four Courts wishes to establish town agency practice offering a personalised service to a small number of principals.

Enquiries to:
Robert Pierse and Associates,
Solicitors,
48 Blackhall Place, Dublin 7
Tel. 01-714414

Fees for attending Social Welfare Appeals

The following letter has been received by the Director General.

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

2nd December '82

Dear Mr. Ivers,

I wish to refer to your letter of 30 August 1982 (Ref. JJI/KC) regarding the payments made to solicitors who attend at oral hearings of appeals under the Social Welfare Acts.

It is considered that the comparison suggested with payments made under the Free Legal Aid Scheme would not be appropriate. However, I propose, in substitution for the current arrangements to have the amount to be awarded to solicitors who attend at oral hearings of appeals increased to £23 for an attendance of 3 hours or less, with effect from 1 January, 1983. As you will be already aware from previous correspondence, these hearings rarely last more than one hour but in the exceptional case where a hearing runs over the 3 hours the Appeals Officer will adjust the amount accordingly.

I should be glad if you would indicate your Society's agreement to the proposed new arrangements so that it may be put into effect in the new year.

Yours sincerely,
Patrick Geoghegan,
Chief Appeals Officer,
Department of Social Welfare,
D'Olier House,
Dublin 2.

LAW SOCIETY ANNUAL CONFERENCE

Dromoland Castle and Clare Inn
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5-8 May, 1983

Programme will include lectures on Management of a Law Office by Robert I. Weil and Patricia Kane, Consultants, Altman & Weil Inc. and an address by Mr. Desmond O'Malley, T.D., on the Legal Profession — The Future.

An interesting social programme has been arranged.

Brochures and Registration Forms will be issued shortly.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 25th day of March, 1983

W. T. MORAN (Registrar of Titles)

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

1. REGISTERED OWNER: James Fenlon, Arm, Castlerea, Co. Roscommon. Folio No.: 1563; Lands: Arm; Area: 12a.0r.19p. County: **ROSCOMMON**.

2. REGISTERED OWNER: James Brady, Mullamagavan, Stradone, Co. Cavan. Folio No.: 9421 and 9422; Lands: (1) Tirlahode Lower (F.9421), (2) Tirlahode Lower (F.9422); Area: (1) 11a.2r.4p. (F.9421), (2) 2a.1r.2p. (F.9422). County: **CAVAN**.

3. REGISTERED OWNER: Andrew McNamara, Neggagh, Carron, County Clare. Folio No.: 22209; Lands: Cahergrillaun; Area: 20a.1r.36p. County: **CLARE**.

4. REGISTERED OWNER: Hazel Susan Smith. Folio No.: 516F; Lands: Bunowen Beg; Area: 0a.0r.19p. County: **GALWAY**.

5. REGISTERED OWNER: Irish Shell & B.P. Ltd., Folio No.: 19899; Lands: Magheross; Area: 0a.2r.20p. County: **MONAGHAN**.

6. REGISTERED OWNER: Anne Marie Costello. Folio No.: 19612; Lands: Ballyedmonduff; Area: 1,560 Square Yards. County: **DUBLIN**.

7. REGISTERED OWNER: Allied Irish Banks Ltd. Folio No.: 7425; Lands: Fenner; Area: 263a.0r.2p. County: **MEATH**.

8. REGISTERED OWNER: Cairbre Finan. Folio No.: 3381L; Lands: East in the Barony of Naas, North situated to the North of Cradockstown Road; Area: 0a.0r.14p. County: **DUBLIN**.

9. REGISTERED OWNER: Timothy Ward. Folio No.: 13828; Lands: (1) Cappanahanagh (parts), (2) Coolnahila (Palmer) (Part); Area: (1) 11a.3r.34p; (2) 7a.1r.8p. County: **LIMERICK**.

10. REGISTERED OWNER: Thomas Hogan (Junior) Feakle, County Clare. Folio No.: 4016; Lands: Feakle; Area: 30a.1r.30p. County: **CLARE**.

11. REGISTERED OWNER: Peter Moore; Folio No.: 11465; Lands: at Baldaragh Barony of Balrothery East and County of Dublin; Area: 23a.3r.5p. County: **DUBLIN**.

12. REGISTERED OWNER: John Kennedy. Folio No.: 11219; Lands: (1) Allenwood North, (2) Derrymullen, (3) Allenwood North, (4) Allenwood North; Area (1) 7a.0r.25p; (2) 1a.2r.12p; (3) 30a.0r.8p; (4) 1a.3r.18p. County: **KILDARE**.

13. REGISTERED OWNER: John Cassidy and Ailish Cassidy. Folio No.: 6478F; Lands: Ballyduane (part); Area: —— ; County: **LIMERICK**.

14. REGISTERED OWNER: David McGrath. Folio No.: 9877; Lands: (1) Glenbower, (2) Glenbower; Area: (1) 48a.2r.36p; (2) 2a.1r.25p. County: **KILKENNY**.

15. REGISTERED OWNER: Mary Anne Connolly. Folio No.: 1597; Lands: Stradeen; Area: 8a.2r.0p. County: **MONAGHAN**.

16. REGISTERED OWNER: William J. O'Connell. Folio No.: 4282; Lands: Dromkeen West: Area: 0a.1r.36p. County: **KERRY**.

17. REGISTERED OWNER: Matthew O'Reilly. Folio No.: 1361L; Lands: Leasehold interest in the property to the South of Staplestown Road in the Townland of Carlow; Area: —— ; County: **CARLOW**.

18. REGISTERED OWNER: Andrew Fletcher. Folio No.: 19456; Lands: Castlelost; Area: 2a.2r.13p; County: **WESTMEATH**.

19. REGISTERED OWNER: Sheila Breen. Folio No.: 5241F; Lands: Annagh; Area: 38a.1r.13p.; County: **LIMERICK**.

20. REGISTERED OWNER: William Rath (deceased). Folio No.: 12723; Lands: Kilcorkey; Area: 45a.1r.4p.; County: **WEXFORD**.

21. REGISTERED OWNER: Harry Eugene Brown (deceased), Folio No.: 20680; Lands: Ballygarvan; Area: 86a.2r.4p.; County: **CORK**.

22. REGISTERED OWNER: Patrick John Daly. Folio No.: 1484L; Lands: Haggardstown; Area: 0a.0r.22p. County: **LOUTH**.

23. REGISTERED OWNER: Hugh Sheridan. Folio No.: 585 & 558; Lands: Curraghglass (part) (F.558) & Carrick West (F.585); Area: 33a.1r.39p. (F.558); 11a.3r.10p. (F.585). County: **CAVAN**.

24. REGISTERED OWNER: William A. O'Connor. Folio No.: 36235; Lands: Castlefreke Warren; Area: 0a.2r.0p. County: **CORK**.

25. REGISTERED OWNER: Noel Kierans. Folio No.: 23629; Lands: Legavooren; Area: 0a.1r.0p. County: **MEATH**.

26. REGISTERED OWNER: Kieran Walsh, Cornageeha, County Sligo; Folio No.: 2716F; Lands (1) Creggyconnell (2) Creggyconnell; Area: 2.369 acres, 0.625 acres; County: **SLIGO**.

27. REGISTERED OWNER: Stephen B. Treacy, Dereen, Abbeyknockmoy, Co. Galway. Folio No.: 11037F; Lands: Ardshea Beg; Area: 0.750 Acres; County: **GALWAY**.

28. REGISTERED OWNER: Christina Clarke. Folio No.: 2045L; Lands: Leasehold interest in the property known as 82 St. Nicholas Avenue, Dundalk; Area: —— ; County: **LOUTH**.

29. REGISTERED OWNER: Thomas Nowill Foster, Keel, Achill, County Mayo. Folio No.: 43456; Lands: Keel East; Area: 4a.3r.5p; County: **MAYO**.

30. REGISTERED OWNER: Owen Johnston. Folio No.: 141L; Lands: Haggardstown; Area: —— ; County: **LOUTH**.

31. REGISTERED OWNER: Brian Taylor. Folio No.: 7713; Lands (1) Taylors Grange (2) Stackstown; Area: (1) 16.013 acres, (2) 0a.3r.15p. County: **DUBLIN**.

32. REGISTERED OWNER: Hugh Tully. Folio No.: 2626; Lands: Drumcar; Area: 6.094 acres; County: **CAVAN**.

33. REGISTERED OWNER: Hugh Patrick Murray (Deceased). Folio No.: 2355; Lands: Knocknagoran; Area: 12a.1r.30p. County: **LOUTH**.

34. REGISTERED OWNER: The Kilkenny Hosiery Co. Ltd. Folio No.: 10854; Lands: Talbotsinch; Area: 1a.3r.25½p. County: **KILKENNY**.

35. REGISTERED OWNER: Patrick James Farrelly. Folio No.: 15443; Lands: Annafarney; Area: 32a.2r.13p. County: **CAVAN**.

36. REGISTERED OWNER: Denis and Mary Helen Boyle, Manor, Tulsk, Co. Roscommon. Folio No.: 4275; Lands: Manor; Area: 50a.1r.17p. County: **ROSCOMMON**.

37. REGISTERED OWNER: Michael Carroll, Robert Carroll and Rita Carroll. Folio No.: 20757L; Lands: known as No. 173 Cooley Road situate in the Parish of St. Jude and District of Kilmainham.

38. REGISTERED OWNER: Catherine Power. Folio No.: 12840; Lands: Kilbarry; Area: 0a.2r.0p. County: **WATERFORD**.

39. REGISTERED OWNER: Michael Brett. Folio No.: 12340; Lands: Ballydavid (part); Area: 119a.3r.36p. County: **TIPPERARY**.

40. REGISTERED OWNER: Joseph Keenan. Folio No.: 4737R; Lands: Togher More; Area: 0a.0r.27p. County: **WICKLOW**.

41. REGISTERED OWNER: Patrick Daly. Folio No.: (1) 986 (2) 8728; Lands: (1) Drumavaddy, (2) Drumavaddy; Area: (1) 10a.1r.15p; (2) 6a.0r.35p. County: **MONAGHAN**.

42. REGISTERED OWNER: Samuel Moody. Folio No.: 3474; Lands: Kinnacally; Area: 73a.0r.34p. County: **DONEGAL**.

43. REGISTERED OWNER: Michael Ahern (Junior) (deceased). Folio No.: 11113; Lands: Ballyregan; Area: 42a.2r.31p. County: **LIMERICK**.

44. REGISTERED OWNER: James Ryan. Folio No.: 21839; Lands: (1) Modeshill (Ayre), (2) Modeshill (Sankey), (3) Modeshill (Ayre); Area: 10a.0r.1p; 9a.1r.15p; 13a.1r.20p. County: **TIPPERARY.**

45. REGISTERED OWNER: John Sisk & Son (Dublin) Limited. Folio No.: 8205; Lands: situate in the Townland of Fox and Geese and Barony of Uppercross. Area: —. County: **DUBLIN.**

46. REGISTERED OWNER: James Burke. Folio No.: 403 (R); Lands: Kilbeg; Area: 41a.1r.35p. County: **TIPPERARY.**

47. REGISTERED OWNER: Mary Murray. Folio No.: 4254; Lands: Tirinisk; Area: 31a.0r.17p. County: **DONEGAL.**

48. REGISTERED OWNER: Patrick Rice. Folio No.: 10039; Lands: Cellarstown West (part); Area: 152a.0r.24p. County: **KILKENNY.**

49. REGISTERED OWNER: John Dickson (deceased). Folio No.: 487; Lands: Ballynakill; Area: 17a.1r.0p. County: **WESTMEATH.**

50. REGISTERED OWNER: South Eastern Farmer's Co-Operative Limited. Folio No.: 12360 now closed to 23199; Lands: Killybegs; Area: 30a.0r.23p. County: **WEXFORD.**

51. REGISTERED OWNER: Kathleen McGuinness. Folio No.: 6929 and 6930 now closed to Folio 10350; Lands: (1) Torpass, (2) Torpass; Area: (1) 43a.3r.34p. (2) 18a.0r.26p. County: **LOUTH.**

52. REGISTERED OWNER: John Shire (deceased). Folio No.: 15401; Lands: Dunnaman; Area: 65a.2r.0p; County: **LIMERICK.**

53. REGISTERED OWNER: Conor McCarrick. Folio No.: 15391; Lands: Bellaugh; Area: 1a.0r.36½p; County: **WESTMEATH.**

54. REGISTERED OWNER: Patrick McCaw, Kilcornan, Miltown Malbay, Co. Clare. Folio No.: 10413; Lands: Ballynew (Part); Area: 20a.1r.28p; County: **CLARE.**

55. REGISTERED OWNER: Ronnie White. Folio No.: 3174; Lands: Curraduff; Area: 74a.3r.17p. County: **WEXFORD.**

56. REGISTERED OWNER: John Macauley. Folio No.: (1) 2921, (2) 3662; Lands: (1) Ballygrennane, (2) Ballygrennane; Area: (1) 5a.3r.1p., (2) 14a.0r.20p.; County: **KERRY.**

57. REGISTERED OWNER: Warner K. Blackmore and Maria Blackmore. Folio No.: 42802L; Lands: situate in the Townland of Knocklyon and Barony of Uppercross; County: **DUBLIN.**

In the matter of the Registration of Titles Act, 1964, and of the application of Matthew Clancy in respect of 75, Goldenbridge Avenue, Inchicore, Dublin 8.

Take Notice that Matthew Clancy, Cloughatanny, Clara, Offaly, has lodged an application for his registration on the Leasehold Register free from encumbrances in respect of the above mentioned property.

The original Documents of Title are stated to have been lost or inadvertently destroyed.

The application may be inspected at this Registry.

The application will be proceeded with unless notification is received in the Registry within one calendar month from the date of publication of this notice that the original Documents of Title are in existence. Any such notification should state the grounds on which the Documents of Title are held and quote reference no. R12360/81.

Dated 25th day of March, 1983

P. O'Brien
Chief Examiner of Title

Lost Wills

Egan, Miss Mary, deceased, late of 77 St. James Walk, Rialto, Dublin 8, Retired Nurse. Any person having any knowledge of any Will of the above-named deceased please contact T. P. Robinson & Co., Solicitors, 94 Merrion Square W., Dublin 2.

Farrelly, James, deceased, late of Coronea, Arva, County Cavan. Will any person having knowledge of the whereabouts of the last will and testament of the above named deceased who died on 3rd January 1983, please contact Messrs. J. J. Keenan & Son, Solicitors, 10 Hillside, Monaghan. Telephone No. (047) 81555 & 81851.

Duggan, James J., deceased, late of 11 St. Margaret's Park, Malahide, Co. Dublin. Will any person having knowledge of the original will of the above named deceased dated 10 April, 1965, please contact Messrs. Walsh Harte & Co., Solicitors, 10 Pembroke Road, Dublin 4.

Farrell, Patrick, deceased, late of Lodge, Athenry, County Galway. Would any person having knowledge of any will of the above named deceased who died on the 18th October 1982, please contact Messrs. O'Donnell Turley & Co., Solicitors, Portarlington, Co. Laois.

Fitzgerald, Kate, deceased, late of Mulroog East, Ballindereen, Co. Galway. Will any person having knowledge of the Original Will of the above named deceased who died on the 24th of February, 1957, please contact Colman Sherry, Solicitor, Gort, Co. Galway.

Soden, Mollie, (otherwise Mary Catherine), deceased, late of No. 69 Church Street (formerly 3 Urney Terrace) Cavan, County Cavan, Spinster. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on 26th February 1983 please contact G. V. Maloney & Co. Solicitors, Cavan.

Griffin, Very Rev. Joseph, deceased, late of Balyna, Moyvalley, Co. Kildare, Parish Priest. Will any person having knowledge of the whereabouts of a Will of the above named deceased who died on the 22nd day of May, 1978, please contact F. P. Byrne & Co., Solicitors, Edenderry, Co. Offaly.

Miscellaneous

For Sale — well established practice in large county Galway town on retirement of principal. Enquiries to Box No. 049.

Practice for sale in southern town. Alternatively might consider junior partnership. Apply Box No. 050.

For Sale: established practice for sale in north-west region. Finance available to suitable candidate. Apply in confidence to Box No. 051.

Honours B.B.S. (T.C.D.) student with Final Examination — First Part seeks Master. Seven years business experience. Dublin or the west preferred. Please contact Peter Martin, Drumiskabole, Sligo (071) 61778.

Wanted: Solicitors practice in rural area for purchase by young solicitors with previous experience in country practice. All areas considered. Practitioner to retire or remain as consultant. All replies in strictest confidence. Box No. 052.

For Sale: Complete set Acts of Oireachtas (bilingual) 1922 to 1978 inclusive, for sale in one lot. Also British Statutes 1887 to 1920 inclusive for sale in one lot. Also, Irish Acts (bilingual) 1923 to 1960 inclusive plus 1966, 1967, Vol. 2, 1968, 1971 and 1975 for sale separately or together. Enquiries to Box No. 053.

Solicitor with over three years experience in conveyancing, probate and general practice seeks position in Limerick City area. Replies to Box No. 054.

Position required as assistant solicitor. Wide knowledge of legal practice. Two years office experience. Excellent references. Apply to Box No. 055.

CHANGE OF ADDRESS

Derek J. Mathews and Ambrose A. Sharpe Solicitors, wish to advise that they have changed address and are now practising under the style of Mathews & Sharpe, Solicitors, Commissioner for Oaths, at 69, Merrion Square, Dublin 2. Telephone 761300/767906.

Peter H. Jones B.C.L. Solicitor has commenced practice under the style Peter H. Jones, at Goff Street, Roscommon, telephone number (0903) 6925.

F.C.C.A./Computer Specialist offers his services as Consultant in designing, installation and staff training for Computer Systems in legal practices. Replies to Box No. 056.

MEDICO-LEGAL SOCIETY

The Society's next Meeting will be held on Friday, 29 April, 1983, at 6.30 p.m. in the Royal College of Surgeons, St. Stephen's Green.

Speaker: Dr. David Gee, Professor of Forensic Pathology, Leeds University.

Topic: *Pathological Aspects of the Ripper Murders.*

The Meeting will be followed by the Society's Annual Dinner at 8.00 p.m. For reservations please contact Brendan Garvan, Hon. Secretary, Medico-Legal Society, 61 Lr. Camden Street, Dublin 2. Tel. 784945.

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S.I. No. 58 of 1983

Trustee (Authorised Investments) Order, 1983

I, Alan M. Dukes, Minister for Finance, in exercise of the powers conferred on me by section 2(1) of the Trustee (Authorised Investments) Act, 1958 (No. 8 of 1958) and having complied with subsections (2) and (3) of that section, hereby order as follows:

1. This Order may be cited as the Trustee (Authorised Investments) Order, 1983.
2. The following investments are hereby added to the investments specified in section 1 of the Trustee Act, 1893, as amended by the Trustee (Authorised Investments) Act, 1958, (No. 8 of 1958), that is to say, investment in interest-bearing deposit accounts with any of the following licensed banks.
   Barclays Bank International Limited
   Irish Bank of Commerce Limited
   Standard Chartered Bank Ireland Limited

GIVEN under my Official Seal this 25th day of February 1983

Alan M. Dukes

(P1. 1378) MINISTER FOR FINANCE

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Ios Pension	£248	**CANADA**	
Crete Pension	£284	Toronto	£299
Corfu Pension	£252	**PORTUGAL**	
SPAIN		Albufeira Apt.	£209
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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 3 April 1983

Fit The Crime

IN the furore which has greeted the decision of Mr. Justice Gannon to impose a suspensory sentence in the Fairview Park manslaughter case, a number of important and relevant issues have been confused and obscured.

Much of the comment is symptomatic of our collective refusal to admit that those who commit crimes are actually members of our own society. This is linked with the belief that more Gardai, wider powers of arrest and questioning by the police and stiffer sentences by our Judges would rid the community of crime. Not only is increasing crime a phenomenon to be observed in other developed countries but, historically, crime was high when punishments that even the most vociferous "law and order" enthusiast would consider barbarous were common.

This is not to say that there is not a need for a more efficient and effective police force, as has been argued before in these pages. Prisons, however, are no more a cure for the problem of crime than graveyards are for the problem of disease. Custodial sentences are undoubtedly necessary for those who commit serious or subversive crime, but there must be better ways of dealing with the petty offender than the choice of a fine or a prison sentence. The prison populations of most Western European countries are well below those of Britain and Ireland. The use of alternative sanctions, such as the Community Service Orders, so belatedly recommended in the June 1981 White Paper, which are about to be introduced, should only be a beginning. There is, arguably, a case for imposing liability on parents for their childrens' criminal acts. The failure of prison systems as institutions of reform is well established; committing young people to prison is likely to increase the chances of them turning into full-time criminals and is a confession of failure by society.

Consistency of punishment is the most empty of the catch cries which have been raised. It may be possible to apply this concept at a fairly low level —in the field of minor motoring offences, for instance — though, even there, it is open to severe question as to whether the same fine should necessarily be imposed on all offenders, regardless of their financial status. However in serious offences the sanction to be imposed must reflect the particular circumstances of each individual case. Only two weeks before the Fairview Park case, one of the Judge's colleagues did not impose a custodial sentence on a young man who had been convicted of the same crime (manslaughter). He had been convicted of the manslaughter of his drunken father, following the last of a regular series of assaults by the father upon the accused's mother.

The general reaction to the Judge's decision in the latter case has been one of approval. If there were to be consistency of sentencing and, as one of the lawyer members of the Dail misguidely suggested, a mandatory prison sentence for crimes involving death or bodily injury, the option so wisely used in the earlier case would not have been available to the Court.

It should be a principle of any system of criminal justice that it is better that some people who may be guilty go free in order to ensure that no innocent people may be punished. It may appear as if the Judge erred in the Fairview Park case but, if he did err, it was after several hours of hearing evidence of character and representations as to sentence — little of which was reported in most of the following day's national newspapers and none at all in that which would consider itself our prime daily journal.

While it may be natural for those who have not sat through the hours of evidence and representations on behalf of the accused to imply, as has been done, that in failing to impose a custodial sentence the Judge was placing a seal of approval on "Queer Bashing", such a conclusion is not necessarily fair. If an assumption is to be made at all, it must be that the Judge was doing no more than attempting to apply, to the best of his ability, the principles of equity and justice, having regard to all the circumstances laid before him.

The case may however indicate a need in our Criminal Court procedures for the Prosecution to play a more active role at the post-conviction stage, when consideration is being given to what the appropriate penalty should be. It may be desirable that submissions be made at this stage, on behalf of the Prosecution, which would reflect the Community's view of the offence.

Our Judges have, since the inception of the State, served its people well — far better than its Legislators have. Perhaps the deplorable standard of the Dail debate which followed the case may be just another symptom of the politicians' disease of maintaining a high profile on any subjects, save those with which they ought to be most concerned, such as the country's present economic difficulties, but that is only an explanation and not an excuse. It seemed as if Deputies were vying with each other in advocating punitive sanctions, almost regretting that transportation is no longer available as a punishment. It is not the duty of politicians merely to echo each popular catch cry; they have an obligation to lead public opinion and to persuade the community that the solution to the problem of crime lies largely in the hands of the community itself. The causes of crime may be manifold, but it is the community alone which can help to reduce the incidence of crime by tackling its causes.

The Fairview Park case has, however, highlighted the veracity of the old adage that not only must justice be done, but it must be seen to be done. The Judge, in the interest of avoiding the contumely which has attended his sentence, could have explained in greater detail why, having emphasised the gravity of the offence, he elected to suspend the sentence. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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Comment...

...the Cost of Motor Insurance

THE recent report of the Enquiry into the cost and methods of providing Motor Insurance 1982* is to be welcomed. One should always welcome such reports particularly those that show a high level of competence and expertise in their preparation and presentation. Solicitors will be particularly interested in the observations and recommendations on legal delays, legal costs and jury assessments. Legal delays are most notable in the Dublin High Court jury list, where the delays from setting down to actual listing for hearing are now at least two years. On the reason for the delays, the Report quotes the Bar Council submissions —

> "the insufficient number of Judges available to hear cases in the High Court, the insufficient number of courthouses available for hearing jury trials in the High Court and the inadequacy of facilities available in the existing courthouses and the inadequacy of staff to service the courts generally."

The Court emphasises the severe personal hardship to plaintiff litigants by such delays and at the same time the complaint of insurance companies that such delays ultimately result in far higher Court awards than would have been made two years before.

On the vexed and difficult question of jury assessments they account for about 16% of the total cost of settling claims. The imposition of 23% V.A.T. on solicitors' and barristers' fees will certainly not reduce that percentage. The principal factor affecting the size of such legal costs is the number of cases where legal proceedings are commenced and go all the way to the door of the court. Two diverse points of view are reflected in the Report for this phenomenon — the one that it is because insurance companies do not reasonably and realistically attempt to settle cases early, the other that plaintiffs seek to extend the maximum possible amount of compensation, whether justified or not.

On the vexed and difficult question of jury assessment of damages the Report recommends no change in the system of jury trial other than that in a High Court hearing for damages for injuries, the trial judge should be permitted to inform the jury as to what he estimates to be the going rate of general damages for the sort of injuries proved in the circumstances of the particular case. This is a common sense suggestion, far better than cliches in judges' charges such as that the jury "must be fair and reasonable and just to both parties". Would such a change still, however, result in uncertainty and inconsistency in that the "going rate" of general damages for a "plaintiff's" judge might

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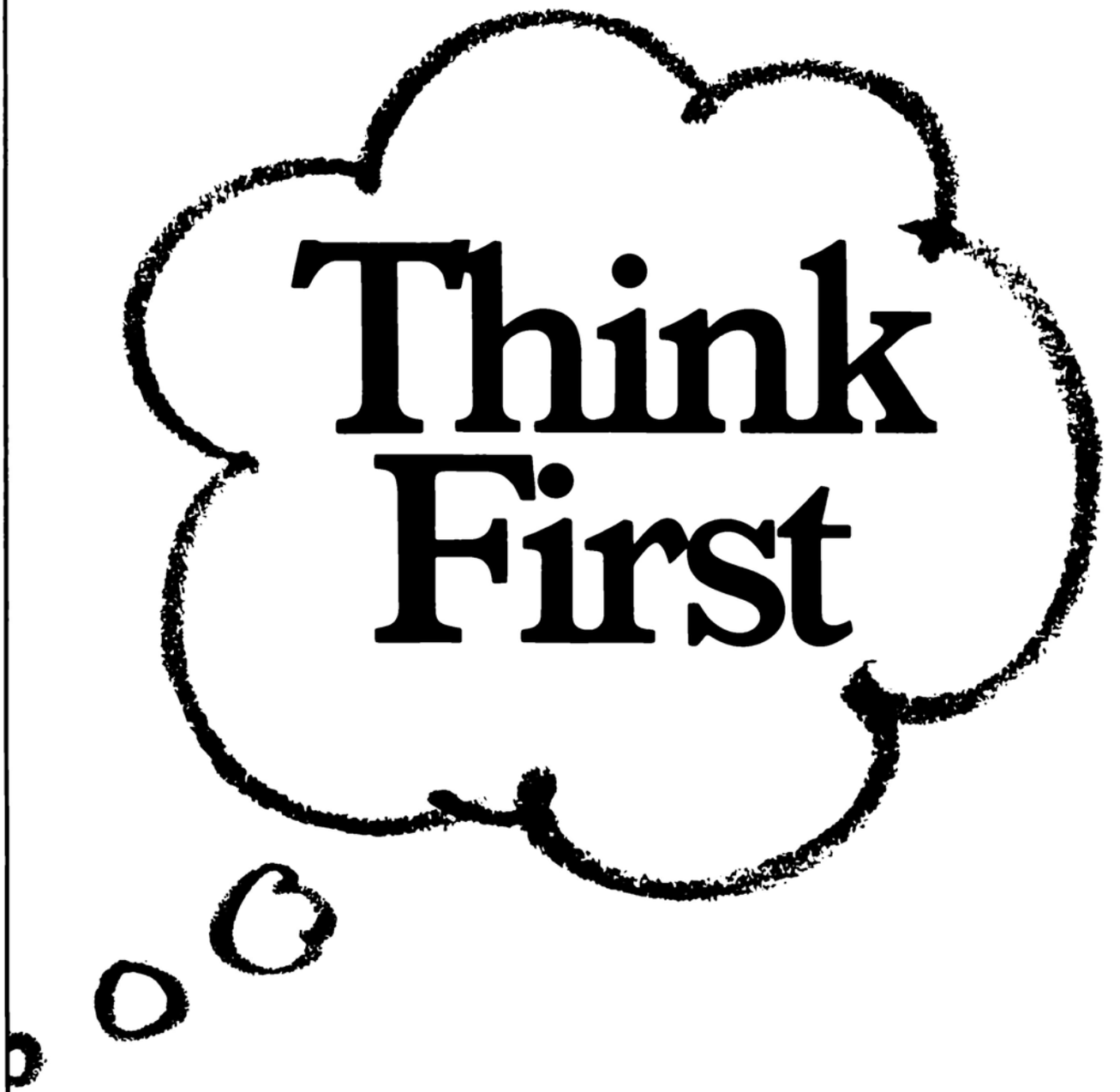

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The People v. Pringle, McCann and O'Shea

Recent developments in Criminal Law

Part 1

by
Eamonn G. Hall, B.A., LL.B., H.D.E., Solicitor

FRESH ground has been broken by the courts in the Criminal Law Field. However, in some cases, it is more a question of old ground being rediscovered. The developments generally have mostly taken place in the procedural field. These developments have been linked with the impact of the Constitution on the powers of the Gardai to arrest and interrogate suspects and the rights of accused persons in custody.

There was *The People v. Shaw*[1] on the law governing detention of suspects and the rule in *The People (AG) v. O'Brien*[2] which excludes evidence obtained in deliberate and conscious violation of an accused person's constitutional rights save in exceptional circumstances.

There was *The Director of Public Prosecutions v. Lynch.*[3] In this case, the suspect had volunteered to go to a garda station but as he had not been at liberty to leave the station, his detention was held to be illegal and unconstitutional under Article 40 by the time any admission was made.

The procedure of a trial within the trial was raised in the *Lynch* case. Certain conflicts of evidence relating to facts concerning an illegal detention or breach of constitutional rights can be decided by the jury.

There is also the right of a person in custody to be attended by a legal adviser — *In (Re Article 26 of the Constitution and the Emergency Powers Bill 1976)*[4] *The People (Director of Public Prosecutions) v. Madden & Ors*[5] and *The State (Harrington) v. The Commissioner of the Garda Síochána.*[6]

This article reviews the decision of the Court of Criminal Appeal in the case of *The People (at the suit of the Director of Public Prosecutions) v. Pringle, McCann and O'Shea.*[7] Many matters of importance including recent developments in the law were considered in the one hundred and thirty three page judgment of the Court of Criminal Appeal.

The judgment of the Court was delivered by the Chief Justice. The nature of the offence of capital murder was considered. Admissions of accused persons had been contested. The law relating to admissions was considered. Submissions to the effect that the accused persons were in illegal custody were discussed. The question of the extent of the right of a person in custody to a legal adviser was also considered. Certain of the Judges' Rules were also considered.

Facts of DPP V. Pringle, McCann and O'Shea

The facts which emerged in evidence at the trial and which were referred to in the judgment of the Court of Criminal Appeal may be summarised.

On 7th July 1980 — just before 3 o'clock p.m. the Bank of Ireland premises in Main Street, Ballaghaderreen were raided. The raid was carried out by three armed and masked men who arrived in a blue Cortina car. Two of the men held the customers and officials of the Bank at gunpoint. A shot was fired into the ceiling. One of the raiders took a large sum of bank notes from the strongroom.

The gunman outside was armed with a shotgun. Passers by were threatened. A Garda patrol car with two Gardaí arrived. One of the Gardaí was in uniform. The Gardaí were ordered from the car by the gunman. The gunman held the gun barrel close to the head of the uniformed Garda.

The raiders then made off with guns pointing through the windows. The blue Cortina car was seen driving towards a white Cortina car which was parked along a road.

Meanwhile following an alert, a Garda patrol car was sent from Castlerea. Three garda officers in uniform and the late Detective Garda Morley who was armed and in civilian attire were in the car. The white car collided with the Garda car. The masked occupants of the white car emerged. Shots were fired. Garda Hugh Byrne and Det. Garda Morley were killed. The gunmen escaped. The money that had earlier been stolen was found in the white Cortina car.

Pringle, McCann and O'Shea were subsequently arrested and charged. The Accused were convicted of capital murder and bank robbery in the Special Criminal Court. Applications for leave to appeal were considered by the Court of Criminal Appeal. The question which arose in the appeal in relation to these Appellants was whether these convictions were justified.

Capital Murder

The judgment of the Court of Criminal Appeal dealt first with matters common to all the Appellants and then gave a separate determination in relation to each appeal.

The Court of Criminal Appeal referred to the decision of the Supreme Court in *The People (at suit of the D.P.P.) v. Murray*[8]. In that case, the Supreme Court pointed out that the effect of the Criminal Justice Act 1964 was to create a new statutory offence which required proof in relation to each of its constituent elements of mens rea.

The Court set out the constituent elements of mens rea as:-

(1) an intention to kill or cause serious injury, and

(2) where the victim was a member of the Garda Síochana, knowledge on the part of the person accused that he was such and was acting in the course of his duty or advertence to such a possibility and reckless disregard thereof:

The Court of Criminal Appeal was satisfied that the shooting of Garda Byrne constituted the offence of Capital Murder within the meaning of the Criminal Justice Act 1964.

As there was no evidence at the trial to show which of the masked men fired the fatal shot which killed Garda Byrne, Counsel for one of the Appellants, Patrick McCann, submitted to the Court of Criminal Appeal that it was essential to identify the killer and show that he had the necessary mens rea.

The Court of Criminal Appeal considered that this submission was plainly wrong. The Court stated:-

> "The importation of criminal responsibility from the acts of another committed in pursuance of a common design or enterprise is recognised as continuing by all the Judges of the Supreme Court in *D.P.P. v. Murray.*"

The Court of Criminal Appeal was satisfied that the evidence in the case admitted of no other inference except the existence of a common intent on the part of all those involved in the bank raid to kill or seriously injure anyone in their way and this included members of the Gardaí. This common purpose and intent continued in existence up to shooting of the Gardaí.

The Court of Criminal Appeal then considered separately whether, on the basis of the existence of such common enterprise, the participation or involvement by each of the accused had been proved in accordance with law.

Contested Admission — Peter Pringle

The Court of Criminal Appeal considered that although there was a considerable amount of forensic and other evidence at the trial, the accused Pringle would not have been convicted but for the fact that the Special Criminal Court construed certain words which the Accused spoke after his arrest as amounting to an admission of guilt. The Special Criminal Court **held** these words of admission were admissible in evidence. Those findings were challenged in the Court of Criminal Appeal.

The accused, Peter Pringle had been arrested under Section 30 of the Offences Against the State Act 1939.

He was subsequently interviewed many times and at length. In one of the last interviews there was evidence that he said to members of the Garda Síochana;

> "I know that you know I was involved but on the advice of my Solicitor I am saying nothing and you will have to prove it all the way."

The accused was then cautioned. A note was taken of what the accused said and it was read over to him. When the accused was asked 'Is that correct?' the accused said "on the advice of my Solicitor I am saying nothing".

The Court of Criminal Appeal considered that the context in which the words were spoken was relevant. During the period of approximately 43 hours before the words of admission were spoken, the Accused had been interviewed by members of the Garda Síochana for lengthy periods.

Certain forensic tests had been carried out on the accused's clothing and during the interviews members of the Garda Síochana informed the Accused of the evidence they had obtained against him.

The Gardaí asked the accused to comment on the available evidence. This evidence was put to him in detail. He was requested that he tell them the truth. Certain forensic evidence had become available and this was also put to the accused.

The accused had seen his solicitor on five occasions prior to the time he made the alleged admission. His solicitor advised him to say nothing in answer to the questions he was asked. During the earlier interviews with the Gardaí, the accused either remained silent or stated he had been advised by his solicitor to say nothing.

The Court of Criminal Appeal stated that they had no doubt — taking into consideration the context in which the words were spoken, that the words used by the accused were an admission that he was involved in the raid and the killing of the Gardaí about which he was being questioned.

Nature and Extent of Involvement

Counsel on behalf of the accused Pringle submitted to the Court of Criminal Appeal that it had not been established beyond reasonable doubt that the admission of the accused was an admission of such involvement to make the accused guilty of murder and armed robbery. The Court of Criminal Appeal did not accept this submission. The Court again considered that the context in which the words were spoken was significant and relevant. In reaching its conclusion on the construction of the accused's admission, the Court stated the same conclusion could be reached by examining certain of the evidence against the accused excluding the post arrest interviews. This evidence consisted of certain visual identification, forensic evidence to the effect that fibres from the accused's jumper matched fibres taken from cars involved in the crimes and forensic evidence concerning the presence of firearm residue in jeans worn by the accused. The Court of Criminal Appeal stated that they were conscious of the care that must be taken in relation to identification evidence and referred to *The People (A.G.) v. Casey*[9] and *R. v. Turnbull*[10].

The Court of Criminal Appeal was satisfied that the Special Criminal Court was correct in deciding that the admission was an admission by the accused that he took part in the raid and was in the getaway car.

"Questioning of an objectionable and oppressive nature"

The Court of Criminal Appeal then considered whether the Special Criminal Court was correct in allowing the admission in evidence. It was submitted that the accused Pringle had been subjected to "questioning of an objectionable and oppressive nature" prior to the admission made by him and that the Special Criminal Court was wrong in admitting that evidence.

The submissions made on behalf of the accused stressed two points. Firstly, it was submitted that the questioning was oppressive, that the will of the accused was undermined which resulted in the alleged admission

not being a voluntary one. Secondly, it was submitted that the alleged admission was procured by improper inducements and threats which "vitiated" the alleged admission as admissible evidence. In this context, Counsel for the accused, stressed the duration of the questioning of the accused before the incriminating words were spoken. The accused had been arrested at 3 p.m. on the afternoon of the 19th July. He was interviewed several times at length that afternoon, next day and the following morning. However, during his detention the accused had five consultations with his solicitor.

The Court of Criminal Appeal referred to the fact that they had recently considered in *DPP v. Breathnach*[11] why statements obtained by oppressive questioning are inadmissible. The concept of what is involved in "oppressive police interrogation" was also considered in the same case. In that case, the President of the High Court delivering judgment stated:-

> "This Court accepts with approval the description of oppressive questioning given by Lord MacDermott in an address to the Bentham Club and adopted by the Criminal Division of the Court of Appeal in England in *R v. Prager*[12]. In that address Lord MacDermott described it as "questioning which by its nature, duration or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent". This Court would further adopt with approval the definition of oppression in the context of questioning contained in the Judgment of Sachs, J. in *R v. Priestly*[13] where he defined it as follows:
>
> "..... to my mind this word in the context of the principles under consideration imports something which tends to sap and has sapped the free will which must exist before a confession is voluntary."

The Court of Criminal Appeal concluded on this aspect of the case:

> "The length of the duration of the interviewing of the accused and the shortness of the duration of the accused's sleep do not in themselves establish the validity of the submission now being considered. It is obvious as the Court of Trial pointed out, that "what may be oppressive as regards a child, an invalid, or an old man or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is of tough character and an experienced man of the world." (See judgment of Sachs J in *R. v. Priestly*[14]. And so when a Court in considering an allegation such as has been made in this case, the physical, mental and emotional characteristics of the person whose will it is said was undermined must be considered. A Court of Trial before whom an accused gives evidence is obviously in a better position than an appellate Court to reach a correct conclusion on such an issue."

The Court of Criminal Appeal considered that the accused was "an experienced man of the world not unused to conditions of physical hardship." The fact that the accused had the benefit of five visits from his Solicitor prior to when he spoke the incriminating words was also relevant.

The Court of Criminal Appeal in their judgment then dealt with a submission by Counsel for the accused Pringle that the evidence of the words spoken by the accused was inadmissible because it was procured by threats and or inducements. The Court then referred to the relevant evidence. The accused stated in evidence that he had a "close relationship" with a certain lady. This lady had been questioned about the crimes and the accused's involvement in them. She had been brought to the Garda Station on the 20th July. She answered questions in the presence of the accused. The accused gave evidence in the trial within the trial that he was told if he gave an account of his movements on the 7th July "the whole matter of (the lady) being at worst charged, or at least having to give evidence wouldn't arise."

The Special Criminal Court in its judgment on this issue said that they were satisfied from the nature of the statements made by certain of the interrogating Gardaí to the Accused:-

> "that the effect thereof could and consequently must be regarded as constituting a threat or inducement to the Accused to make a statement."

The Special Criminal Court, however, held that notwithstanding the inducement, the verbal statement was admissible on the grounds that (A) the effect of the threat or inducement had been dissipated by subsequent events and (B) had not been revived by any subsequent questioning. The Court was satisfied that the effect of such threat or inducement had been dissipated as a result of an interview the accused had with his solicitor before he made the admission.

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The Court of Criminal Appeal did not consider that the motive of the accused when he said the words of admission:-

> "I know that you know I was involved but on the advice of my Solicitor I am saying nothing and you will have to prove it all the way."

was to avoid the possible involvement of his friend in future criminal proceedings.

Forensic Evidence

A further ground of appeal related to fibres taken from a maroon coloured pullover which the accused admitted he was wearing on the 7th July 1980 and also to fibres found in cars used by the raiders. The Special Criminal Court stated that the evidence relating to the fibres was consistent with the finding of guilt which the Court reached on the evidence of the accused's admission. An expert witness who had compared the fibres had stated in evidence that the major comparison between the two sets of fibres was the colour which could be observed in the "comparison microscope". It had been argued that the Judges should have examined the fibres themselves and, as the Judges had not done so, it was submitted on behalf of the accused in the Court of Criminal Appeal that the evidence was inadmissible.

The Court of Criminal Appeal rejected that ground of appeal stating that the Judges of the Court were not required themselves to carry out any laboratory experiments or to use any laboratory equipment for visual comparisons or otherwise.

Application for leave to appeal by Pringle failed. The verdict of Court of Trial stood.

Footnotes

1. *People v. Shaw.* 17 December 1980, Supreme Court, unreported.
2. *People (A.G.) v. O'Brien.* [1965] I.R. 142.
3. *D.P.P. v. Lynch* [1981] ILRM, 389.
4. *In Re Article 26 of The Constitution and the Emergency Powers Bill, 1976,* [1977] IR, 150.
5. *People (D.P.P.) v. Madden & Ors.* [1977] IR, 336.
6. *State (Harrington) v. Commissioner of the Garda Siochána.* High Court, unreported, 14 December 1976.
7. *People (D.P.P.) v. Pringle, McCann & O'Shea.* Court of Criminal Appeal, 22 May, 1981. Unreported.
8. *People (D.P.P.) v. Murray* [1977] IR 360.
9. *People (A.G.) v. Casey* [1963] IR. 33.
10. *R. v. Turnbull* [1976] 3 W.L.R. 445.
11. *D.P.P. v. Breathnach.* 16 February 1981.
12. *R. v. Prager.* [1972], 56 Criminal Appeal Reports 151.
13. *R. v. Priestly* [1965], 51 Criminal Appeal Reports.
14. *R. v. Priestly,* [1965], 51 Criminal Appeal Reports 1.

(Part 2 of this article will appear in May, 1983 Gazette).

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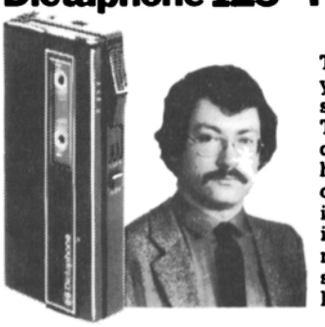

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4. Gerrard Scallan & O'Brien, Hainault Hse, 69/71 St. Stephen's Green, D.D.E. No. 19.
5. Arthur Cox & Co., 42/45 St. Stephen's Green. D.D.E. No. 27.
6. Matheson Ormsby & Prentice, 20 Upr Merrion St. D.D.E. No. 2.
7. Cawley Sheerin Wynne, 1/2 Upr Hatch St. D.D.E. No. 169.
8. Kenny Stephenson Chapman, Newtown, Waterford
9. Eugene F. Collins & Son, 61 Fitzwiliam Sq. D.D.E. No. 25.
10. Fitzpatricks, 37/39 Fitzwilliam Sq. D.D.E. No. 13.
11. Whitney, Moore & Keller, 46 Kildare Street, D.D.E. No. 105.
12. Mason, Hayes & Curran, 6 Fitzwilliam Sq., D.D.E. No. 11.
13. Wm. Fry & Sons, Fitzwilton House, Wilton Place. D.D.E. No. 23.

Practice Note
High Court — Jury Lists

Under the existing High Court Rules, Notice of Discontinuance cannot be served in personal injury cases at any stage after the Notice of Trial has been served. This may give an unrealistic indication of the number of cases in the Jury List going on for hearing.

Accordingly, to facilitate members, where cases have been settled after Notice of Trial has been served, Solicitors for Plaintiffs are required to write to the Registrar of Juries in the High Court, Four Courts, Dublin, quoting the full title of the case, the record number and, if there is a Jury number available, the Jury number and stating that the case has been settled. The Registrar will then place an asterisk beside the name of the case in the list. It should be noted that this practice does not apply to cases involving a minor, or persons in Wardship or to be taken into Wardship.

The Litigation Committee recommended that this practice should be adopted in order to facilitate members of the profession, and to give a more realistic indication of the number of cases likely to go on for hearing □

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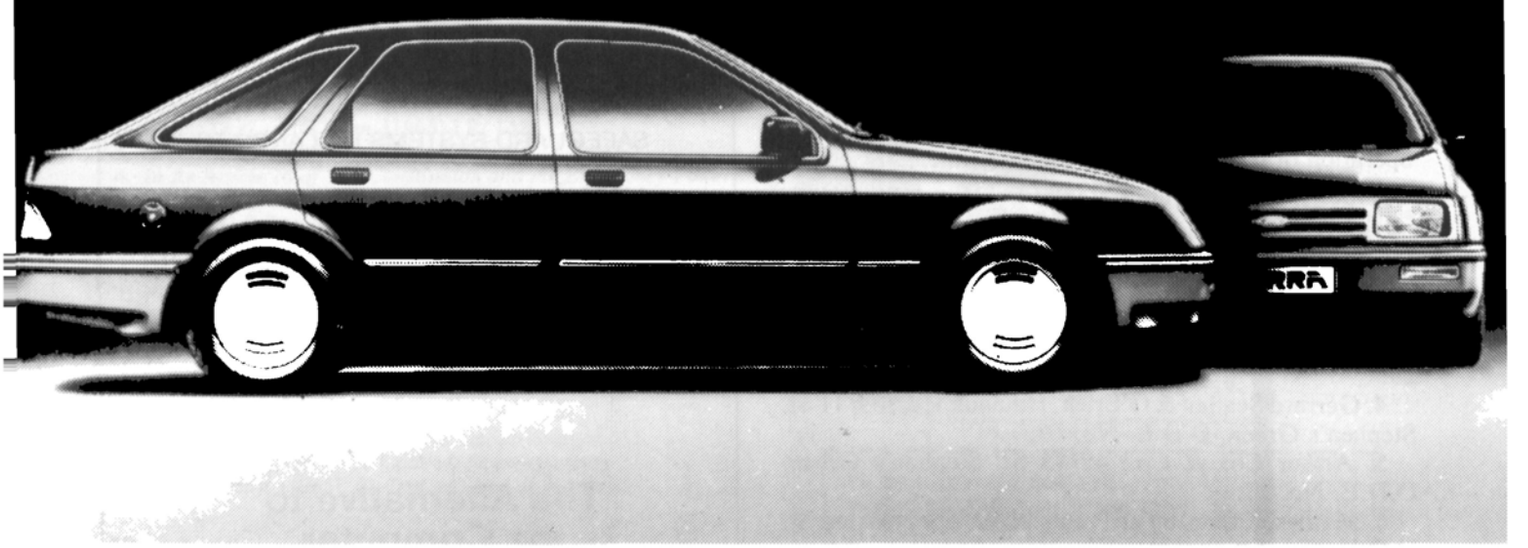

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Witnessing and Attestation

by
Charles R. M. Meredith, Solicitor.

Under the above title, the Gazette of November 1981 (Vol. 75 No. 9) contained an examination of the separate concepts of *witnessing* and *attestation* in the light of the various decided authorities, culminating in the 1881 case of *Seal v. Claridge* (50 L.J.Q.B. 316).

In the article the author mentioned, almost parenthetically, that the Registry of Deeds had finally made up its mind as to the proper execution and attestation of deeds by corporate bodies in order to satisfy the requirements of the Statute 6 Anne, c.2, and stated that it is now established that the signatories to the seal of a corporate body are not *attesting witnesses*; to satisfy the requirements of the Statute, two further attesting witnesses are required, one of whom must swear the affidavit of due execution endorsed on the Memorial.

The author's statement as to Registry of Deeds practice was made as a result of personal experience. Some six years ago the author presented for registration a deed and memorial executed by a limited liability company, but bearing no signatures other than those of a director and the secretary of the company. The deed was rejected by the Registry of Deeds staff and, upon enquiring by telephone, the author was informed that the Registry had taken the view (which, on the basis of the decisions discussed in the author's previous article, would seem to be the correct view) that the signatures of the director and secretary could not be regarded as *attestation* within the meaning of the Statute. The author was informed by various colleagues that the same view had been expressed to them by the Registry.

In a letter to the author dated 15th February 1982, the Assistant Registrar has stated that all his staff are "..... aware of the desirable method (of attestation) but realise that where a Solicitor insists on registration on a questionable execution of the deed and Memorial ...." they are under pressure to register. The Registrar further explains that precedent has ruled that the Registry proceed with registration, provided that the Solicitor indicates that there are two witnesses to the execution of the Memorial and that one of such witnesses is set out in the Memorial as being a witness to the execution of the deed. If the Solicitor does not set them out as witnesses and does not indicate that they are witnesses to the execution of the Memorial, then the memorial will be rejected as not complying with the requirements of the Statute. The Registrar concluded with the very helpful assurance that it has been Registry practice to err on the side of registration rather than rejection, if the requirements of the Registry have, on the face of it, been met. While the helpfully pragmatic approach of the Registrar and his staff cannot but be appreciated by the profession, the inescapable conclusion would seem to be that the profession may, inadvertently, be misleading the Registry of Deeds staff by so setting out the execution of deeds and Memorials as to indicate that the signatures of directors and secretaries are by way of *attestation* of the execution by a corporate body, rather than part of the execution itself. In his judgement in *Seal v. Claridge*, Lord Selborne, concentrating on the meaning of the word "attestation" (quite apart from the specific provisions of the Bills of Sale Act) considered that the word must imply the presence of some person who stands by but is not a party to the transaction. Arguably, in the execution of a deed and Memorial by a corporate body, the director and secretary whose signatures are required by the articles of association as part of such execution must themselves be "parties to the transaction", being officers of the corporate body whose signatures are required to give effect to the corporate body's seal and cannot be regarded as simply "standing by".

It may, perhaps, be relevant, rather than merely tempting, to postulate the question of what might happen to priorities if the issues were sufficiently large or the circumstances sufficiently important to justify a plaintiff in seeking to set aside the registration of a deed executed by a corporate body, on the ground of inadequate attestation. Maguire on "Registration of Title, etc." 1900 Ed. on p.74 states that it is well settled that the certificate of registration endorsed on a deed "is only *prima facie* evidence of the validity of the registration. It affords only a *presumptio juris*, which may be rebutted by showing such non-compliance with the Statute or such other irregularity as would vitiate the registry (*Rennick v. Armstrong*, 1 H. & B. 727; *Sullivan v. Walsh*, 1 Jones 264; *re Monsell*, 2 Ir. Jur. N.S. 66)". While the practice of the Registrar and his staff may appear at first sight to be of immediate assistance to the practitioner, to register a deed without unquestionable attestation may well be to ignite the fuse of a time bomb. □

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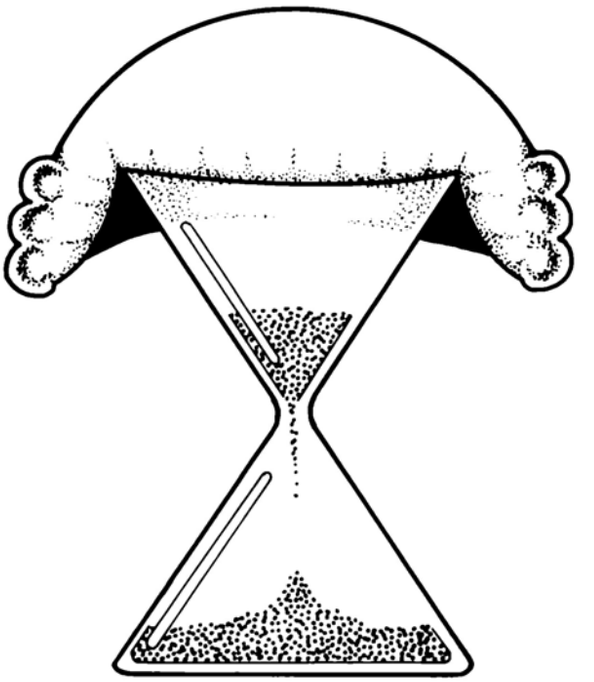

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European Court of Justice

The E.E.C. Committee has prepared brief notes on a selection of recent decisions of European Court of Justice which might be of interest to Irish practitioners. We understand that it is intended that further brief notes of this nature will be prepared from time to time.

Practitioners should, of course, consult a full report of any decision before giving advice based thereon.

1. 8/81 *Becker v. Finanzamt Munster-Innenstadt* — Preliminary ruling under Article 177 of the Treaty of Rome — Directive of direct effect — Sixth Council Directive on harmonisation of laws relating to VAT.

The Plaintiff Mrs Becker was a credit negotiator who requested the German Tax Authorities that her transactions be exempt from tax under the provisions of Article 13B (d) of the Sixth Directive which compels member states to exempt from Value Added Tax inter alia "the granting and the negotiation of credit" on or before 1st January 1979. Germany had not implemented the Directive.

HELD — the provisions of the Sixth Council Directive No. 77/388/EEC of 17th May 1977 might be relied on from 1st January 1979 by a credit negotiator and the State might not rely as against her on its failure to implement the Directive. As and from 1st January 1979 the Directive became a direct application.

On 10th June 1982 in case 255/81 — *R. A. Grendel GmbH v. Finanzamt fur Korperschaften* on a reference for preliminary ruling under Article 177 of the Treaty of Rome the Court in circumstances very similar to the Becker case gave nearly identical judgement and referred specifically to its judgement in the Becker case.

2. 76/81 — *S. A. Transporoute et Travaux (Bruxelles) v. Minister of Public Works (Luxembourg)* — Preliminary ruling under Article 177 of the Treaty — freedom to provide services — directives on Public Works Contracts.

The Court dealt with the interpretation of Council Directives Nos. 71/304 and 71/305 dealing with the abolition of restrictions on the freedom to provide services in respect of Public Works Contracts and the award of Public Works Contracts. A Belgian company submitted the lowest tender for carrying out a Public Works Contract for the Bridges and Highways Authority of Luxembourg. The tender was rejected because:-

1. The Belgian company did not have a Government Establishment Permit required by Luxembourg Law; and
2. The prices in the tender were considered to be abnormally low;

and the Contract was awarded to Luxembourg Contractors.

HELD — (1) Directive No. 71/305 precludes a Member State from requiring a tenderor from another State to furnish proof that the criteria listed in Articles 23 — 26 of the Directive are satisfied and proof of his good standing, including an Establishment Permit. (2) Directive No. 71/305 requires that the authority where it is of the opinion that a tender is obviously abnormally low must seek from the tenderor, before the award of the Contract, an explanation of his prices or to inform the tenderor which of his tenders appears to be abnormal and to allow him a reasonable time within which to submit further details.

3. 6/81 — *Industrie Diensten Groep B.V. v. J. A. Beele Handelmaatschappij B.V.* — Preliminary ruling under Article 177 of the Treaty of Rome — Free Movement of Goods — Servile imitations.

This case arose in the course of litigation between two Dutch companies one of which was the sole importer of goods manufactured in Sweden and marketed in the Netherlands since 1963 and the other of which had since 1978 marketed in the Netherlands similar goods manufactured in Germany. The Swedish goods had formerly enjoyed patent protection inter alia in Germany and the Netherlands and the manufacture of the German goods commenced only after the expiry of the patents.

HELD — The rules of the EEC Treaty on the Free Movement of Goods do not prevent a national law, applying to domestic and imported products alike, from allowing a trader, who has in the EEC State in question marketed a product which differs from similar products, to obtain an injunction against another trader restraining him from continuing to market in that State a product coming from another State in which it is lawfully marketed but which for no compelling reason is almost identical to the first mentioned product and thereby causes needless confusion between the two products.

4. 102/81 — *Nordsee v. Reederei Mond and Reederei Friedrich Busse* — Preliminary ruling under Article 177 of the Treaty of Rome — Arbitration.

The case centered on proceedings regarding the performance of a Contract entered into in 1973 by a number of German Shipbuilders. The dispute was submitted to

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Arbitration under the Contract of 1973. In the Arbitration proceedings the Defendants claimed that the 1973 Contract was void in certain respects. The Arbitrator was of the opinion that under German law the question of whether a Contract for a particular purpose was valid depended as to whether that purpose amounted to an irregularity within the meaning of the relevant EEC regulations and he referred the matter to the Court for a preliminary ruling.

HELD — that the link between the Arbitration procedure in this instance and the organisation of legal remedies through the Courts in the Member States in question was not sufficiently close for the Arbitrator to be considered as a "Court or Tribunal of a Member State" within the meaning of Article 177 and that accordingly the Court had no jurisdiction to give a ruling under Article 177.

5. 53/81 — *Levin v. Stattssecretaris van Justitie* — Preliminary ruling under Article 177 of the Treaty of Rome — right of residence.

The case dealt with the application by a Mrs Levin of British nationality whose husband was a national of a non-Member country for a residence permit in the Netherlands.

HELD — in considering the matter, the terms "worker" and "payed employment" may not be defined by reference to the laws of a Member State but have a scope determined by Community law. It was also held that the provisions of Community law relating to the free movement of workers covers a national of a Member State who pursues an activity which may give an income less than that which may be considered in that State as the minimum required for subsistance whether such person supplements the income with other income so as to arrive at the minimum, or is satisfied with the means of support lower than the minimum provided that he pursues an actual and genuine activity as an employed person and also, that the motive which prompted a worker of a Member State to seek employment in another Member State is immaterial, provided that he pursues or wishes to pursue an actual and genuine activity.

6. Joined cases 141 to 143/81 — *Holdijk and Others* — Preliminary Ruling under Article 177 of the Treaty of Rome — measures having an effect equivalent to quantitive restrictions.

This case arose out of the application of Dutch Law regarding enclosures for fattening-calves.

HELD — that Community law does not prevent a Member State from introducing unilateral rules relating to standards to ensure the protection of the animals which apply, without distinction, to calves intended for the national market and calves intended for export.

7. 155/79 — *A.M. & S. Europe Limited* — Legal privilege.

This very important case relates to the interpretation of Article 14 of Regulation No. 17 of the Council of 6th February 1962.

This decision deals with the rights of the Commission to investigate and obtain information in order to enforce compliance with Article 85 of the Treaty of Rome and whether there is any doctrine of privilege or confidentiality recognised by Community law in relation to such powers.

In the course of a lengthy judgement, the Court HELD that there are principles of privilege and confidentiality which aply to any lawyer entitled to practice his profession in one of the member states and that the powers are subject to a restriction imposed by the need to protect confidentiality but this extends only to an independent lawyer, i.e. one who is not bound to his client by a relationship of employment.

The Court further held that it is a matter for the person seeking to rely on the privilege to provide sufficient information to the Commission's authorised agent of such a nature as to demonstrate that the communications fulfill the conditions and it is not a matter which may be left to an arbitrator or to any national authority. In the case of a dispute it is for the Commission to order reduction of the communications in question. Although by virtue of Article 185 of the EEC Treaty any action brought by an undertaking against a decision of the Commission does not have a suspensory effect, its interests are safeguarded by the possibility which exists under Articles 185 and 186 of the Treaty as well as under Article 83 of the Rules of the procedure of the Court for obtaining an Order suspending the application of the decision which has been taken by the Commission or any other interim measure. □

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Enquiries to: The Registrar, Royal College of Surgeons in Ireland, St. Stephen's Green, Dublin 2.

Self-regulation for Advertising

MEMBERS of the advertising profession and the public — through consumer-related organisations — attended a symposium on advertising at Blackhall Place in February and were welcomed by the President, Michael P. Houlihan, who expressed appreciation of the self-regulatory body set up by advertisers, advertising agencies and the media with consumer representation.

He referred to the Society's Wills Week campaign and said that while it was difficult to estimate the feed-back from such an exercise, "the Society was satisfied that the money expended, which was in excess of £25,000, which is a lot of money for a profession of 3,200 odd solicitors, was well spent, and it is probably an exercise that we will indulge in in the future in different facets because what we as a profession have to be seen to do for the future, is to get into the more positive field of promotion of matters relating to the law and professional interests."

Conscientious advertisers

The symposium was organised under the title "Nothing but the Truth" and Brian Walsh, President of the Association of Advertisers in Ireland and Marketing Manager of W. & C. McDonnell Ltd., claimed that it is the advertisers themselves who have the greatest interest in making sure that advertising is above reproach. "The vast majority of Irish advertisers are highly conscientious and extremely careful to ensure that their advertising is truthful and does not mislead consumers. It is not in any advertisers interest to mislead consumers — a consumer who buys a product which does not live up to what is claimed for it in its advertising is unlikely to repurchase. An advertiser who promises more for his product than his product can deliver is not just misleading the consumer, he is also cheating himself and he will fail. The consumer will find him out very quickly and will take the most effective action that can be taken against such an advertiser, that of not buying his product."

He considered it essential that a strong body should exist to maintain a code of standards which will be rigidly adhered to, and which has power to enforce the standards. Voluntary control, as opposed to legal control, was important because advertising would cease to be effective if there is general cynicism as to its honesty; legislation is apt to be rigid and frequently open to widely different interpretations. Action could be taken in the courts against advertising under the Consumer Information Act, but he felt this would be wasteful and unnecessary. The judgment of whether advertising is misleading or untruthful or is merely using accepted hyperbole, is more often than not a matter for commonsense rather than legislation.

A plus factor

A former President of the Institute of Practitioners in Advertising in Ireland, James Nolan, Deputy Managing Director of Arks Ltd, was clear in avowing that advertisements should, and do, contain the truth but they should and do contain much more besides.

There is a lot of loose talk about a lack of truth in advertising. Much of this is generalised folklore which has little basis in fact and those indulging in it never seem to get down to specifics. It would be very foolish to suggest that all advertising was above reproach in the matter of truthfulness but there are some powerful safeguards and protections of which people should be aware, and the first one is that no reputable advertiser would risk his good name by untruthful or misleading advertising."

Information is an important element of most advertising and from time to time there are calls for more information in advertising — calls which come close to the theme of the symposium — "The whole truth". Advertising must respond to consumer requirements in terms of information needed to make a purchasing decision, and the amount of information needed depended on the type of purchase involved.

Mr Nolan submitted that if advertisements were to contain 'Nothing but the Truth' they would be dull, boring and ineffective and, therefore, they should and do contain much much more and are all the better for that. Advertisements inform, amuse, entertain, advise and persuade. They are commercial advocates and, like their counterparts in the courtroom, never confine themselves to 'Nothing but the Truth' — but use a little drama and a little humour or a little human interest to influence the jury in favour of their client.

Strict Code in force

The Director of Consumer Affairs, James F. Murray, outlined the role of his office in relation to advertising and in the establishment of the Advertising Standards for Ireland. The Chief Executive of that body, Kevin O'Doherty, explained that it is a voluntary self-regulatory body to promote and enforce the highest standards of advertising in all media. The code of Advertising Standards has been widely distributed and it is a condition of membership of the Authority that no advertisement can be published that does not comply with the Code.

Consumer interests are represented on the Authority by the five members appointed by the Director of Consumer Affairs who also appoints the independent Chairman. Complaints are investigated if the Code is though to have been breached. The Authority monitors advertisements to identify any which might contravene the Code and appropriate action is then taken if required. A pre-publication vetting service of advertisements is also provided.

The code is interpreted by the Authority and a decision on whether or not an advertisement contravenes the Code can be taken only by the Committee of Management. The Code is not a legal document, but ASAI members are subject to sanctions. A member can be fined or suspended or both or expelled for a breach of the Code. The progress made since the Code was published last year is regarded as

satisfactory and the way in which it is being enforced has attracted favourable attention from trade and consumer organisations in this country and overseas.

The symposium, which was "chaired" by Mrs Moya Quinlan and John F. Buckley, closed after a useful discussion session with a tribute to the Society from Peter Owens, chairman and governing director of Peter Owens Ltd, for its public spirit in organising symposia of this type.

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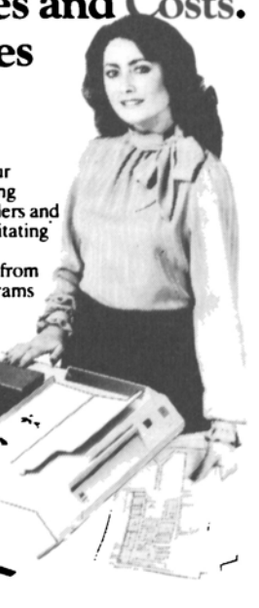

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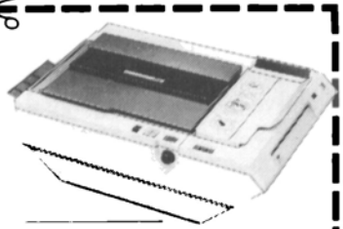

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Practice Note
Exempted Development

The Joint Committee of Building Societies' Solicitors and the Law Society has issued the following Practice Note, which is intended to replace in its entirety the note which appeared as Practice Note (2) in the Recommendations of the Joint Committee issued as a supplement with the January-February Gazette, 1982.

By virtue of Regulations made in 1964 under the Local Government Planning & Development Act 1963, an extension (of up to 120 square feet in the case of a single-storey, or of up to 180 square feet in the case of a two-storey) added to the rere of a dwellinghouse which complied with the other criteria was "exempted development".

Under the Local Government (Planning & Development) Regulations 1977 (S.I. No. 65 of 1977), which came into effect on 15th March 1977, the exempted area of an extension was extended to 18 square metres and the distinction in area between single and two-storey extensions was removed.

The 1977 Regulations also introduced as an exempted development the conversion of a garage attached to the rere or to the side of a dwellinghouse.

Under the Local Government (Planning & Development) (Amendments) Regulations 1981, which came into effect on 1st May 1981, the area of exemption for an extension was extended to 23 square metres.

A great many conveyancing transactions involve houses which have been extended or the garage converted and it frequently arises that an extension would not have been an exempted development under the Regulations applicable at the time it was built (or, in the case of a garage, at the time of conversion) but, in fact, would be exempted development if carried out now.

The Committee has considered the position carefully and particularly the fact that it is the intention of the Minister for Environment that Planning Authorities should not be concerned with matters relating to extensions or conversions that come within the current guidelines. The Committee accordingly recommends that solicitors for purchasers and mortgagees should not insist upon application being made for permission to retain the structure or conversion, provided that an appropriate Certificate is furnished to verify that the extension would be exempted development under current regulations.

It is almost inevitable in such a case that no Building Bye Laws Approval would have been obtained (in areas where they are applicable). It is important to note that compliance with Building Bye Laws is a condition of the entitlement to the exemption and this should be carefully dealt with in any Architect's Certificate. □

Comment . . . (Continued from P. 55)

differ considerably from the "going rate" for a "defendant's" judge.

This report in all its recommendations is thought provoking, particularly for the common law practitioner. One hopes that its recommendations will gather less dust than its sister O'Connor Report in 1972.†

*Prices Advisory Committee (Motor Insurance) Report of Enquiry into the cost and methods of providing Motor Insurance 1982 (Pl 1323).

† Committee of Inquiry into the Insurance Industry — Interim Report on Motor Insurance, 1972 (Prl 2843).

BOOK REVIEWS

PLENDER, RICHARD: "A Practical Introduction to European Community Law". Sweet & Maxwell, 1980.

This paperback (166 pages) is "designed to present the practitioner with the basic information that he requires in order to recognise a point of European Community law when he sees it, and to show how that law can be used with effect". The author, by providing a readable text together with an extensive bibliography and authoratative footnotes at the end of each chapter, has competently and intelligently achieved his objective notwithstanding his modestly prefaced reservation that it "is not, of course, to be used as a work of reference . . . Nor is it to be used as a students' text book". Avoiding lengthy explanation of the Institutions of the EEC, Dr. Plender methodically explains, canvasses and criticises both established and innovative uses of Community law on a carefully organised chapter basis to which I will now turn.

His first Chapter "Basic Principles" describes coherently the direct effect and supremacy of Community law, its sources and the developing common law of the European Court of Justice (ECJ) as a new legal system creating rights and duties for supranational institutions, Member States, corporations and individuals.

His discussion in Chapter 2 "The Jurisdiction of National Courts and of The European Court", the remedies available and the 'locus standi' rules is fundamental information for every practitioner. It should be noted (at p. 17-19) however that the guidelines provided by Lord Denning in *Bulmer v. Bollinger* ([1974], 2 All ER 1226 (at 1234-1236)) as to when an Article 177 reference should be made to the ECJ which he discusses have been rejected by Barrington, J. in the Irish High Court (*ICMSA v. Government of Ireland*, unreported 1979 No. 5672P, 25.10.79 at p.5). He criticises the ECJ's original jurisdiction in Community staff cases (amounting to nearly 30% of all cases which have been brought before it) as an "intolerable strain on the court's time and resources" (p. 30) and recommends the establishment of a Staff Tribunal. His presentation of the procedure to be followed when bringing a case before the ECJ (which may award legal aid in the form of a cash grant to any litigant) in Chapter 3 combines accuracy with simplicity.

In Chapter 4 he introduces the reader to a rich area of potential private action, namely the free movement of goods provisions, customs duties and their valuation, and the prohibition of measures having overt or covert equivalent restrictive effects. In this regard as an example he points to certain legislation which "remains open to challenge" (p. 49) and questions inter alia whether "the rate of duty on wines, in a country such as the United Kingdom or the Republic of Ireland, be such as to afford indirect protection to the brewing industry?" (p. 50).

Again in his Chapter 5, on the free movement of labour, stressing that "about 250,000 natives of Ireland live in the Greater London area alone" (p. 59) and with a view to canvassing uses, he catalogues (at p. 65) the several rights and welfare benefits enjoyed by workers, and raises some probing questions in relation to their possible future application (p.66). The eight forms of social security for workers provided by Community legislation which "cover a life blighted with misfortune from the cradle to the grave" (p.70) provide in his analysis a bridge between the employed and the self-employed.

The self-employed, corporations, co-operatives, partnerships and firms are the subject matter of his sixth Chapter dealing with the freedom of establishment. His otherwise summary treatment of the Community Directives on Company Law raises the doubt as to whether the language of the English Act implementing the First Directive "is apt" (p.83). He explains the conditions under which architects, doctors and nurses may freely practise their profession in any of the Member States, and in relation to the legal profession, he demonstrates that as there is no Community provision regulating the rights of a lawyer in one part of a State to practise in another part of that State" . . . an Irish barrister may be permitted to perform in England functions that an English barrister could not properly discharge" (p.91).

In Chapters 7 and 8 he correctly and concisely treats the anti-trust laws on restrictive agreements and practices (EEC Art. 85) and on monopolies and dominant positions (EEC Art. 86) separately. In the former, he considers which concerted arrangements are prohibited and void for their (potential) anticompetitive effects and which are excepted and criticises the legal uncertainty in this distinction. In the latter, he states how the Treaty's prohibition on an abuse of a dominant position is based upon "a traditional economic or moral objection to monopolies and dominant positions, which lies in the inefficiency with which they are likely to produce, granted the breadth of discretion that they afford to their occupants to make commercial decisions free of competitive restraints" (p. 110).

His short Chapter 9 on Trade and Agricultural Products reopens discussion on the availability of remedies for private litigants which in a second edition would be more appropriately found in Chapter 2.

Finally, from his introductory-type comments on the Community regulation of agribusiness, he concludes with a critical analysis of the European Convention on the Enforcement of Judgments in Civil and Commercial Matters which has subsequently been implemented in England although not yet in Ireland.

No good book is free of printing errors: thus one should read "and" for "or" on the third line of the second paragraph of p.142; and surely one should not dishonour the Commission with a perfunctory "commission" (third line from end of p.123)?

This book with its practical bias and short concise text provides a comprehensive overview of Community law which for the past ten years has been part of the Law of Ireland and is recommended to all Irish Solicitors.

Duncan S. J. Grehan

The Northern Ireland Act, 1982 by **Paul R. McGuire Current Law Statute Reprints,** Sweet & Maxwell STG£4.50 pp 17.

Subscribers to Sweet and Maxwell's Current Law Statutes obtain copies of new legislation as it is enacted, together with annotations placing the legislation in perspective and offering clear and concise interpretations. This publication is of specific interest to those with an interest in Northern Irish politics. The booklet reproduces

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the text of the Act in full, together with its schedules and offers lengthy and well-researched commentary and interpretation on each section. The booklet commences with a general note giving the history of devolution in Northern Ireland from 1920 to date, carrying references to all the major legislation leading up to the 1982 Act. Each Section is then dealt with separately with an explanatory note on each. While the Act has only 7 Sections and is considerably shorter than most pieces of legislation, Mr. McGuire is to be complimented on his excellent commentary which will be of considerable value to both lawyer and lay-man alike.

While the Act is short, it is quite complex. The Act amends the Northern Ireland Constitution Act of 1973 and the Northern Ireland Assembly Act of the same year. The purpose of the 1982 Act is to provide for a staged devolution of power to the province of Ulster. In a general note of explanation to the background leading up to enactment, Mr. McGuire, obviously aware of the delicate political background to the "Irish question", treats his subject thoroughly and dispassionately. However, while the publication date was 25th November 1982, Mr. McGuire ends his short reference to relations between the Republic and the United Kingdom with the Executive decision of both Governments in November 1981 in establishing the Anglo-Irish Inter-Governmental Council.

It may not be appropriate to a publication of this sort to comment on what, after all, is a rather changeable relationship between the two jurisdictions, but Mr. McGuire does quote the Labour Front Bench Spokesman commenting favourably on the Bill in Hansard. This quotation is left without comment from the author, but its inclusion appears to be intended to show the political will to obtain "cross-community support necessary for devolution". I would not have thought that much semblance of this support existed at the time of publication.

On a more general point, this type of commentary should be required reading for the draftsmen of explanatory memoranda on Irish legislation. Such explanatory memoranda are rarely of much practical use, but a commentary of the sort written by Mr. McGuire would be of tremendous value.

The publishers are also to be complimented on their excellent presentation of this booklet. An extension of this idea to Irish legislation would be most welcome.

Gary Byrne

Review of Terrell on the Law of Patents — 13th Edition. Sweet & Maxwell Ltd., London. 700 pp. £40.00 (Sterling).

The first edition of this indispensable text-book for the practitioner appeared in 1884. The present edition has been necessitated by the sweeping changes introduced into the United Kingdom by the Patents Act, 1977. This Act has not only amended the Patents Act, 1949 in many fundamental respects: it also introduces provisions which enable the United Kingdom to fulfil its obligations under the Patent Co-Operation Treaty of 1970, the European Patent Convention of 1973 and the Community Patent Convention of 1975.

The principal changes highlighted by the new edition are the following. A statutory definition of patentability has been introduced conforming with that contained in the European Patent Convention changing radically the previous statutory definition and interpretive case law. The new Act removes the ground of invalidity known as prior claiming. It introduces a statutory definition of infringement which replaces the former case law based upon the language contained in the form of granted Letters Patent for inventions. A further change is to increase the period of patent protection from 16 to 20 years with a concomitant abolition of the right to apply for an extension of the term of a patent. The new Act also abolishes the previous pre-grant patent opposition procedure and patents of addition. The Act having been passed by a Labour Government not surprisingly introduces provisions regarding employees' inventions including the right of the employee to an award of compensation in certain circumstances for inventions made by him in the course of his employment. The other noteworthy innovation effected by the 1977 Act is the abolition of the former Patents Appeal Tribunal and the creation of a new Patents Court as part of the Chancery devision of the High Court.

Part 2 of the Act has introduced the most fundamental change to enable effect to be given to three International Conventions already mentioned. The Community Patent Convention has not yet come into operation. The European Patent Convention of 1973 established a European Patent organisation including a European Patent Office situated in Munich empowered to grant so-called European patents as provided for under the Convention. Thus it is no longer necessary for an inventor to file separate national applications in those European countries which have ratified the European Patent Convention. Instead the Applicant has the option of filing one application at the European Patent Office and designating any of the contracting states of the Convention where patent protection is desired. If, following examination by the European Patent Office, the application is accepted, a European patent is granted for each of the designated states and thereafter the European patent is treated in the State concerned as having the effect of and being subject to the same conditions as our national patents granted by that State.

With the enactment of the Patents Act, 1977 the exclusive monopoly enjoyed by the U.K. Patent Office no longer exists but is now shared with the European Patent Office. The enactment of the Patents Act 1977 therefore constitutes a striking diminution in British sovereignty with profound consequences for the future development of indigenous British Technology. Only government instability in this country has prevented the enactment of similar legislation and moreover the derogation from sovereignty implicit in the British legislation may not so easily be achieved in this country with its more rigid constitutional provisions touching on the question of sovereignty.

The foregoing are some of the complex new features of U.K. Patent law dealt with by this latest edition of Terrell and it seems safe to predict that the pace of judicial interpretation will require further editions in the future and in this connection it is to be hoped that the publishers will consider the printing of a loose leaf edition which can be readily up-dated with supplements to take account of changes of official practice and judicial interpretation.

Martin Tierney

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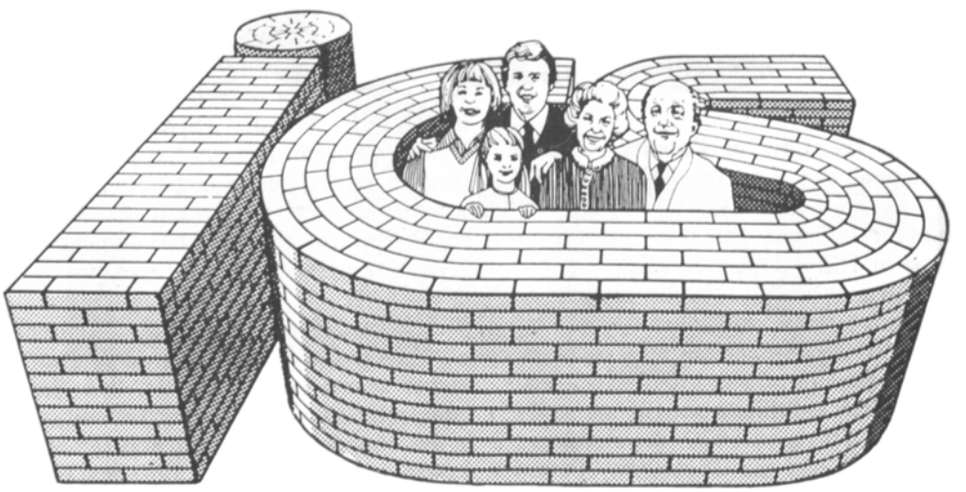

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Practice Note
Proceeds of Life Assurance Policies

It happens not infrequently that Solicitors acting for personal representatives are called upon to give personal undertakings on behalf of beneficiaries who are expecting benefits from estates in course of administration. The subject of such benefits can include the proceeds of assurance policies payable on the deceased's death or out of which it is intended that benefits such as legacies should be financed.

The Society has learned that certain Life Assurance companies are insisting on paying the proceeds of policies direct to the personal representatives, rather than to the solicitor, notwithstanding that the solicitor is on record with the Company and may even have exhibited the Grant of Representation and applied for the payment.

The attention of practitioners is drawn to the desirability, before giving any personal undertaking relating to or depending upon the proceeds of any life policy, of obtaining a clear and irrevocable authority from personal representatives authorising Life Assurance companies to pay policy proceeds direct to the solicitor concerned, in order to avoid the solicitor being left in circumstances in which he is unble to perform such an undertaking. □

For your Diary . . .

29 August - 2 September, 1983 Association Internationale des Jeunes Avocats. Annual Congress, Helsinki. Further details can be obtained from Michael W. Corrigan, Solicitor, 61 Fitzwilliam Sq., Dublin 2. Also see note on p. 75.

LAW CLERKS COURSE

Held in the College of Commerce in conjunction with the Law Society

This is a one year part-time course for law clerks who are already working in offices. The subjects covered are Conveyancing, Civil Litigation, Company Law and Probate. The next course will commence in October 1983 and lectures take place on Wednesday afternoons and Thursday evenings.

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Annual General Meeting of the Solicitors Benevolent Association

The 119th Report of The Solicitors' Benevolent Association for the 1982 was held by kind permission at The Law Society, Blackhall Place on 25th March 1983.

In proposing the adoption of the Receipts and Payments Account the Chairman Mr Eunan McCarron mentioned that a sum of £13,594.00 yearly subscription kindly collected for the Association by The Law Society had been received shortly after the close of the year under review and consequently the true figure for yearly subscriptions was in fact £26,894.00 as against £21,318.00 for the previous year. This was a satisfactory increase.

The Chairman in thanking Bar Associations, The Society of Young Solicitors and The Law Society for their Donations drew attention to the fact that 17 Bar Associations had not contributed and he appealed to them to assist if possible.

There were 53 Grantees/Annuitants most being in receipt of monthly remittances. Of these 10 were Solicitors, 19 were Widows or Deserted Wives and 3 were students. The average age of those helped was 65 years.

The Chairman drew particular attention to the fact that the Association embraced the 32 Counties, that requests for assistance were dealt with as of immediate urgency and that complete confidentiality was observed by the Directors.

The proposal was Seconded by Mr Michael Houlihan, President of The Incorporated Law Society who congratulated the Chairman, Deputy Chairman, Secretary and Directors on the excellent work done by the Association and considered it a Charity well worthy of support. He stated that it was his intention to seek to further its cause at every opportunity.

The Metropolitan and Provincial Directors were re-elected as was the Auditor Mr Joseph Taaffe.

Mr Colm Price was elected a Metropolitan Director and Mr Robert Flynn of Cork, a Provincial Director.

Association Internationale des Jeunes Avocats

The Annual Congress of AIJA — Young Lawyers International Association — will be held in Helsinki from 29th August to 2nd September 1983.

The topics chosen for the Congress are the following:

1. Divorce — Recognition of Foreign decrees.
2. The Rights of the Employee.
3. East/West Trade.
4. The Legal Profession and Tomorrow's Client.

Further details of the Congress can be obtained from:

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

Practice Notes
Planning Acts — Appeals

The attention of the Editorial Board has been drawn by a Solicitor to the editorial note which appeared in Correspondence on page 19 of the January/February 1983 issue, in which it was stated that persons who make representations to a Planning Authority in relation to an application under Section 26 or 27 of the 1963 Planning Act while the Planning Authority was considering such application had no formal status under the Act and are not "notice parties". Our correspondent drew attention to the provisions of paragraph 32 (2) of the Local Government (Planning & Development) Regulations 1977, which provide that where any person or body has made objections in writing to the Planning Authority in relation to a Planning Aplication, the Planning Authority shall, within 7 days of making a decision, notify such person.

There must be considerable doubt whether this purported provision is valid. There is no provision in either the 1963 or 1976 Planning Acts which obliges a Planning Authority to notify a person who merely makes representations to them in respect of a Planning Application during the course of its consideration by the Planning Authority. The attempt in paragraph 32 (2) of the 1977 Regulations to impose this obligation on a Planning Authority may well be open to challenge on the grounds that it is ultra vires.

The Editorial Board, while regretting that the note which appeared in the January/February issue was inaccurate in overlooking this particular provision, would be reluctant to encourage persons making representations to a Planning Authority to rely on the apparent duty of the Authority to notify them of decisions. □

Issue of Contracts to Auctioneers in Private Treaty Sales

Notwithstanding a previous recommendation published in the July/August 1979 Edition of the Gazette, it has come to the attention of the Conveyancing Committee that it is still the practice of some Auctioneers to procure contracts from Solicitors with a view to obtaining the signature of a prospective Purchaser to a Contract without the Purchaser's Solicitors first having an opportunity of considering its terms and advising the Purchaser on same. The Committee feels that this is a most undesirable practice and also understands that it is contrary to the directions of the I.A.V.I., to its Members. Such a practice may not be in the best interest of the Vendor, as it is questionable whether such Contracts could be specifically performed.

The Committee considers that a Party to a sale should have an opportunity of having the Contract vetted by a Solicitor before executing same and recommends that in Private Treaty Sales the practice (where it exists) of sending out copies of Contracts to Auctioneers be discontinued. □

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Correspondence

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

2 April 1983

Sir,

Perhaps the Minister for Labour may reconsider his recent ill-considered suggestion that the Law should be taken out of Industrial Relations — now that the Government is at the receiving end of Trade Union advice to employees to divert PAYE & PRSI away from the Government.

To take the Law out of Industrial Relations is about as sensible as taking it out of drugs abuse or family matters. The Community needs the Law in all three for its protection. No worker was ever jailed for striking — only for disobeying a court order to stop breaking the law.

The Minister was, of course, only echoing the irresponsible claims to leave the Trade Union Movement a State within a State — free to break the law with impunity and to use it when it suits.

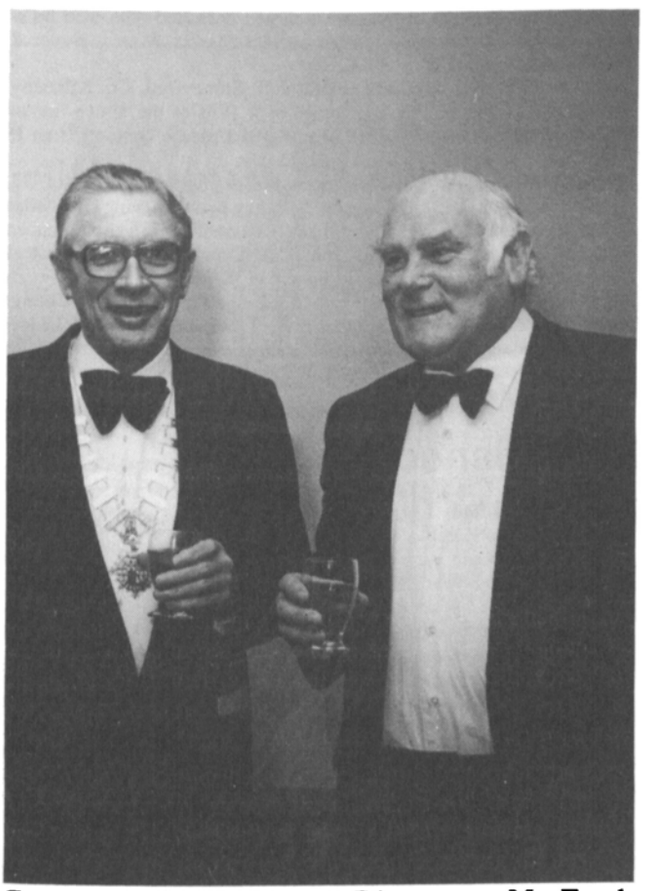
To divert an employer's — or the Government's funds in an employer's hands is no different to putting one's hand in the till. The sooner this is recognised the better, with the consequential rights of the defrauded to be recompensed and of the offender to be penalised. The cynical response of trade unionists is that, if large numbers break laws, this confers effective immunity. In the cases of the monopolist ESB and banks some years ago, Governments of the day scotched that ploy by making the funds of Unions and their officers subject to heavy penalties in such cases — but only on ad hoc bases — instead of keeping these effective sanctions on ice for later use.

If the present Government is to retain credibility, it must demonstrate that not only tax defaulters but tax diverters may equally face imprisonment — Sauce for the Goose . . .

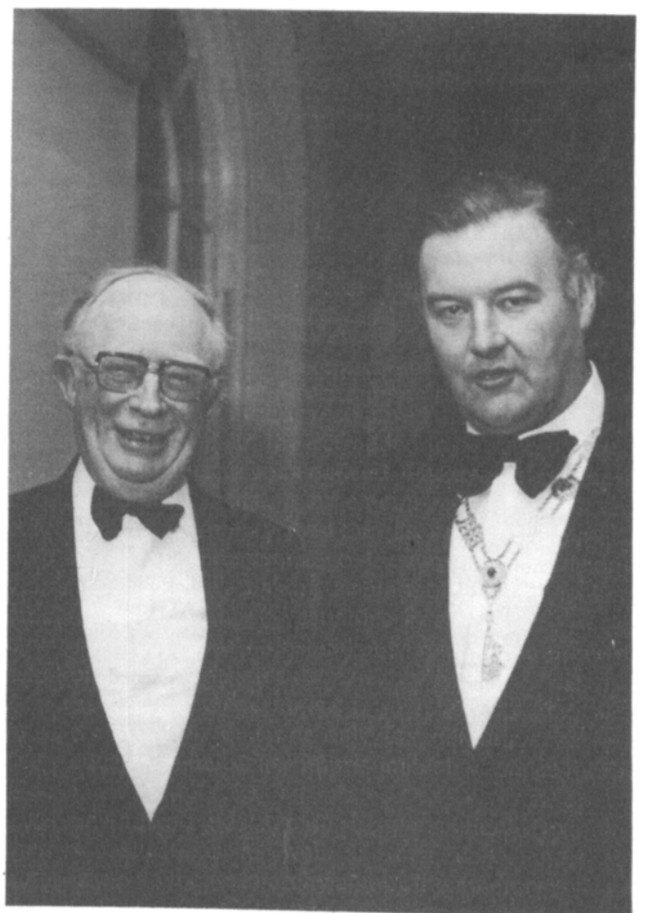
Meanwhile, Trade Union Leaders should examine their Constitutions as well as their consciences for authority to advocate anarchy among their members — for that is exactly what they are doing no matter how they dress it up.

F. X. Burke,
Solicitor,
13 Northbrook Rd.,
Dublin 6.

Law Society, Council Dinner



Guests attending the Council Dinner were Mr. Frank Barrett (left), President of the Institute of Chartered Accountants, and Mr. Patrick McMahon, Chairman of the Revenue Commissioners.



The Hon. Mr. T. F. O'Higgins, Chief Justice and Mr. Michael P. Houlihan, President of the Incorporated Law Society.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 11th day of May, 1983

B. FITZGERALD (Registrar of Titles)

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

Lost Land Certificates

1. REGISTERED OWNER: Edward Williams, Folio No.: 4661 Lands: Acragar; Area: 40a.0r.37p; County: **LAOIS.**

2. REGISTERED OWNER: Thomas Galway, Folio No.: 3846; Lands: Castlegorden; Area: 46a.3r.0p; County: **KILKENNY.**

3. REGISTERED OWNER: Mollie Cronin, Folio No.: 22860; Lands: Knockane; Area: 32a.3r.30p; County: **CORK.**

4. REGISTERED OWNER: Kathleen Earl, Folio No.: 10761; Lands: Grantstown; Area: 1a.1r.38p. County: **WATERFORD.**

5. REGISTERED OWNER: Schull Investment Co., Folio No.: 45574; Lands: Gubbeen; Area: 0a.3r.37p; County: **CORK.**

6. REGISTERED OWNER: Peter Falvey & Sons Ltd. Folio No.: 16300F; Lands: —; Area: — County: **CORK.**

7. REGISTERED OWNER: Michael O'Sullivan and Bridget O'Sullivan, Folio No.: 10400; Lands: Brittasdryland; Area: 99a.2r.16p.; County: **KILKENNY.**

8. REGISTERED OWNER: Michael Golden, Ballycastle, Co. Mayo. Folio No.: 20040; Lands: Ballycastle; Area: 2a.2r.10p.; County: **MAYO.**

9. REGISTERED OWNER: Cairbre Finan, Folio No.: 3381L; Lands: East in the Barony of Naas, North situated to the north of Craddockstown Road; Area: 0a.0r.14p. County: **KILDARE.**

10. REGISTERED OWNER: Joseph Garland, Folio No.: 14993; Lands: Kinnegad; Area: —; County: **WESTMEATH.**

11. REGISTERED OWNER: Eileen McMahon and Alice Maher, Folio No.: 488L City of Dublin. Lands: known as 185 Griffith Avenue. Situate on the North side of the said Avenue in Drumcondra Parish of Clonturk and City of **Dublin.**

12. REGISTERED OWNER: Patrick Ward, Folio No.: 3911 Co. Galway. Lands: Annaghbeg; Area: 1a.1r.14p. County: **GALWAY.**

13. REGISTERED OWNER: John P. Scallon, Folio No.: 5013R; Lands: Ardfarn; Area: 32a.3r.8p.; County: **DONEGAL.**

14. REGISTERED OWNER: John Ennis (deceased); Folio No.: 12799; Lands: Boston (part); County: **KILDARE.**

15. REGISTERED OWNER: Michael Lawlor and Caroline Lawlor, Folio No.: 38234L; Lands: situate to the South of Skelly Lane in the Parish of Artaine and District of Artaine West, containing 0a.0r.8p. shown as Plan 186C on the Registry Map (O.S. 14/16D). City of **Dublin.**

16. REGISTERED OWNER: John Stewart, Millmount, Boyle, County Roscommon, Folio No.: 4944; Lands: Termon; Area: 11a.-r.-p. County: **ROSCOMMON.**

17. REGISTERED OWNER: John Stritch, Folio No.: 8162; Lands: Curraghviller; Area: 12a.1r.24p. County: **TIPPERARY.**

18. REGISTERED OWNER: Patrick Moran, Ballindrimly, Castlerea, Co. Roscommon, Folio No.: 27L; Lands: Demesne; Area: 33 perches; County: **ROSCOMMON.**

Lost Wills

Cahill, Winifred, deceased, late of 2, Ontario Terrace, Rathmines, Dublin and formerly of Ashleaf House, Cromwellsfort Road, Crumlin, Dublin. Will any person having knowledge of a Will of the above named deceased who died on the 15th March, 1983, please communicate with: Patrick P. O'Sullivan, Solicitor, 24, Dame Street, Dublin 2.

Healy, James, deceased, late of Cloghogue, Castlebaldwin, Via. Boyle, County Sligo, Farmer. Will any person having knowledge of a Will of the above named deceased who died on the 16th day of March, 1983, please contact Johnson & Tighe, Solicitors, Ballymote, Co. Sligo.

Gamble, Ida Maude, deceased, late of St. Giles, 17, Fairfield Road, Glasnevin, Dublin, 9. Would any person having knowledge of the whereabouts of a Will of the above-named deceased who died on or about the 6th March, 1983, please contact Messrs. Mason Hayes & Curran, Solicitors, reference RK.

Cody, Patrick, deceased, late of Rathduff, Stoneyford, Co. Kilkenny. Would any person having knowledge of a Will of the above named deceased, who died on the 15th March 1983 please contact Brian P. Redden & Co., 9, Fitzwilliam Place, Dublin 2.

Haire, Bartholomew and Maureen Haire, deceased, late of 32, Glenard Crescent, Salthill, Galway. Will any person having knowledge of the whereabouts of the Last Will and Testament of the above-named deceased please contact Messrs. John C. O'Donnell & Sons, Solicitors of 15, Mary Street, Galway. — Phone 61128/29.

Murphy, Kathleen, deceased, late of Grange Cross, Ovens, County Cork. Will any person having knowledge of the whereabouts of the last Will and Testament of the above named deceased who died on the 12th March 1980 please contact Messrs. R. Neville & Co., Solicitors, South Main Street, Bandon, Co. Cork.

Miscellaneous

Recently qualified Legal Assistant/Clerk seeks employment in Solicitors office. Box No. 057.

Publican's Licence required. Dublin area. Please reply to Eugene Kelly, Solicitor, Lower Merrion Street, Dublin 2.

Lady Solicitor 13 years qualified seeks part-time position (mornings). General experience: Phone 305144. Box No. 058.

Solicitors require all or part of Solicitors' Practice. Practitioner to retire or remain as consultant. Replies which will be treated in strictest confidence to Manley & Associates, Accountants, 58 Mulgrave Street, Dun Laoghaire, Co. Dublin. Ref:-DM. Phone 800201.

Evening Law Student following preparatory law course in Rathmines seeking practical experience in Solicitor's office. Part-time work preferable. Is interested in gaining experience in any or all aspects of the practical profession. Experienced typist. Mary Ward, 68 Malahide Road, Clontarf, Dublin 3. Telephone 337558.

Eugene Davy, B.C.L. Dip. Soc. Science, has commenced practice at 16/18, Harcourt Road, Dublin 2. Telephone numbers — 754766 and 754850.

David M. Bergin, BCL, Solicitor, has now commenced practice in the firm of O'Connor and Bergin, Solicitors, 30, Bachelor's Walk, Dublin 1. Telephone: 732411, 732608 and 732796.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 4 May 1983

Law Office Management Seminar

During May, Mr. Robert Weil and Ms. Patricia Kane, of Altman & Weil, Inc., Management Consultants, addressed members of the Society at the Annual Conference at Dromoland Castle, County Clare, and later at regional seminars in Cork, Galway and Dublin.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 4 May 1983

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Comment

Going . . . Going . . . Gone

Amost disturbing feature of recent insolvencies, at least in the Dublin area, has been the canvassing of creditors by prospective liquidators seeking support for their appointment. The existence of such canvassing does nothing to cast doubt on the allegation that receiverships and liquidations are extremely profitable sources of revenue for those appointed.

Contests between the director's nominees and those of creditors are perhaps inevitable and there may be occasions when one group of creditors may legitimately feel that their interests might be better served by another liquidator than the one proposed by one major creditor.

It is not easy to see, however, why creditors should have to be importuned by candidates for appointment as liquidator. In many cases the creditors will, unfortunately, already have sufficient experience of insolvencies to be able to decide, perhaps in consultation with others similarly placed, on the most suitable appointee.

It is a practice which diminishes the reputation of the accountancy profession and it is to be hoped that the professional bodies of accountants will take steps to end it. □

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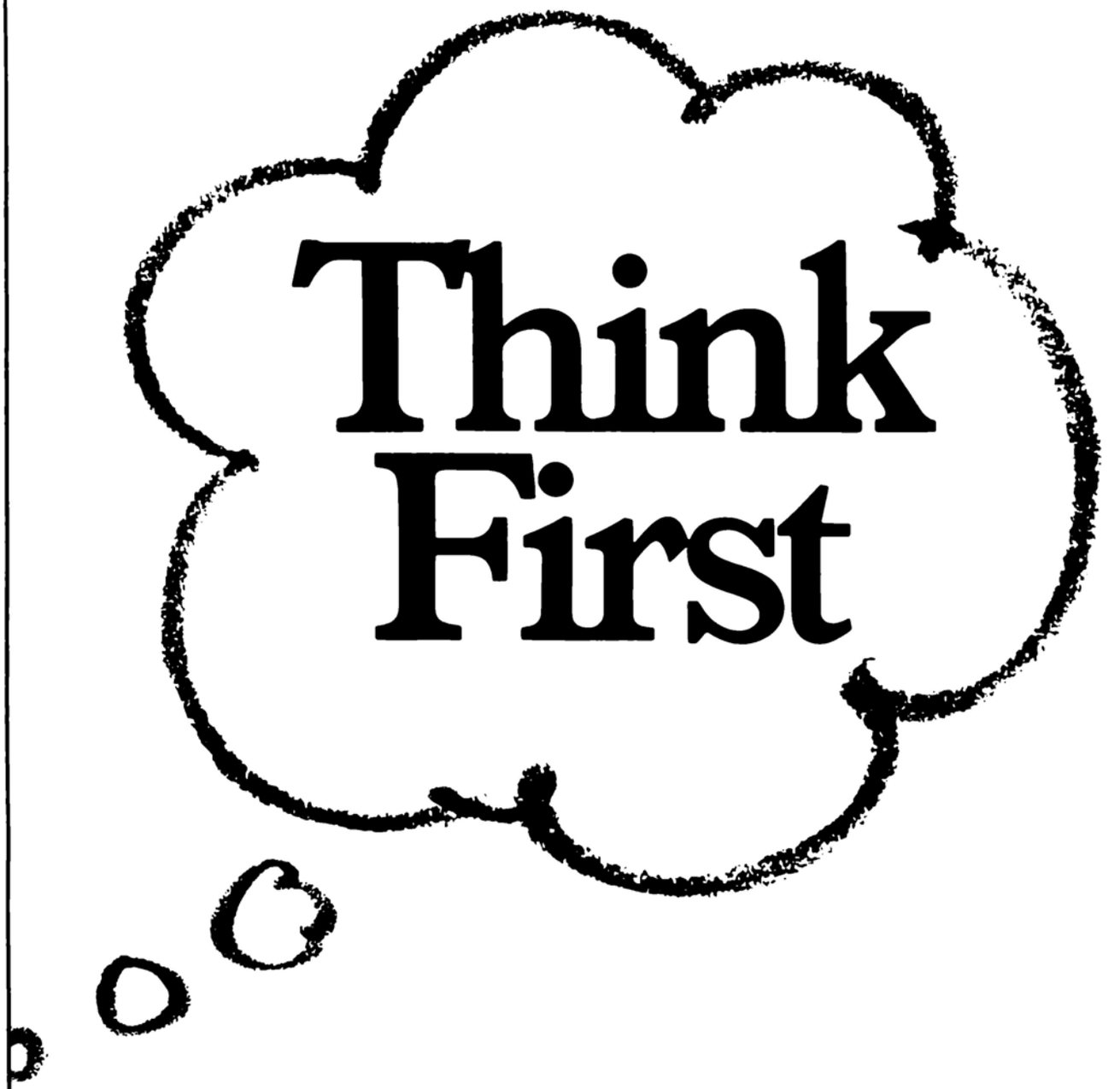

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The People v. Pringle, McCann and O'Shea

Recent developments in Criminal Law

Part 2

by
Eamonn G. Hall, B.A., LL.B., H.D.E., Solicitor

Patrick McCann

Patrick McCann had been arrested shortly after 9.00 a.m. on 9th July 1980 at Frenchpark, Co. Roscommon. He had been informed that he was being arrested pursuant to Section 30 of the Offences Against the State Act 1939. Within 24 hours of his arrest an extension order was made. On the 11th July 1980 he was brought to the Special Criminal Court. He was charged with robbery of the Bank of Ireland in Ballaghadereen and with capital murder of Garda Byrne. He was remanded in custody to the Special Criminal Court on the 25th July 1980. On the 25th July 1980, Counsel for the State applied to have the charges withdrawn because of a typographic error and also applied to have new charges preferred in their place. Counsel for the accused urged that the accused was entitled to be released. Liberty was given by the Special Criminal Court to the prosecution to withdraw the charges and at the same time prefer other charges. Counsel for the applicant argued, *inter alia,* that when the charges were withdrawn and fresh charges preferred on the same date that the applicant was not lawfully before the Court but was 'in the illegal custody or detention of the Court'.

The Court of Criminal Appeal stated that there was nothing in the terms or the provisions of the 1939 Act which could be interpreted as "confining the method of lawfully bringing before the Special Criminal Court a person to be tried by it to an arrest under Section 30 or pursuant to a warrant of the Court . . ."

The Court considered that what was involved was a substitution of two charges for two charges previously preferred. This was within the "inherent jurisdiction of the Court". The Court stated the procedure adopted did not "conceivably constitute any injustice, disadvantage or prejudice to the applicant."

Three further grounds of appeal were argued on behalf of McCann in the Court of Criminal Appeal. They were (a) that the questioning of the applicant during his period of detention in Frenchpark Garda Station was oppressive by reason of its length; (b) that the applicant had been intentionally deprived of his constitutional right to the presence of his solicitor while he was being interrogated by the Gardai and, (c) verbal statements were obtained in breach of Rule 9 of the Judges' Rules — in that the interviewing Garda Sergeant did not make a note of the statements at the time they were made by the applicant and they were not read over until after the conclusion of all the interviews during which the statements were made.

The Court of Trial had been satisfied that the questioning of the applicant had been conducted "in a fair and reasonable manner and was not of such a nature as would render any reply thereto as other than voluntary."

Right of person in custody to a Solicitor

The applicant had been permitted three interviews with his legal advisers. All these interviews were in private.

The applicant did not make any further request to consult with a solicitor. However, before returning to Dublin, his solicitor sought a further interview with his client. The Superintendent in charge had issued a directive that no further interviews would be permitted without his authority. The Superintendent had gone to attend the funeral of the deceased Gardai. He could not be contacted.

The solicitor then wrote a short letter to the accused — but one of the interviewing Gardai would not accept delivery of the letter. The Special Criminal Court considered that the applicant had been afforded reasonable access to his solicitor in accordance with his constitutional rights and that the direction of the Superintendent did not amount to a deprivation of the accused's constitutional rights.

The Special Criminal Court was also satisfied that all the requirements of the Judges' Rules were complied with in relation to the applicant. The Court of Criminal Appeal was satisfied that the findings of fact by the Court of Trial were the only findings of fact available on the evidence adduced.

The Court of Criminal Appeal then considered whether any of the inferences drawn by the Special Criminal Court from the facts found were "perverse and inappropriate" in the legal sense and, whether any principles of law applied were erroneous.

The Court then considered the submission on behalf of Counsel for the applicant that the applicant while in detention and while being interrogated by the Garda Síochána had a constitutional right to have his lawyer present at any interview and that he should be informed of that right and unless he waived it, he should be afforded that right.

Dealing with this issue of the right to services of a solicitor while in custody, the Court of Criminal Appeal in its judgment quoted from the judgment of the same Court in the *People v. Farrell*[15].

> "All these judgments lay emphasis on the constitutional duty of the Court undertaking the trial of a person charged with a criminal offence to be vigilant to ensure the trial is in all respects fair and just. The several judgments give substantial guidance as to the standards of fairness under the predominant concept of justice to be observed in relation to the particular circumstances of the person appearing before the Court. But none of the judgments go so far as to declare that every person under suspicion of, or faced with a charge of a criminal

offence has a constitutional right to have the services of a solicitor and doctor before being questioned by an investigating Garda. Such rights as are adumbrated in the judgments cited are all related to the particular circumstances of the person whose rights require protection and vindication."

The judgment continued: "This Court accepts and is prepared to follow this statement of the law as contained in the *People v. Farrell* and an inevitable conclusion from it is that if a persion has not got a constitutional right to have the services of a solicitor before being questioned by an investigating Garda neither has he got a constitutional right to the presence of a solicitor while any interrogation is being carried out."

The Court of Criminal Appeal was satisfied, as had been established, that a person in lawful custody was, however, entitled to reasonable access to his lawyer or solicitor.

The Court stated that it was also satisfied, as had been decided in the case of *State (Harrington) v. The Commissioners of the Garda Síochána*[16], that the right of access of a person in custody to a solicitor extends to a case where any person "bona fide" interested on his behalf seeks the arrangement for such a meeting.

Here there was no blanket refusal to grant access to a solicitor. The request came from the solicitor himself and the decision of the Chief Superintendent was a decision postponing access only. The Court of Criminal Appeal was satisfied that access of the accused to his solicitor during his detention had been reasonable. The Court concluded that the detention, therefore, was not tainted with illegality arising from a refusal of such access.

Length of Questioning

The Court considered an additional ground of appeal, that the questioning of the applicant was oppressive by reason of its length. The Court of Criminal Appeal accepted the findings of the Special Criminal Court that the questioning was at all times conducted in a fair and reasonable manner.

Judges' Rules

The facts proved before the Special Criminal Court were that a number of statements were made by the accused to a Detective Sergeant. After several interviews, the Detective Sergeant made a note of these statements in his notebook. Later, after further interviews, the Detective Sergeant made a note of these interviews and read over the entire of the notes to be accused. The accused agreed they were correct. However, the accused would not sign the notes. It was argued by Counsel that Rule 9 of the Judges' Rules was broken.

Rule 9 states:

"Any statement made in accordance with the above Rules should, whenever possible be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish."

The Court of Criminal Appeal stated that they were unable to find any judicial decision dealing with the interpretation of the Rule relating to the time at which the Statement should be taken down and the time it should be read over to the accused. The Court stated that the proper interpretation would seem to be found in a consideration of "the purpose of the Rule". The Court considered that;

"the permissible time-lag between the making of a statement, the recording of it and the reading over of it must of necessity vary from case to case and in particular be governed by the circumstances of each case."

Here, there was evidence that the applicant did not challenge the accuracy of what had been recorded. the Court of Criminal Appeal was satisfied that the evidence supported the decision of the Special Criminal Court that the rule had been complied with. This additional ground of appeal failed.

Some of the statements made by the accused were summarised by the Court of Criminal Appeal as follows:

"I know I am in much trouble over this shooting than ever before in my life. I know it is a capital charge and I am afraid for my head."

and

"I will be satisfied getting away with 10 years to 12 years over this."

There were other such statements. The Court of Criminal Appeal was satisfied — having considered the statements and the context in which they were made — that there was not any construction or interpretation of these statements consistent with the innocence of the applicant which could reasonably have been entertained by the Court of Trial.

Fingerprints

It was argued on behalf of the applicant McCann that the evidence of the finger marks found on portable objects — two maps — was inadequate to base a conviction. The Court of Criminal Appeal stated that if a finger print found on a portable object was the only evidence incriminating an accused, this evidence was not of sufficient certainty to justify a conviction. The Court, however, stated in relation to the interpretation of the statements made by the applicant and in relation to the issue as to whether they were truthful, then evidence relating to the fingerprints was probative.

The Court of Criminal Appeal considered that the verdict and conviction against the applicant could not be interfered with.

His application for leave to appeal was refused.

Colm O'Shea

The applicant Colm O'Shea was found by four members of the Garda Síochána on a roadway in a forest. There was evidence that he admitted to one of the Gardaí that he was involved in the bank raid at Ballaghadereen that day. He also said he had been shot. O'Shea was then taken to Galway Regional Hospital for treatment. When he left the hospital seven days later he was arrested under Section 30 of the Offences Against the State Act 1939, taken in custody to Eglinton Street Garda Station, Galway and later brought to Dublin to a hearing of the High Court. He was then transferred to the Bridewell Garda Station. While he was in the Bridewell he was taken ill and was

taken to the Richmond Hospital. He remained there for another nine days. On his discharge from the hospital he was again arrested and brought before the Special Criminal Court, charged with offences and later found guilty.

'Illegal Arrests'

It was submitted on behalf of the accused O'Shea that the accused had been arrested in the forest and brought in custody to the Regional Hospital Galway where he remained until he was discharged some seven days later. It was submitted that the "arrest" in the forest and subsequent custody were illegal. There was evidence at the trial of the accused that the accused had been first arrested on discharge from the Galway Regional Hospital pursuant to Section 30 of the Offences Against the State Act 1939. Counsel for the accused had submitted that this arrest on discharge from the Regional Hospital was unlawful and his subsequent detention was illegal.

It was argued that the manner in which the Gardaí brought the applicant O'Shea from the forest to hospital and treated him while in hospital "exhibited all the characteristics of, and incidence of, an arrest" and that the applicant was not free to leave their custody nor told he could leave. In evidence it had been established that his room was under armed police guard.

The Gardaí strongly denied that they had arrested him in the forest. The Court of Trial accepted their evidence and stated that it was satisfied beyond a reasonable doubt that the accused had not been arrested in the forest either at common law or under Section 30 of the Offences Against the State Act 1939. The Court of Criminal Appeal held that this finding could not be challenged. The Court stated that although the Gardaí had a duty to arrest the applicant once they had good ground for charging him with the serious crimes *(Creagh v. Gamble*[17]*)* the Gardaí were entitled to postpone the implementation of that duty in view of the suspect's urgent need for medical treatment.

The Special Criminal Court found that the applicant "willingly and voluntarily" remained in Galway Regional Hospital until the time he was discharged by the hospital authorities. The Special Criminal Court found as a fact that he had not been detained in hospital against his will. The Court of Criminal Appeal also stated that although in certain circumstances armed gardaí may be in the vicinity of a suspect, to ensure, *inter alia,* that he does not escape, this does not in itself mean he is in garda custody.

In support of the submission on behalf of the applicant, the Court of Criminal Appeal was referred to a statement by Henchy J in *The State (Walsh) v. McGuire*[18].

> "As an arrest means a physical act done with a view to detention, and since the accused was already arrested and in detention, this cannot have been an arrest in law."

The Court of Criminal Appeal stated that Mr. Justice Henchy was referring to a situation where a person was in lawful detention and to the purported second arrest of such a person, whereas in this case it had been argued that the applicant was in unlawful custody.

The Court held that the applicant was never in Garda custody until his arrest outside his room in the Galway Regional Hospital. So the argument as to the invalidity of the arrest failed.

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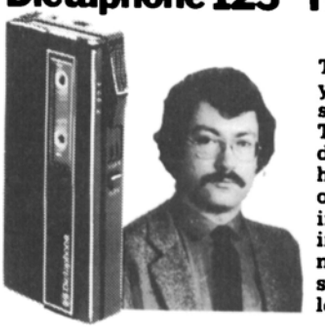

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The Court stated that a detention which may initially "have been illegal can in certain circumstances be legalised (*In re Laighléis*[19]) and there are many circumstances in which a valid arrest at law can be made immediately after the release of a person from a custody which had been for one reason or another illegal".

Applicant in Richmond Hospital Dublin

On the 15th July the applicant, while in the Bridewell Garda Station, complained of difficulty in breathing. He was taken to the Richmond Hospital. Before he left the Bridewell an extension order was made under Section 30 of the Offences Against the State Act 1939. The validity of the extension order was not challenged. On the 16th July in the Richmond Hospital, the accused was informed that he was no longer being detained.

As the applicant left his room in the Richmond Hospital on the 24th July he was arrested at common law and brought in custody to the Special Criminal Court where he was charged with the crimes of which he was subsequently found guilty. Again, it was argued that the common law arrest was unlawful. Two armed gardaí were on duty inside the applicant's hospital room. Two more armed gardaí were on duty outside the room of the applicant. Anyone going to the room was searched. The Court of Trial had found that the applicant had willingly agreed to go to the Richmond Hospital for medical treatment and that he voluntarily remained in hospital until his discharge on the 24th July. The Court of Criminal Appeal stated that neither it nor the Court of Trial was required to infer from the very close Garda surveillance that the applicant was in Garda custody. The Court of Criminal Appeal stated that it was its opinion that the applicant's arrest on the 24th July outside his room in the Richmond Hospital was lawful and that the Special Criminal Court had jurisdiction to try him.

Admissibility and weight of Evidence against the Applicant

Evidence had been given in the Special Criminal Court that when a Detective Garda approached the applicant O'Shea in the forest, the Detective Garda asked the applicant "were you involved in this bank raid at Ballaghaderreen today?" and the applicant said, "yes, I was" and bowed his head.

The Special Criminal Court found that the applicant had spoken the words of admission. Several arguments were advanced to the Court of Criminal Appeal to the effect that the Detective Garda who heard the admission was deliberately lying. The Court of Criminal Appeal stated that the Court of Trial heard and saw the witness and the finding of fact in relation to his veracity could not in the circumstances of the case be set aside.

Two separate grounds were advanced on the question of the admissibility of the oral admission. First, it was submitted that the admission was not a voluntary one, and secondly it should not have been admitted as there had been a breach of the Judges' Rules.

The Court of Criminal Appeal rejected the submission that the admission was induced by any threat made either explicitly or implicitly by the Detective Garda. The Court stated that the Detective Garda had not been under any obligation to caution the applicant before the incriminating words were spoken. In the circumstances, the Judges' Rules had not been breached.

No Breach of Constitutional Rights

A footprint had been found on the counter of the bank at Ballaghadereen. There was evidence that it was from the shoe of Colm O'Shea. It was alleged that the applicant's shoes and clothing were unlawfully taken from him while he was in Galway Regional Hospital. While in the intensive care unit of the hospital, swabs were taken from his hands. When asked if he was agreeable to this, the applicant had nodded his head. The Court of Trial had not been satisfied that the applicant had consented to the taking of the swabs and concluded that there had been an illegal seizure of the clothing as well as of the matter from the applicant's hands.

The Court of Trial, however, decided that there had been no breach of the applicant's constitutional rights and considered how its discretion should be exercised in relation to the evidence obtained by the Gardaí in the Regional Hospital. The Court of Trial considered that the public interest was best served by the admission of the evidence with regard to the applicant's clothes, the swabs taken from his hands, the sample taken from his hair and the blood samples. The Court of Trial concluded:

> "To hold otherwise, the Court considers, in the words of Mr. Justice Lavery, in *Attorney General v. O'Brien*[20] 'would be wrong to the point of absurdity and would be bringing the administration of the law into well deserved contempt.'"

The Court of Criminal Appeal agreed.

Capital Murder

Submissions were made to the effect that the evidence did not establish that the common enterprise of the raiders involved an agreement to kill or cause serious bodily harm. It was argued that even if there had been a common enterprise, it had not been established that the applicant had not withdrawn his consent to this common enterprise. The Court rejected those submissions stating the verdict of capital murder and the conviction of the applicant must stand. Accordingly, application for leave to appeal was refused.

Sentence of Death

The Court of Criminal Appeal referred to a communication which the Court received on behalf of the Minister for Justice concerning the place for the carrying out of the sentences — in the event of the applications for leave to appeal being refused. The Court stated that the law provides for the sentence of death to be carried out by hanging. The Court stated that the Court of Trial did not have to specify the place of execution.

The Court of Criminal Appeal finally stated in its judgment that "each applicant be detained in a lawful prison and be taken thence to a place of execution."

Commutation

The sentence of death was later commuted by the President on the advice of the Government. □

Footnotes

15. *People v. Farrell* [1978], IR. 13 at p. 20.

16. *State (Harrington) v. Commissioner of Garda Síochána.* 14 December, 1976. High Court, unreported.
17. *Creagh v. Gamble.* (1888) 24 L.R. IR. 458.
18. *State (Walsh) v. McGuire.* [1979] IR. 372 at 386.
19. *In re Laighléis* [1960] IR 93, 129.
20. *Attorney General v. O'Brien.* [1965] I.R. 142 at 148.

*Part 1 of this article appeared in April Gazette, 1983 p. 57.

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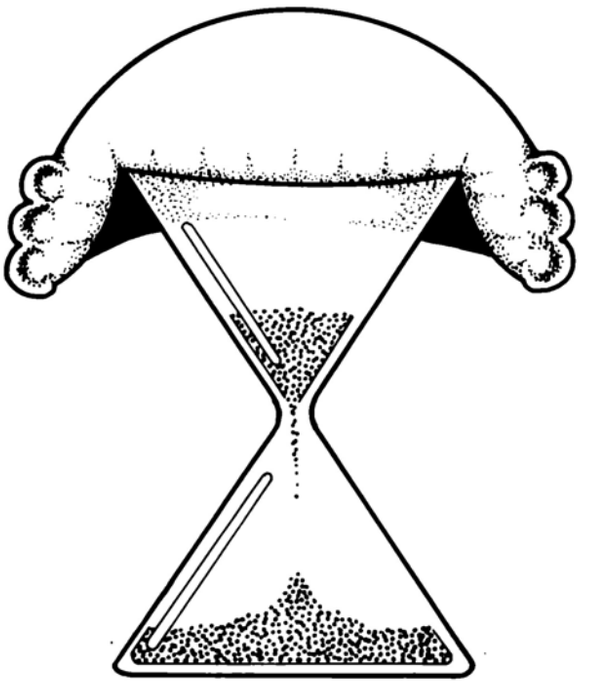

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The Purpose of Prisons?

Address to the Annual Conference of the Association of Prison Officers, Green Isle Hotel, 27th May, 1982 *

by
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I TEACH Criminology and Penology which is all about crime control and criminals, without necessarily ever meeting a criminal, a policeman, or a prison officer. You deal with criminals without necessarily ever reading a book on Criminology or Penology. Indeed you may have fairly cynical or sceptical views on the need for academic criminologists or theorists at all.

To some extent I could understand such antipathy for when I began to review what criminologists and penologists had to say about prison officers, I discovered two things. The first is that despite the mountain of Penological material examining the minutiae of the prison system, very little academic attention has been paid to what must be one of the most crucial areas of prison life — the role of the prison officer. The second discovery I made was that where academic penologists had decided to look at the custodial officers, then what they had to say of them was far from flattering. In an article published in 1945 by Joseph Fishman which describes in lurid detail the life of a prison officer the headline reads 'The Meanest job in the World'. Gordon Hawkins, himself a former prison governor, devotes a chapter of his book "The Prison" to his former colleagues. He titles the chapter on prison officers 'The other prisoners'. Donald Clemmer in his celebrated account of The Prison Community claimed that prison officers had three major preoccupations —none of which had much to do with prisoners or penal theory. Their first preoccupation was when do we eat —the second — when do we quit and the third when do we get paid? How accurately those preoccupations reflect the main areas of interest of Irish prison officers today, you are better qualified to judge than I am. But it is a fact that over the past few years the Association of Prison Officers has been more often in the public limelight because of disputes over pay, overtime, rostering etc, than over idealogical conflicts about the role of prison in contemporary society.

It does surprise me that at a time when prisons are in crisis throughout the Western World, at a time when many observers are demanding the development of alternatives to imprisonment and the reduction of numbers being sentenced to imprisonment on the grounds that it is an expensive, demoralising and dehumanising failure which compounds criminality rather than reducing it — why are those people closest to the implementation of penal policy so seemingly disinterested in the debate? Recently I met a sociologist who was investigating labour relations in an Irish semi-state body which regularly throws this country into chaos in pursuit of wages claims, arguments over demarcation and overtime. He patiently explained to me that his research into the causes of this persistent industrial unrest showed that the real issues were not about money at all, but that there was a profound deeprooted dissatisfaction with the job itself — public image of the job was poor — the body they worked for was the butt of regular jibes, their work lacked status, they were expected to perform miracles with outmoded equipment etc., but instead of investigating these areas of unease and unrest and making them part of, if not central to their negotiations with management, their resentment about these things remained untapped, inarticulate and was translated into wages and demarcation claims.

That conversation made me wonder just how much that same kind of dissatisfaction was there within the prison service itself and how could it be tapped to promote the development of a better more coherent and more successful prison system than we presently have. If I was a prison officer who did have a developed sense of duty and commitment to the job of caring for prisoners I think I would feel that society was dealing me a less than fair hand. There is a public stereotype of a prison officer as a uniformed locker and unlocker of doors whose job it is to inflict punishment on prisoners, to repress them, to bring it home to them that they are bad and the rest of us are good. The prison officer is chosen to do society's dirty work — he's probably well enough paid for it in terms of money, but in terms of status there is considerable public ambivalence. The prison officer is expected to deal with problems he was never trained to deal with and then he is censured by the media for what is identified as his or the system's failure to solve the problem. For example he or rather the prison is expected to punish people and rehabilitate them simultaneously. The P.O. is expected to take an illiterate adult who has never held a steady job in his life, who comes from an area where there is chronic unemployment and teach him to read, equip him with vocational skills, convince him of the error of his ways and find him a job, send him out into the world again a paragon of virtue. He is usually expected to accomplish all this in less than six months. He is given heroin addicts, drunks, vagrants, prostitutes, beggars, psychopaths, sociopaths, vandals, thugs, murderers, rapists and once they are safely delivered into his hands, society breathes a sigh of relief that the problem is now being taken care of and no one thinks to ask, how well equipped is the prison or its personnel to handle this particular problem.

Are their other and better ways of handling it. The prison is there, it can't say no — this is not our problem — we can't cope, it has no power of veto, no way of saying — this person is not suitable to what we have to offer — we are the wrong place. The hospitals can decide who they will treat, the psychiatric hospitals can say, this patient does not suit us, the special schools can say, this guy is too disruptive we don't want him, so they all end up in the one place which is obliged to keep open house — the prison!

When crime rates soar and the public demand stiffer sentencing in the unguided belief that the longer and harsher the sentence the more it will deter the criminal, the courts respond by increasing penalties, sending more

people to prison and nobody stops to enquire can the prison cope? When, as happened lately, the prisons become overcrowded and in an effort to alleviate conditions and prevent them from becoming intolerable, the decision is taken to release prisoners early, there is a public hue and cry — directed where? — at the prisons! And when the guy who is released burgles another house as soon as he is released, or robs a shop, the fault lies not with the society whose neglect and institutionalised inequalities have made a life of crime more attractive to him than a life in bored idleness on the dole — but the fault lies with the prison who didn't hold on to him, punish him, educate him, convert him, mould him into a model citizen, who on leaving the prison was happy to accept his lot at the bottom of the heap.

It has become predictable for critics of the prison system to point to the high rates of recidivism as evidence of the failure of the prison system to rehabilitate. Even within the prison system itself there is a feeling of hopelessness about the viability of rehabilitation as recidivism rates from the institutions designed with rehabilitation rather than punishment as their primary objective like Shanganagh Castle or Glengariffe Parade, show no dramatic or appreciable improvement on the old faithfuls like St. Patrick's and Mountjoy. Yet, ironically I believe that if we are looking for scapegoats to blame for recidivism, there are more likely candidates than the prison itself.

The operation of the Criminal Justice System

If we take a broad and integrated look at the operation of the criminal justice system the entire process resembles a rather crude sieve. Into that sieve we put all crime. Give it a shake and out falls the crime we never know about — the white collar crime, tax evasion, employee thefts, sick benefit claimants who aren't sick, the bank officers who embezzle but who are quietly sacked but not prosecuted, the cross border smuggling, the larcenies nobody bothers to report, the drug pushers, etc. We probably live with a level of unrecorded crime which is astronomic by comparison with recorded crime. That leaves us with only recorded crime in the sieve — i.e. those offences known to the police. The police have limited numbers and limited resources. They never solve all the reported crimes, so give the sieve another shake and you are left with those they do solve. The crimes left in the sieve are not really the result of something so arbitrary as simply shaking a sieve — there is in fact quite a subtle form and substance to the likelihood of certain crimes being detected. For example the detection rate for crimes of violence is well over 80%. Violent crimes form only about 6% of all recorded crime and since they involve a direct confrontation between offender and victim the chances of detection are quite high. Also, of course, precisely because they are crimes of violence and thus more immediately of public concern, there is a greater incentive to detection, a greater need to allay public fears. We saw for example in England how huge resources in money and manpower were thrown into the search for the Yorkshire Ripper. No one would expect the same commitment to apprehending someone who persistently steals shampoo and soap from chain stores.

If we see prisons as places of containment and punishment then we would expect to see the violent and the dangerous being incarcerated, so no one bats an eyelid when the judge orders a custodial sentence. Yet even within this relatively small group of offenders the variety of types and needs is incredibly wide. There are the psychopathic, the mentally unbalanced, the deliberately disruptive, the politically motivated, the bully, the unfortunate who lost his head through drink and killed his father or mother or wife — all to be coped with by people who have no formal training in psychiatry, human relations, communication medicine, nursing, whose training may have been for six or ten weeks, whose selection may have involved no investigation of personality or attitudes, and who may have a confused idea of their role in relation to the prisoner and what is expected of them. Furthermore, while the prison officer has the most day to day contact with that prisoner and while he clearly occupies a vital role — a pivotal role in terms of how well a prisoner adapts or does not to prison life — he may find his significance being eroded by a cluster of so-called experts — who appear in the prison one day a week or a few hours a day — doctors, social workers and psychiatrists whose attitude to the officer may be remote and patronising. The officer may be the person expected to implement the advice of the experts — he takes on a treatment role, a therapeutic role simply because he is there.

If we go back to the sieve we find that we are left with offences against property. Of every hundred crimes in that sieve only about 35 will be detected. Again the process by which some crimes against property will be resolved and some not is not so arbitrary as might appear. For example much will depend on police deployment — where the police are, how quickly they are on the scene — their

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local knowledge — their knowledge of previous offenders whose pattern of crime is similar — so it is hardly surprising that those more likely to get caught are those who have been caught before.

Roots of criminality

Of those the police prosecute — only one third are sent to prison — but once again we find that judges have a tendency to go easy on first timers and to send back to prison those who have been there before — so each time the sieve is shaken the core of people staying inside it are those who are more likely to be firmly committed to a deviant career and who are unlikely to respond to rehabilitation insofar as that is designed to profoundly change their way of life. About 60% of those sent to prison have been there before. If we add two other factors to that it becomes apparent that the judges who send people to jail to change and reform them and public who expect them to be better people as a result of incarceration have little notion of the real root problems which provoke criminality as we define it. Those two factors are, one that the majority of these repeat offenders are sentenced to six months or less which often means weeks rather than months in prison. Two, they are by and large from the lowest social stratum, the unemployed, unskilled, ill educated, the disadvantaged. The opportunities which exist for them on leaving prison are almost invariably the same as when they entered it. They have little in the way of work experience, many are illiterate or semi-literate. The kind of work they are equipped for, semi-skilled or unskilled manual labour is in short supply even for those with no criminal record and in any event tends to be insecure and seasonal. Let us assume that on release from prison they are confronted with a set of options — to go straight or to rob and steal.

Going straight may mean living on the dole. It means no new clothes, no weekend drinking in the pub with your mates, no holidays by the sea, no motorbike, no car, no new tapes or records, no discos, no participation in sports or clubs, no hope, no future, no part of the good life. Why should we expect him to be satisfied with that?

If we are realistic we can without too much difficulty see the advantages and attractions of a life of crime — relatively easy money, power, fun, excitement, access to the good life and if his conscience does bug him he can neutralise its effect by pointing out to us, the goodies, the moral majority, a number of areas where our thinking is less than straight. We preach equality and equal opportunity, yet one million people are consigned to poverty and it is from these that our prisoners are predominantly drawn.

There are those who do nixers, who pretend to be sick so they can stay home and do the garden, those who abuse expense accounts, those who abuse office privileges like stationery and telephones and postal privileges. We have managed to subtely redefine certain activities so that they are seen as official perks rather than dishonesty and we have created a society where the moral bind is weakening gradually but perceptibly, where the cult of greed and self is eroding traditional beliefs and values. Those of us who have jobs know only too well the access to 'legitimate' dishonesty that most workers have in some shape or form, and the immunity we enjoy from prosecution, yet those who have no jobs, who live in slumbs or suburban morgues are expected to display a level of honesty and satisfaction with their lot we forgot years ago.

My contention is therefore that in relation to those committed to a life of petty larceny and burglary, the causes of their recidivism are rooted firmly in society and its structures and are only incidentally related to the prison experience. If we are seriously committed to the idea of rehabilitation and of reintegration of the offender into society then the answer does not lie in building bigger and better prisons with bigger and better workshops and training facilities but in accepting that there are two things prison can do and does do well. It does punish — the deprivation of liberty, the isolation from family and friends, the lack of control over one's life are all in themselves dreadful punishments, even under the most caring, humane and enlightened regime. The second thing it does well is that it contains people, keeps them out of trouble for whatever period, successfully. Any claims over and above that are unrealistic, and it is about time we gave up talking about them.

That does not mean to say that we should accept a harsh and rigidly disciplined prison model undiluted by attempts at education or worktraining provided we see the rehabilitative role of the prison as only a tiny part of what is required if this offender, this human being is to live in the centre rather than on the fringes of our community, then the confusion, resentment and frustration often felt by prison officers to the whole notion of rehabilitation is understandable. Prison officers have in the past in this jurisdiction and in others, been accused of standing in the way of prison reform. They wanted to hold fast to the good old days of militaristic regimes whose sole concern was control and containment and which did not suffer from crises of identity or confusion about role and expectations.

All too often the transition to correctional and rehabilitative models from the simple custodial model, has been achieved in a hamfisted way in the course of which prison officers have perceived their authority being undermined, their influence dwindling and their territory growing smaller as other personnel entered the prisoners life . . . the social workers, welfare officers, teachers. Recruitment into the service too has changed radically with more and more experienced personnel being recruited whose main function is to train and educate rather than to lock up. So we are seeing the development of two strands of officer type. The changes the prison system has undergone over the last decade in particular must have had profound effects on you the officers who have been in the front line of change. Some officers particularly those who work in the 19th century institutions like Mountjoy and St. Patrick's must realise that the bones of the work they do has not altered radically since the 1850's. Others have been able to participate more fully in a more contemporary role, but overall no attempt has been made to cope with and resolve this role conflict — indeed much that has happened may have made it worse. It is time that we focussed some attention on this area of the penal system so that those who are the frontline implementers of penal policy have a clear idea of their role and more important have a decisive input into the development of that policy.

I do not believe as Clemmer does or did, that prison officers are men who by "dominance over a helpless group are able to tackle their egos and obtain some satisfaction through the power of their authority, who are imbued with a spirit of retaliation towards inmates and who believe that the essential purpose of imprisonment is incapacitation".

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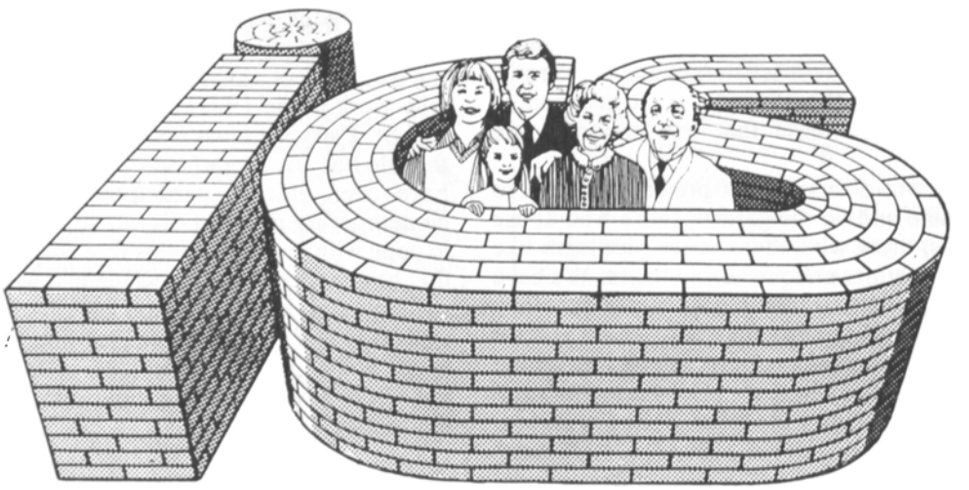

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If there are those prison officers who believe that they should not be there, they are in the wrong job. The sentence of imprisonment is society's sanction and the full expression of its indignation after that, those in charge of the job of running the prison are primarily concerned with the care of human beings who represent only the tip of the iceberg of deviance and dishonesty. I believe like Sir Rupert Cross that for too long we have been engaged in the wrong debate on prisons. The argument about rehabilitation has obscured other more important considerations, among them the effect on prisoners of the interpersonal contact between officer and prisoner.

Prison Officer as reformer

Few people doubt that the prison experience can be demoralising, dehumanising, institutionalising, labelling. If we cannot reform the least we can do in a Christian, civilised community is ensure that we do not deform — that we do not via imprisonment lead to the further alienation and demoralising of the offender. This is where the debate should now centre — this is where the prison officers should now be making their enquiries — how can they do their job in a human way, in a spirit of concern and caring rather than paternalism or vindictiveness, so that the person who is released when his sentence is up goes back to the community at the very least no worse than when he came in.

The task role for the future is to decide who should go to prison and how they should be treated while they are there. I was amazed in talking to many ex-prisoners how much emphasis they placed on the importance of human relationships within prison. The presence or absence of close rapport with officers, the warmth or coldness of the relationship with officers was always the dominant topic of conversation. Yet this is an area which has been almost totally neglected by theorists and policy makers. Prison officers are human beings too. They are more than lockers and unlockers of doors. Their attitudes can dictate the success or failure of any correctional programme — because fundamentally they are the implementers of policy on the ground. If the regime and structure is authoritarian or rigid, then the most caring and humane of officers will find huge obstacles to the development of relationships with prisoners and despite his overtures the overall effect of prison will be a brutalising, oppressive and demoralising one.

If we look at our own system particularly at St. Pats and Mountjoy one wonders how any experience can be salutory which confines people to cells for up to eighteen hours a day — on their own — people who are often illiterate and used to a high degree of social intercourse; what an appalling waste of time and resources considering that the prisoners are matched almost man to man by officers. Why must prison be such an incredibly lonely and debilitating experience? The resentment and frustration the prisoner must feel will inevitably be taken out on the one he most closely identifies with responsibility for those deprivations — the officers.

That in turn must deeply prejudice the interaction between the two. It is interesting to note that in the surveys of prisoners' attitudes to prison staff, almost invariably friendliness and fairness were characterised as being important but that these were not regarded as meaning that the officers concerned were permissive or lenient. Friendliness need not prejudice control. It ought to be possible for us to professionalise the role of the traditional prison officer — custodian by giving him a positive role in the development of personal and sociable relationships with prisoners. This role, because it is presently crucial should be recognised as central and much more important than the now outmoded notion of rehabilitation.

One does not have to be a professional psychologist to work out why this role is so vital. Anyone with a history of poor self image rejection, ego deflation, who is a member of the lowest social stratum is likely to be sensitive to slights whether real or imagined. If those who are in charge of him are hostile or disparaging the values and morals they are supposed to represent can hardly seem any more attractive than their proponents. The likelier thing is of course that such hostility will actively promote closer identification with criminals, fellow inmates and criminal values. Whereas friendliness, humaneness, a concerted and deliberate concern to preserve the prisoners dignity, privacy and esteem, while unlikely to cause instant conversion to an upright way of life, will at the very least not be a push in the direction of frustration and resentment which may ultimately compound criminality.

The kind of personality such an approach calls for may be different from the kind of person recruited traditionally into the system and again it might not. Apart from educational qualifications I have no idea what attributes officers are expected to have and develop. It is up to the officers themselves to ensure that recruitment procedures protect the move towards increased professionalism and that things like height, weight, hearing, educational level etc., do not play a more important role in selection than personality, aptitude, ability to win voluntary cooperation, skill in interpersonal relationships.

It seems to me that officers can settle for being eclipsed by the other professionals who are increasingly moving into the area of prisoner care — they can take a back seat and remain largely custodians, for as long as that role lasts, and is not superceded by even more rehabilitators and treatment personnel, or they can capitalise on the vital and crucial role they play within the penal system, by deciding now how best that role should be developed for themselves as a profession, for the prisoners in their charge and for the wider society we all live in. □

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The Law Society has reprinted a mono-lingual version of the Irish Statutes from 1922 to 1976 (inclusive). At a reception at Blackhall Place on 21st April 1983, Mr. Justice Brian Walsh, President of the Law Reform Commission formally launched the reprint. The President of the Society, Mr. Michael P. Houlihan and Mr. Michael V. O'Mahony, Chairman of the Publications Committee of the Society, also spoke.

The re-printing (by a photo process) was by Confidential Report Printers Limited (with the hard cover binding by John F. Newman). With few exceptions, the mono-lingual version is entirely comprised of the English version of each Statute — that being the language in which it was passed by the Oireachtas — and the same page numbers are maintained as in the original bound bi-lingual version.

A total of 200 full sets of the Statutes have been reprinted, 105 of which were ordered in advance of re-publication. In addition, there were a large number of advance orders for individual volumes by people with incomplete sets. The cost of a full set is £800 plus packing and delivery charge, obtainable only from the Law Society. □

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Attending the launch of the Reprinted Bound Volumes of the Acts of the Oireachtas, 1922-76, were (left to right): Mr. Brian Stokes, Joint Managing Director, Confidential Report Printing Ltd., Mr. Michael P. Houlihan, President of the Law Society, Mr. Justice Brian Walsh and Mr. Michael V. O'Mahony, Chairman of the Society's Publications Committee.

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Gifts and Distributions to U.K. Residents

by
Colin A. Chapman, Solicitor

A Press Release from the U.K. Revenue, following the recent Budget Speech of Sir Geoffrey Howe, confirmed that the United Kingdom Finance Act, 1981, has important effects upon gifts and distributions to beneficiaries resident in the United Kingdom from donors or settlements in the Irish Republic — in addition to the Exchange Control and other difficulties which already beset an Irish benefactor.

The value at which a U.K. resident beneficiary may acquire an asset from a non-resident donor or trust.

Section 90 of that Act introduced new anti-avoidance provisions which have material consequences for U.K. resident beneficiaries from an Irish donor or trust. The section was introduced to counter certain tax avoidance schemes (Reverse *Harrison v. Nairn Williamson Ltd.*, [1978] STC 67) but introduces what appears to be unfair treatment where a disposal is made by a non-U.K. resident person or trust in favour of a U.K. resident.

Normally, the acquisition cost of an asset is deemed to be the market value of the asset at date of acquisition. Now, however, where a U.K. resident acquires an asset from an "excluded person", the market value rule no longer applies.

An "excluded person" is defined to mean:—

(a) a person neither resident nor ordinarily resident in U.K.;
(b) a person exempt from U.K. C.G.T.;
(c) a Charity or Friendly Society;
(d) a person making a disposal for purposes of:—
  (i) an approved pension scheme which is exempt from U.K. C.G.T.;
  (ii) superannuation funds for employees outside the U.K.

The effect of this is that the U.K. resident beneficiary who receives a gift or a distribution from an Irish or other non-U.K. resident donor or trust receives the asset distributed at a "nil" value for U.K. Capital Gains Tax and, on a subsequent disposal of that asset, will be chargeable to U.K. Capital Gains Tax on the total value realised from such disposal. (Indexation does not help, as a multiple of nothing is still nothing!).

Examples

1. An Irish resident and domiciled person makes a gift of shares with a market value of, say, IR£30,000 (having obtained the appropriate Exchange Control permission) to a U.K.resident. The acquisition cost of the U.K. resident will be NIL and, therefore, on a disposal of the shares by him, the entire net proceeds will represent a chargeable gain.
2. Marketable securities valued at, say, £100,000 are held by Irish trustees upon trust for A for life, with remainder to B. B is now resident in England. On the death of A, if the trustees distribute the marketable securities to B *in specie*, B will receive the investments at a NIL base value for U.K. Capital Gains Tax purposes and, on subsequent disposal, will be chargeable to U.K. Capital Gains Tax on the full proceeds.

A distribution of Sterling cash from an Irish trust would not, however, give rise to this problem and consequently the trustees, in such circumstances, should convert the assets for distribution to the U.K. resident into Sterling (having obtained all appropriate Exchange Control approvals) prior to distribution.

This anti-avoidance section does not capture an inheritance by a U.K. resident beneficiary from the free estate of a non-U.K. resident and non-U.K. domiciled testator or intestate as, in such case, the deceased is deemed to have disposed of the asset on death at its market value to his personal representatives, whose acquisition is treated as the acquisition of the beneficiaries (Sec. 49, U.K. C.G.T. Act 1979).

Liability for U.K. Capital Gains Tax on capital payments from non-resident trusts.

Section 80 of the same U.K. Finance Act (1981) also changed the rules for the allocation of gains made by non-resident trusts which may be attributed to U.K. resident beneficiaries.

Prior to 5th April 1981, U.K. legislation was capable of imputing to potential trust beneficiaries resident in the U.K. the gains of overseas trusts of which they were potential beneficiaries. Surprisingly, Section 80 of the U.K. Finance Act, 1981, which modified this legislation, offers some opportunity for deferral of U.K. Capital Gains Tax in such circumstances. However, it does impose upon non-resident trustees the necessity for keeping proper records, in a form suitable for U.K. tax purposes.

The general scheme of the new rules is to attribute gains of non-resident trustees to beneficiaries who actually receive capital payments from such trustees.

If a settlor was domiciled in the U.K. at the time a settlement was made, or if he was so domiciled at the time a gain was made, then from and after 6th April, 1981, the gains of the settlement in each year are computed as if the trustees were resident or ordinarily resident in the U.K., but only attributed to a beneficiary when a distribution is made. Those gains, together with gains brought forward from earlier years (but excluding the annual exemption for trustees) which have not already been attributed to a

beneficiary, are regarded as trust gains for the year.

The "trust gains for the year" are then treated as chargeable gains accruing to any beneficiary of the settlement who actually received a capital payment from the trustees in that year, or received a capital payment from the trustees in earlier years in respect of which no trust gains were attributed. The chargeable gain is then attributed in proportion to the capital payment received by the beneficiary but the gain so attributed is not to exceed the payment received.

For example, under a non-resident settlement made in 1982, the trustees make gains of £10,000 in the year '83/'84 and then, in the following year, make capital distributions to two U.K. resident beneficiaries of £20,000 to beneficiary A and £60,000 to beneficiary B. The gains will be apportioned as to one-quarter to beneficiary A (£2,500) and three-quarters to beneficiary B (£7,500).

Note that a beneficiary is not chargeable to U.K. Capital Gains Tax unless he is domiciled in the U.K. at some time in the year in which he receives the benefit.

These rules apply to will trusts as well as settlements, but it should be borne in mind that if the settlor was not domiciled in the U.K. when he made the settlement or at the time the gains were made, then the old rules still apply — that the total gains of the non-resident trust may be apportioned annually between U.K. resident beneficiaries who are *likely* to benefit from the settlement. For example, if the beneficiaries of a non-U.K. resident discretionary settlement are the children and grandchildren of the settlor and under a letter of wishes the settlor has indicated to the trustees that he wishes the trust fund ultimately distributed to his grandchildren, then, if this letter of wishes is disclosed to the U.K. Revenue, they will apportion the gains between the grandchildren in equal shares; if it is not disclosed, then they are likely to apportion the gains of the settlement between *all* the resident beneficiaries each year.

There are a large number of Irish-resident donors and trusts with potential beneficiaries resident in various parts of the United Kingdom. The Double Taxation Agreements at present in force do not appear to cater for the problems arising. The Taxation Committee of the Law Society is considering the problem with a view to making representations in appropriate quarters to see if inequities can be removed.

U.K. tax is a complex and specialised subject and, quite apart from the questions of Capital Gains, there may be Capital Transfer Tax and other implications to be borne in mind. Irish professional advisers would be well advised to seek assistance from suitably qualified U.K. colleagues before taking decisions and making distributions to beneficiaries resident in the U.K. □

Addendum

Since this article was written, the U.K. General Election necessitated the deletion of a number of sections from the U.K. Finance Bill 1983, including sections confirming:—

(i) That in most cases the acquisition cost of trust-assets to which a beneficiary becomes absolutely entitled as against non-resident trustees is restricted to the consideration, if any, given by such beneficiary;

(ii) The liability in certain circumstances of U.K. resident beneficiaries for capital gains tax on gains made by non-resident trustees with the definitions of 'settlement' and 'settlor' broadened.

Presumably, the new government will incorporate similar provisions in the next U.K. Finance Bill.

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BOOK REVIEW

Clerk & Lindsell on Torts, Fifteenth Edition, Sweet & Maxwell Ltd., London. General Editor: R.W.M. Dias. cc/xiv + 1417 pp. £65.00 (Sterling) net.

This new edition of an established masterly work follows seven years after the fourteenth edition. Despite considerable organisational rearrangement the format will be familiar to tort lawyers: over 1400 pages divided in 29 chapters contributed by seven distinguished editors with the whole under the General Editorship of Mr. Dias. Sir Arthur Armitage, who had been a joint General Editor of the previous edition, is now a Consultant Editor. Amongst the largely Cantabrian team of Editors Professor A.I. Ogus and Mr. J.W.A. Thornely have replaced Mr. J.A. Jolowicz. The law is stated as at August 1, 1981.

Since 1981 Irish lawyers have been fortunate to have to hand McMahon & Binchy's "Irish Law of Torts" which has considerably lessened the dependence on overseas (in the main English) monographs on the subject. However, Clerk & Lindsell provides a convenient companion volume in the Irish law library; several chapters (e.g. the final three on intellectual property) are of a specialist nature while the depth of treatment throughout places the volume in the category of a reference work. (Indeed, this writer freely confesses that, although a review copy has been available to him for some months and is now considerably annotated, not every page has been read). Clerk & Lindsell provides a very full, accurate and lucid statement of English law incorporating not ungenerous references to Commonwealth and Irish law. McMahon & Binchy expound not only an exhaustive treatment of Irish law but supplement it with a liberal comparative treatment of tort law in other Common Law jurisdictions, especially in North America, on a scale that is not attempted in Clerk & Lindsell. Nor does the latter rival the successive editions of Salmond & Heuston, under the distinguished editorship of Professor Heuston, in its generosity of reference to Irish law, both statutory and judicial. In particular, the new edition of Clerk & Lindsell might have considered some recent Irish developments worthy of note in the wider Common Law world, e.g. *Connolly v South of Ireland Asphalt Co. Ltd.,* [1977] IR 99, S.Ct., *Conole v Redbank Oyster Co. Ltd.* [1976] IR 191 S.Ct., *Cotter v Ahern unreported,* Finlay P, 1977 or *Garvey v Ireland* [1981] IR 75, S.Ct (as to exemplary damages).

Reference could also have been made to *Siney v Dublin Corporation* [1980] IR 400, S.Ct. which might have been compared with the very important but difficult, decision of the House of Lords in *Anns v Merton LBC* [1977] 2 All ER 492. In some instances, however, the inadequacies of Irish law reporting do not help.

However, it would be churlish and insular not to recognise the achievement of the present edition. Full treatment has been accorded not merely to the plethora of judicial decisions since the last edition but also to statutes enacted in that period some of which are difficult e.g. the Fatal Accidents Act 1976, the Torts (Intereference with Goods) Act, 1977, the Unfair Contract Terms Act, 1977, the Civil Liability (Contribution) Act, 1978, the Limitation (Amendment) Act, 1980, and a considerable body of labour legislation. The principal features of the textual reorganisation mentioned above take cognizance of the burgeoning topic of Negligence, now expanded into two chapters; Causation and Remoteness, formerly dealt with under Damages, are now subsumed neatly in the second Negligence chapter. Those on the kindred subjects of Occupiers Liability and Breach of Statutory Duty follow immediately.

The single most significent development since the previous edition of Clerk & Lindsell was, however, the publication of the Report of the Royal Commission on Civil Liability and Compensation for Personal Injury under the Chairmanship of Lord Pearson. Although there is considerable reference to Pearson in the text, some of the treatment is surprisingly uncritical, especially in the light of Westminster's lukewarm reception of the Report.

Chapter 15 and 16 of Clerk & Lindsell on Economic Torts, under the hand of Professor Lord Wedderburn of Charlton (formerly K. W. Wedderburn) are, perhaps, two of the most attractive in the volume. Even allowing for his readily discernible political views, the author has an almost unrivalled clarity and didactic ability in handling a notoriously difficult subject matter. Despite the major statutory divergence between England and Ireland since 1974, the chapters provide a most useful update to the learned author's invaluable monograph, "The Worker and the Law", published in 1971 and now, alas, out of print, at least in paperback.

In keeping with the publisher's tradition in its series, "The Common Law Library", the present volume is magnificently produced with full tables and index. As a reference work, complementary to McMahon & Binchy in the terms described above, it would prove a most useful addition to an Irish law library although the price is liable to deter at least the younger practitioner.

Patrick J. C. McGovern

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Tourism Symposium in Galway

There was a strong representation of the tourism and hotel industries, as well as solicitors, at the symposium organised by the Law Society on "Tourism and Public Protection" in Galway on 22nd May. The active participation of members of the audience in the question-and-answer periods reflected the interest of those attending in the subject, and their reaction to the speakers.

The symposium was opened by Mrs. Moya Quinlan, Past-President; and Brian Claffey (Galway) and Raymond T. Monahan (Sligo), acted as chairmen of the sessions.

The Law Society was warmly thanked by Michael Brennan, general manager, P. V. Doyle Hotels Group, and Ray Joyce, traffic development manager, Shannon Free Airport Development Company, for organising the symposium and providing a forum for a discussion of views by sectors of the industry, and the opportunity of meeting with members of the solicitors' profession.

Speakers were Niall Reddy, executive director-development, Bord Failte; Thomas J. Lonergan, chief executive, Irish Travel Agents' Association; Richard Birchall, managing director, The Birchall Company Ltd., advertising agents; and Michael V. O'Mahony, solicitor. □

Association Internationale des Jeunes Avocets

The Annual Congress of AIJA — Young Lawyers International Association — will be held in Helsinki from 29th August to 2nd September 1983.

The topics chosen for the Congress are the following:

1. Divorce — Recognition of Foreign decrees.
2. The Rights of the Employee.
3. East/West Trade.
4. The Legal Profession and Tomorrow's Client.

Further details of the Congress can be obtained from:

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

C.C.B.E. MEETING IN DUBLIN

A two-day Bi-Annual Meeting of the Consultative Commission of the Bars and Law Societies of the European Communities was officially opened at the Berkeley Court Hotel, Dublin, on Thursday, 21st April, 1983. Ireland was represented at the meeting by Mr. John Cooke, S.C. of the Bar Council, and Mr. Raymond T. Monahan of the Incorporated Law Society of Ireland.
(From left): Mr. Jean-Reignier Thys, Secretary General of the C.C.B.E.; Mr. Louis Schiltz, President of the C.C.B.E.; Mr. Michael P. Houlihan, President of the Incorporated Law Society of Ireland and Mr. Patrick McEntee, S.C., Chairman of the Bar Council of Ireland.

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Law Society's 1983 Journalism Award

The Incorporated Law Society Award 1983, for students attending the School of Journalism at the College of Commerce, Rathmines, has been awarded to Deirdre Poole, of Blackrock, Co. Dublin. Claire Grady, of Westport, and Tim Healy, Finglas West, Dublin, were highly commended for their submissions.

Ms. Poole received the Award (£100) from the President of the Law Society, and the piece of plate associated with the award will be presented at the formal College prize-giving ceremony later in the year. Ms. Grady and Mr. Healy will also receive cash awards.

The standard of entries was substantially higher than in 1982 and the submissions showed a good enough approach to the subject treated — all with a legal interest. Research was good and it was obvious that members of the legal profession and other informed people had co-operated with the young journalists in answering queries in the course of the students' investigations. The winning entry, which will appear in a later edition of the Law Society GAZETTE, covered the involvement of solicitors and barristers in the work of the Employment Appeals Tribunal.

The adjudicating committee, representing the Law Society and the College, considers that the 1983 submissions indicate that the purpose of the Law Society Award — the stimulating of an interest among entrants into journalism in presenting informative articles on legal matters — is being achieved. □

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For your Diary . . .

29 August — 2 September, 1983. Association Internationale des Jeunes Avocats. Annual Congress, Helsinki. Topics include Divorce — Recognition of Foreign Decrees, The Rights of the Employee, East/West Trade, The Legal Profession and Tomorrow's Client. Further details of the Congress can be obtained from Michael W. Corrigan, Solicitor, Eugene F. Collins & Son, 61 Fitzwilliam Sq., Dublin 2.

14/15 November, 1983. International Bar Association. London Law Office Management Seminar. Full programme and details from Dawn Ives, Conference Assistant, International Bar Association, 2 Harewood Place, London W1R 9HBB, England. Tel. (01) 629 1206.

HANDWRITING

Mr. T. R. Davis, M.A. (Oxon.), B. Litt., Department of English, University of Birmingham, P.O. Box 363, Birmingham B15 2TT, England, will undertake the examination of handwriting for forensic purposes (anonymous letters, forgeries, etc). For further details contact him at the above address or phone either Birmingham (021) 472-1301 ex. 3081, or Dublin 684486.

TAX LOOSE-LEAF SUPPLEMENTS

1. THE TAXES ACTS
   THE FIFTH SUPPLEMENT to the loose-leaf volumes "The Taxes Acts" has now been published. The supplement embodies the amendments made by the Finance Act, 1982.

2. LAW OF VALUE-ADDED TAX
   REVISION No. 1 of the loose-leaf volume "Law of Value-Added Tax" is now available. The material in this revision incorporates the changes effected by the Finance (No. 2) Act, 1981, Finance Act, 1982 and Statutory Instruments Numbers 428 of 1981 and 279 of 1982.

   Copies of the supplements may be purchased from the Government Publications Sale Office, Sun Alliance House, Molesworth Street, Dublin 2.

   Price:
   Taxes Acts Supplement Price £8.15 Postage extra.
   Value-Added Tax Supplement Price £4.45 Postage extra.

Revenue Commissioners, Dublin Castle April, 1983.

INCORPORATED LAW SOCIETY OF IRELAND
Final Examination — First Part

The Society wishes to recruit an assistant examiner for each of the following subjects of the above examination namely:—

Tort — Contract — Property — Constitutional Law — Company Law — Criminal Law

Solicitors who feel themselves qualified to undertake this work should write to the undersigned supplying a curriculum vitae in each case.

Ms. Jean Sheppard,
Education Officer,
Incorporated Law Society of Ireland, Blackhall Place, Dublin 7.

LAW SOCIETY JOURNALISM AWARD 1983

Mr. Michael P. Houlihan, President of the Incorporated Law Society, congratulating the winner of the 1983 Law Society Journalism Award, Miss Deirdre Poole, Leopardstown, Co. Dublin. Also pictured Miss Claire Grady, Quay Road, Westport (left) and Mr. Tim Healy, Finglas, Co. Dublin, whose entries were very highly commended. The winning essay will be published in the June Gazette.

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Correspondence

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

12th April 1983

Dear Sir,

On behalf of Amnesty International, I would like to draw your readers' attention to the unjust detention of a Zambian lawyer. Nkaka Chisanga Puta was served with a one year detention order two weeks after he was detained by police. Such orders can be continually renewed and detainees have no effective means of challenging them.

The authorities stated Mr. Puta was held because of efforts to release prisoners charged with plotting the overthrow of the government. There has been no formal charge. I believe he is being held because he defended his uncle, a former government minister, subsequently charged with treason. In November 1980 he successfully applied for his uncle's release on a writ of habeas corpus. (he was immediately re-detained under a new order).

This and other attempts to secure his client's release have embarrassed the Zambian authorities. Though a habeas corpus action on Mr. Puta's behalf failed in the High Court in December 1981, the judge did find that he had been subjected to inhuman treatment and ordered that he be compensated.

The present order expires in July this year; it is likely, however, that it will be renewed unless pressure can be brought on the Zambian government, and President Kaunda in particular, to release him. He is being held in Mpina Prison, Kabwe.

I urge members of your Society to appeal to President Kaunda on behalf of Nkaka Chisanga Puta. Please send courteous letters to:

His Excellency President Kenneth Kaunda,
State House,
Lusaka,
Zambia.

Yours sincerely, Jean Cross,
AMNESTY INTERNATIONAL
Liberty Hall, Dublin 1

The Editor,
Incorporated Law Society of Ireland Gazette,
Blackhall Place,
Dublin 7. 25.5.83.

Dear Sir,

My attention has been drawn to the cover article in your April issue where you discuss the sequel to Fairview Park and certain aspects of the case. As Declan Flynn's mother you might permit me to comment.

You say the furore following the sentence confused and obscured important issues. The most important issue was never obscured. Judge Gannon set at liberty five people who on their own admission made a habit (and presumably a tidy profit) of beating people up and who beat my son to death.

My own recollection of the case is that the Judge having spent three quarters of an hour indicating the gravity of the offence, did say why he proposed to suspend the sentences. The grounds cited by him were: firstly, that the gang element in the assault outdid individual participation and accordingly diffused individual culpability. He should explain his logic to my son in Glasnevin who was the focus of combined attention of the said individuals when he fought for his life. My understanding was that people who acted in consent or conspired to commit a crime were treated to a heavier hand of the law than the solitary criminal. The reverse was applied in this case. The second reason cited for a non-custodial sentence was the character evidence. When evidence of the defendants' angelic characters was being given by a procession of tame clergymen et al, it was remarked by the Judge, if memory serves me correctly, that during the period the character witnesses were forming such good impressions of them, some of the defendants were regularly assaulting and robbing people. What value should one therefore attach to such character assessments? Yet the Judge found great merit in them as mitigating factors.

You refer in your article to the deplorable standard of the Dáil debate which I translate to mean that when legal personalities are subject to public criticism it's "close ranks time". This seems to be borne out as the tenor of the article is by and large a defence of the Judge's inexplicable sentence.

If T.D.'s on both sides of the house were vociferous perhaps it was because of the obvious inequity in the sentence handed down and their impotence in the matter.

Your final paragraph implies that justice was done while suggesting it was not seen to be done. Justice was not done and was seen to be not done — hence the furore.

Mary Flynn,
183 Swords Road,
Whitehall,
Dublin 9.

Professional Information

(continued from p. 110.)

Miscellaneous

For Sale. Bound set of the Irish Reports for 1961-1981 (inclusive). Excellent condition. £700.00. Also unbound volumes for 1919-25 (inclusive). Moderate condition. £50.00. Apply Box No. 059.

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

Dated 15th day of June, 1983.

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

1. REGISTERED OWNER: James Cahill, Folio No.: 29071; Lands: (1) Ballaghveny, (2) Ballaghveny; Area: (1) 4a.0r.12p; (2) 28a.3r.20p. County: **TIPPERARY.**

2. REGISTERED OWNER: Mary Kirwan (deceased); Folio No.: 11583; Lands: Clogher (part); Area: — County: **LOUTH.**

REGISTERED OWNER: Owen McGrath; Folio No.: (1) 4252, (2) 4253; Lands: (1) Ballagan, (2) Ballagan; Area: (1) 9a.2r.15p; (2) 3a.1r.19p.; County: **LOUTH.**

4. REGISTERED OWNER: Thomas J. Staunton; Folio No.: 8847; Lands: Ballynacarrig; Area: 1a.2r.5p.; County: **WICKLOW.**

5. REGISTERED OWNER: Vivian C. Matthews, Folio No.: 34518L; Lands: of 28 Stillorgan Wood, Co. Dublin; Area: — County: **DUBLIN.**

6. REGISTERED OWNER: Michael Hannan and Margaret Mary Hannan, Folio No.: 7852; Lands: Caherdavin; Area: 28a.0r.28p.; County: **LIMERICK.**

7. REGISTERED OWNER: William Rowland, Folio No.: 19472L; Lands: situate in the Townland of Palmerstown Upper in the Barony of Uppercross containing 0a.0r.14p. shown as plan 226 on the Registry Map (O.S. Supply Map N3 to 17/18.;) Area: 0a.0r.14p.; County: **DUBLIN.**

8. REGISTERED OWNER: Elizabeth Mulhare, Michael Mulhare, Elizabeth Mulhare, Annie Mulhare, Bridie. Deegan and Andrew Mulhare, Folio No.: 140; Lands: Courtwood; Area: 67a.3r.21p.; County: **LAOIS.**

9. REGISTERED OWNER: John Loughman (deceased), Folio No.: 32232; Lands: Curraghmarky; Area: 18a.0r.32p.; County: **TIPPERARY.**

10. REGISTERED OWNER: Gerald Fitzell; Folio No.: 4227; Lands: Togherbane; Area: 20a.3r.39p.; County: **KERRY.**

11. REGISTERED OWNER: John White, Cloghogue, Castlebaldwin, Boyle, Co. Roscommon, Folio No.: 19889; Lands: (1) Cloghogue Upper, (2) Cloghogue Upper, (3) Treanscrabbagh, (4) Treanscrabbagh; Area: (1) 12a.2r.9p., (2) 12a.2r.12p.; (3) 8a.0r.25p., (4) 9a.0r.34p. County: **SLIGO.**

12. REGISTERED OWNER: Terence Clancy, Folio No.: 10358; Lands: (1) Ballyknockan Upper, (2) Ballyknockan Upper; Area: (2) 6a.1r.0p.; County: **WICKLOW.**

13. REGISTERED OWNER: Clifford J. Keane (deceased), Folio No.: 739L; Lands: Wicklow/Arklow Road; Area: 0a.0r.21p.; County: **WICKLOW.**

14. REGISTERED OWNER: Patrick Stafford, Folio No.: 2077; Lands: Trimmer; Area: 4a.0r.28p.; County: **WEXFORD.**

15. REGISTERED OWNER: John Irish, Folio No.: 1450F; Lands: (1) Ballykillaboy, (2) Melville, (3) Melville, (4) Ballykillaboy; Area: (1) 21a.2r.25p.; (2) 82a.1rr.39p; (3) 16a.0r.12p.; (4) 21a.0r.0p.; County: **KILKENNY.**

16. REGISTERED OWNER: James Finnegan, Folio No.: 14416; Lands: (1) Lobinstown, (2) Lobinstown; Area: (1) 6a.2r.19p; (2) 11a.0r.24p; County: **MEATH.**

17. REGISTERED OWNER: Patrick Mulvihill, Folio No.: 19524; Lands: Moyvane North; Area: 0a.0r.6p.; County: **KERRY.**

18. REGISTERED OWNER: William Moran, Folio No.: 23682; Lands: Cleggarnagh East 14a.3r.14p, Cleggarnagh East 20a.2r.30p.; Area: as above; County: **MAYO.**

19. REGISTERED OWNER: Right Rev. Bartholomew Monsignor Fitzpatrick, Right Rev. Michael Monsignor Hickey, Very Rev. Francis Joseph Wall, Most Reverend Edward Joseph Byrne, Reverend Patrick J. McGrath, Reverend Patrick Dunne, Folio No.: 759; Lands: Daneswell or Crossguns; Area: 0.809 hectares being the property comprising the Church of St. Columba's and surrounding grounds at Iona Road. **CITY OF DUBLIN.**

20. REGISTERED OWNER: Nora Quinlan, Folio No.: 4819; Lands: Knockduff Upper; Area: 26a.3r.32p.; County: **CORK.**

21. REGISTERED OWNER: William John Crowe Williamson, Folio No.: 769R: Lands: Cordevlis; Area: 27a.2r.25p.; County: **MONAGHAN.**

22. REGISTERED OWNER: Eugene McGillycuddy, Folio No. 6664F; Lands: Ownagarry; Area: 0.281 acres; County: **KERRY.**

23. REGISTERED OWNER: Arthur Titer, Folio No.: 20485; Lands: Callanfersy East; Area: 48a.2r.24p.; County: **KERRY.**

24. REGISTERED OWNER: Patrick Kenny, Folio No.: 14443 & 14447 (now closed to 2949F); Lands: (1) Kilgarvan Glebe, (2) Kilgarvan Glebe; Area: (1) 10a.3r.24p. (F.14443), (2) 24a.2r.6p. (F.14447); County: **WESTMEATH.**

Lost Wills

Cryan, Thomas, deceased, late of Knocknaskeagh, Gurteen, Ballymote, County Sligo. Would any person having knowledge of a Will of the above named deceased who died on the 25th March, 1983 please contact Johnson & Tighe, Solicitors, Ballymote, Co. Sligo.

Enright, John F., deceased, late of 29, Trimlestown Avenue, Boosterstown, County Dublin, retired Bank Manager and retired Irish Permanent Building Society Manager who died at Aut Even Hospital, Kilkenny, County Kilkenny, on May the 4th 1983. Would anyone having any knowledge of the whereabouts of a Will made by John F. Enright kindly contact James Fagan and Company, Solicitors, 57/58 Parnell Square, Dublin 1, reference MK.

Doyle, Mrs. Anne, late of Haughton Hospital, New Ross in the County of Wexford, Widow and formerly of Dranagh, Caim, Enniscorthy, County Wexford, Parkton Nursing Home, Enniscorthy, County Wexford and Dr. Cuddigan's Nursing Home, Enniscorthy, County Wexford. Will any person having knowledge of a Will dated later than 18th June, 1970 of the Deceased who died at the Haughton Hospital, New Ross in the County of Wexford on 1st day of December, 1981 please communicate with Henry J. Frizelle, Solicitor, Slaney Place, Enniscorthy, Co. Wexford.

Tracy, John, late of Boherboy, Saggart, Co. Dublin and 14, Pim Street, Dublin 8. Will any person having knowledge of the whereabouts of a Will of the above-named deceased who died in July 1982, please communicate with St. John M. Donovan, Solicitor, 45, La Touche Park, Greystones, Co. Wicklow — Telephone: 800629/875706.

Boles, Comdt. Joseph (Retired) late of 68 Irishtown, Clonmel, County Tippeary and formerly of Costume Barracks, Athlone. Will any person having knowledge of the whereabouts of a Will of above-named deceased who died on or about the 8th May 1983 please contact John Shee and Company, Solicitors, Parnell St., Clonmel.

Culligan, Clare, deceased, late of Letter Cadamstown, Birr in the County of Offaly, Spinster. Will any person having knowledge of a Will of the above named deceased who died on the 19th February, 1983, please communicate with Thomas W. Enright, Solicitor, John's Place, Birr, Co. Offaly. Phone Birr 293 or 252.

Rafferty, Patrick, deceased, late of 84 Griffith Road, Finglas East, Dublin 11. Will any person having knowledge of a Will of the above named deceased made after 25 February, 1982, please contact Betsy Nagle, Solicitor, Croskerrys, 35 Merrion Square, Dublin 2.

(continued on p. 109)

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 5. June 1983

Tourism and Public Protection Symposium, Galway, 22 May 1983

Attending the Symposium were (from left): Mr. Brian Claffey, Solicitor, Galway, Mrs. Moya Quinlan, Past President of the Law Society, who opened the Symposium, and Mr. Niall Reddy, Executive Director—Development, Bord Fáilte.

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GAZETTE

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Comment . . .

In a broad sense, few solicitors need to be told of the problems of delays and expenses associated with private house purchase transactions. Their appreciation and understanding of those problems is, however, and necessarily, subjective — confined to their particular difficulties.

The recent Report by An Foras Forbatha* adds a new, albeit contentious dimension to the problems, resulting as it does from a three-year survey, involving data obtained from the Law Society, individual firms of solicitors, building societies, the Land Registry, the Registry of Deeds and the Valuation Office. Some practitioners may be tempted to criticise certain recommendations, but to do so would be a subjective reaction, discounting the mass of facts, figures and opinions which the Foras Forbatha team has analysed in the course of its investigations.

To be told that a typical mortgage transaction with a building society takes five months from application to issue of cheque will come as a surprise to many, but this conclusion is derived from 197 transactions, taken from the three main building societies. In fact, of the 197 samples, 37% of cases took 6 months, 23% took 8 months and 15% took more than 10 months.

In a brief note it is impossible to mention all the conclusions and recommendations of the Report. Most will please but some may not. Few will argue with the recommendation that duplication of solicitors be avoided by using one solicitor to represent both purchaser and lending agency. All must support the suggestion that rates of stamp duty on house purchases be substantially covered. The recommendation that attendance in person at the Registry of Deeds should no longer be required can only merit a standing ovation.

The underlying concern of the Report is clearly that much of the delay and a consequent proportion of the expense of private house purchase transactions is caused by ever-increasingly complex bureaucratic requirements and procedural inefficiencies — in which the solicitors' profession must take its share — but by no means the entire — of the blame.

Every solicitor should purchase and study this Report. Apart from considering the matter of putting one's own house in order, every practitioner should be in a position to take part in the informed debate which the subject merits and must have. The purchase of private houses is of equal importance to clients and solicitors and both have an equal interest in ensuring that these transactions are carried out as quickly and as inexpensively as possible. □

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Criminal Due Process and the Definition of Crime

by
T. A. M. Cooney, Lecturer in Law, U.C.D.

IN this article, I will attempt to sketch the requirements of criminal due process which limit the legislative power to define a crime. My focus will concentrate on the principle of legality and the requirements of *actus reus, mens rea* and their coincidence.I will also argue that the principle of proportionality should be regarded as a limitation on the legislative definition of crime. This is, therefore, an effort to set the stage for the rethinking of the criminal law in constitutional terms.

The presumption of innocence: a substantive constitutional imperative

With the recent increase in the volume of cases concerning the constitutional aspects of criminal procedure, the Courts have enunciated a variety of protections for those enmeshed in the criminal process.[1] This constitutional awakening was inspired by the Supreme Court's divination, in *People(Attorney General) v. O'Callaghan,*[2] of the true nature of our system of criminal justice.

In *O'Callaghan,* the Supreme Court reaffirmed the traditional holding that the fundamental test in deciding whether to allow bail was the probability of the applicant evading justice. As Walsh J. declared, "the object of fixing terms of bail is to make it reasonably assured that the applicant will surrender at his trial".[3] The Court rejected the submission that bail should be withheld when the prosecution was of the opinion that there was a likelihood of the commission, by the accused person, of offences while at liberty pending trial. Ó Dálaigh C. J. declared that the reasoning underlying this submission was a denial of "the whole basis of our system of law". He inveighed against its transcending "respect for the requirement that a man shall be considered innocent until he is found guilty" and its attempt "to punish him in respect of offences neither completed nor attempted".[4] In this regard, Walsh J. was also trenchant:

> "The object of bail is neither punitive nor preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases "necessity" is the operative test. *The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial.* In the modern complex society in which we live the effect of imprisonment upon the private life of the accused and of his family may be disastrous in its severe economic consequences to him and his family dependent upon his earnings from day to day or even hour to hour. It must also be recognised that imprisonment before trial will usually have an adverse effect upon the prisoner's prospects of acquittal because of the difficulty, if not the impossibility in many cases, of adequately investigating the case and preparing the defence".[5]

O'Callaghan understood the accusatorial nature of our system of criminal justice in which the individual is adjudged to be the ultimate entity of moral value. It would be rewarding to elaborate the meaning of this in the context of the case. Firstly, the presumption of innocence, the fundamental concept of our accusatorial criminal process, constitutes a guarantee that the individual may act according to his or her own dictates in any area of permitted liberty free from the arbitrary intrusion of official power. The individual who accuses another of an offence cannot depend on his accusation alone to transfer to the accused the burden of proving his innocence but must first produce reasonable evidence of the past commission of an offence by the accused and prove the latter's guilt beyond reasonable doubt. "It represents a commitment to the proposition that a man who stands accused of crime is no less entitled than his accuser to freedom and respect as an innocent member of the community. Only those deprivations necessary to assure the progress of the proceedings pending against him — deprivations which do not rest on any assumption of guilt — may be squared with this basic postulate of dignity and equality".[6]

Secondly, the form of preventive detention favoured by the State was constitutionally infirm because it relied on an anticipated danger rather than on a free choice to violate the law, and also because it depended on a prediction about the likelihood that the accused would commit offences if released on bail rather than on a due assessment of events completed by the accused. The State's submission went "beyond involuntary detention of the uncontrollably dangerous and would imprison persons presumptively able to choose between violating and obeying the prescriptions of the criminal law. To imprison such persons on the assumption that they will make the wrong choice impairs personal autonomy in a way that incarceration of the dangerously ill does not". And since our criminal law proceeds on the moral premise that individuals make blameworthy choices in engaging in certain criminal acts, "the preventive detention of an individual believed

capable of conforming to society's demands entails a peculiarly offensive anticipatory condemnation".[7]

Thirdly, the Court recognised that preventive detention would be so unreliable that it would fail to diminish as far as possible the chances of an innocent person being convicted. Walsh J. noted that, in most cases, "even of persons with known criminal records, an attempt to predict who is likely to commit an offence while awaiting trial on bail can never be more than speculation".[8] This makes preventive detention all the more dangerous for the innocent accused. The reason is that the form of detention involves a self-validating prediction. The system will appear to fail only when it releases persons who prove to be worse risks than anticipated; but when the system detains persons who could safely have been released, its mistakes will be hidden. Because no accused in detention will commit an offence in public, each decision to detain will confirm the prediction that led to the detention, while any decision to release pending trial may be refuted by its outcome.

The point of these comments on *O'Callaghan* is to illuminate the judicial recognition that each individual facing the criminal process has a right to equivalent respect as an end rather than a means. The Constitution attests this normative premise concerning the individual — in its Preamble and Fundamental provisions — as the matrix for criminal due process. To those who take constitutional principle seriously and for whom, therefore, the moral imperative of personal autonomy is a shaping force, the priority of rules and procedures that respect the dignity and freedom of the individual over any advantages obtained by deviating from them must be accepted. It is proposed briefly to describe the notion of criminal responsibility through this constitutional lens.

The principle of legality: Nullum crimen sine lege

Article 15 of the Constitution emphasises the legislative role in the definition of offences and penalties. The requirement of prospectivity and clarity of definition in criminal law emanates from the Constitution. Article 15.5 prohibits the legislature from declaring "acts to be infringements of the law which were not so at the date of their commission". The doctrine of criminal due process has given voice to a doctrine of clarity and specificity regarding criminal statutes. The commitment to the requirement of fair warning is encapsulated in the principle of legality: there must be no offence or punishment save in accordance with established, reasonably specific, and fairly ascertainable enacted law.[9]

It is clear since *King v. D.P.P.*[10] that violation of the principle of legality is a constitutional defence to a prosecution. In *King* the claimant had been convicted of being a "suspected person", found in a certain public place, loitering with intent to commit a felony, i.e. to steal, in breach of s. 4 of the Vagrancy Act, 1824.[11] Under the statute, no proof of any act showing intent to commit a felony was necessary. McWilliam J. was mindful that the expression "loitering" was vague, and,

> "without other ingredients, could not possibly constitute an offence in any way, so that doing what is a perfectly lawful act on the part of any other citizen may be the foundation of an offence on the part of a suspected person or a reputed thief, and as no proof of any act showing intent to commit a felony is necessary, a person could be convicted for doing an otherwise lawful act".[12]

However, McWilliams J. voided the relevant part of s.4 of the 1824 Act on the grounds it denied the claimant a fair trial, as the provision diluted the integrity of the guilt-eliciting process, and trenched upon his right to move freely in public without intruding on others. McWilliam J.'s decision was affirmed in the Supreme Court.[13] The specified part of s.4 of the 1824 Act was held to be violative of the requirement of clarity and specificity mandated in view of Articles 38.1, 40.4.1°, 40.1 and 40.3 of the Constitution. Henchy J. adjudged that the impugned part of s. 4 did not meet even the elementary prerequisites of adequate crime definition. His opinion was that,

> "the ingredients of the offence and the mode by which its commission may be proved are so arbitrary, so vague, so difficult to rebut, so related to rumour or ill-repute or past conduct, so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature, so prone to make a man's lawful occasion become unlawful and criminal by the breadth and arbitrariness of the discretion that is vested in both the prosecutor and the judge, so indiscriminately contrived to mark as criminal conduct committed by one person in certain circumstances when the same conduct when engaged in by another person in similar circumstances would be free of the taint of criminality, so out of keeping with the basic concept inherent in our legal system that a man may walk abroad in the secure knowledge that he will not be singled out from his fellow-citizens and branded and punished as a criminal unless it has been established beyond reasonable doubt that he has deviated from a clearly prescribed standard of conduct, and generally so singularly at variance with both the explicit and implicit characteristics and limitations of the criminal law as to the onus of proof and mode of proof, that it is not so much a question of ruling unconstitutional the type of offence we are now considering as identifying the particular constitutional provisions with which such an offence is at variance".[14]

The idea that a conviction without fair warning to the individual is unconstitutional raises the problem of legality: an enactment which criminalises conduct but which is incapable of being obeyed is not "law" at all. As Lon Fuller opinioned, "to speak of governing conduct today by rules that will be enacted tomorrow is to talk in blank prose".[15] It is necessary to justify the requirement of particular statutory clarity. Firstly, vague penal statutes are objectionable because they fail to provide enforcement agents with adequate guidance regarding the precise ambit of the prohibited conduct. Thus they furnish such agents with excessive discretion over whether to initiate a prosecution. Secondly, it vindicates the priority of constitutionally protected conduct. The individual who is uncertain about the applicability of a vague criminal provision to his or her protected activity might be inhibited from exercising his or her, constitutional rights. *King* intimates that the courts will apply an exacting level of review to such a statute. Thirdly, the protections accorded the individual in criminal process, for example, inquiry rights at trial, might count lightly in a case based on a complex set of facts, if the crime involved was vaguely defined. Fourthly, the most important justification reflects

a general principle of fairness to individuals who are criminal defendants. In this respect the cryptic rationale propounded by Holmes J.in *McBoyle v. United States*[16] is apposite:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the law should be clear".

This may be explicated in the terms underpinning *O'Callaghan.*[2] Within its jurisdiction the State constitutionally monopolises the legitimate use of force. Criminal laws in the ordinary course of things, are backed up by coercive penalties which are viewed as reasonably due to those who fail in certain ways to comply with prescribed standards. The infliction of such punishments, as imprisonment and fine, demands an analysis of the principles of fairness which ought to govern their application. The goal would be to achieve the effective operation of the criminal law intended to secure compliance with standards of a reasonable community life. In view of Articles 40.1 and 40.4.1°, as informed by the preamble of the Constitution, this effort must be consistent with respecting individuals as ends and not as means. The dignity and freedom of individuals must be guaranteed in the sense that they are assured that they have the liberty and opportunity to arrange their lives in accordance with their conception of freely chosen ends. Accordingly, individuals must be accorded the greatest equal liberty and opportunity to ascertain what precisely is subject by law to the taint of criminality. Criminal standards that are so defined that all individuals are given the greatest equal liberty and opportunity to govern their behaviour in compliance with the standards accord equal respect to each individual as an end in himself. However, a vague and overbroad criminal proscription violates this basic principle.

The conditions of criminal responsibility: actus reus and mens rea

In the criminal setting, the word "responsibility" conveys the idea of being blameworthy under applicable legal standards for some action or class of actions. Above, the requirement that the applicable legal standards be fairly ascertainable, was examined. In this part the conditions of criminal responsibility, are further described. The principle of legality emphasises the primacy of the individual as a responsible moral agent. This subjective focus has been sustained in recent decisions emphasising the mental factors that figure in voluntary choice and personal blameworthiness.[17] It is suggested that these are precisely the factors that a constitutional theory reaffirming individual moral autonomy should stress. Thus the requirements of *actus reus, mens rea* and their coincidence are considered below.

(a) Actus reus

The requirement of *actus reus* for culpability in the criminal law is guaranteed by a number of consitutional provisions which either expressly or implicitly exclude certain bases of criminal responsibility. For example, Article 44.2 of the Constitution would vitiate the basis of any law proscribing the exercise of a religious faith. Furthermore, in *King,* the punishment of an individual for a mere personal condition, as opposed to any act or ommission, was assailed successfully. There the Supreme Court struck out a statute which permitted the punishment of a person who had been convicted of being a "suspected person", which meant a person having previous convictions, found loitering. It will be recalled that Hency J. inveighed against the ingredients of the offence as being arbitrary, vague, virtually irrebutable, so related to reputation, *"so ambiguous in failing to distinguish between apparent and real behaviour of a criminal nature"*,[14] that they were plainly unconstitutional. This decision underpins the insight that the concept of innocence in this legal system is a substantive constitutional one. The requirement of *actus reus* requires voluntary conduct as a condition for the imposition of punishment; and conduct may involve an act or omission or possession.

It was noted earlier that criminal due process prescribes that the individual be considered as a responsible moral agent. Articles 40.1 and 40.4.1° of the Constitution, as informed by the Preamble, were interpreted as mandating that the individual's liberty and opportunity to comply with the law and predict the consequences of his or her actions be maximised. The notion of *actus reus* guarantees the individual liberty from criminal punishment unless he or she has freely chosen to violate a law which rests on a constitutionally adequate basis. As a core feature of crime definition it assures the greatest equal liberty to all in planning their conduct and assessing the legal consequences of that conduct. Thus it respects the individual as an end rather than a means. In its operation it evinces a concern for evidence of personal intention to violate a criminal proscription, a concern that such intentions be manifest in provable conduct, and a concern that the legislature be seen to confine proscriptions within constitutionally permissible limits.

(b) Mens rea

The analysis offered above is consonant with that carried out by H. L. A. Hart.[18] Hart argued that utilitarian aims justify the general practice of punishment in particular cases must be restricted by an independent imperative to treat people as ends rather than means. In other words the conditions of criminal responsibility must respect individual autonomy. Accordingly, punishment may not be applied to an individual, even when it would efficiently further the general welfare, unless the individual has voluntarily committed an offence.

Constitutional tradition seems to guarantee that our system of criminal justice will pursue this critical moral approach. Hart explained that the moral importance of the restriction of punishment to the offender cannot be explained as merely a consequence of utilitarian objectives. Human society, he observes, is a society of persons, and

> "persons do not view themselves or each other merely as so many bodies moving in ways which are sometimes harmful and have to be prevented or altered. Instead persons interpret each other's movements as manifestations of intentions . . .".[18]

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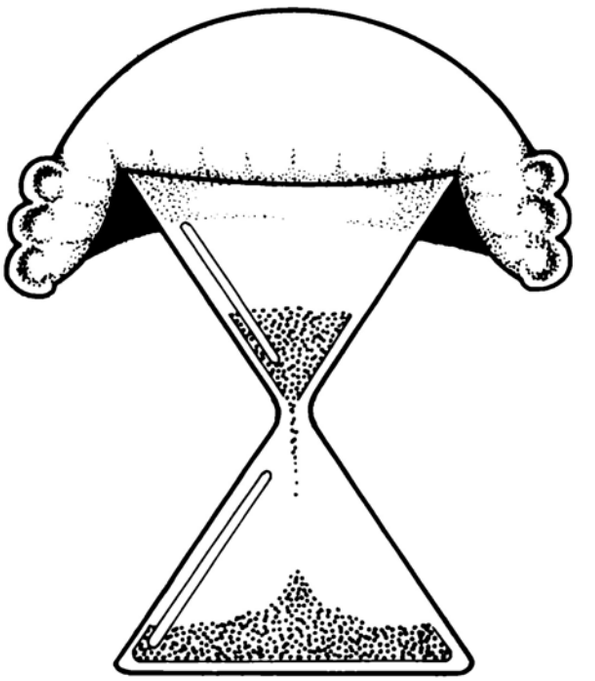

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In this regard, criteria of criminal responsibility require the carrying out of a voluntary act or omission or possession by the individual. The law also recognises the existence of mental elements accompanying such acts. Animating the concept of *mens rea,* those elements comprise intention, recklessness, or negligence. These factors indicate that the individual, who has committed an offence, had the capacity to take into account the relevant norms that responsible moral agents consider, or assume, in their own evaluation of the criminal significance of their behaviour. The range of blameworthy attitudes on the part of an offender goes from carelessness to knowledge to intention. Intentional acts emanate from deliberate human design. They are a proper condition of criminal responsibility since they express moral autonomy. Recklessness and negligence do not directly reflect human plans and thus they constitute a lower degree of blameworthiness. However, a person exercising the capacities of reasonable care associated with deliberate human action could have avoided the harm effected and the punishment imposed. As Hart points out, the word *negligently* "makes an essential reference to an omission to do what is thus required". Recklessness involves a more conscious undertaking of a harm-effecting risk. Since the agent has a greater liberty and opportunity to avoid the harm, recklessness is more blameworthy than negligence.

Two consequences of this subjective emphasis invite brief comment. Firstly, acceptance of the proposition that negligence may properly form a requirement of *mens rea* does not stand in opposition to respect for individual autonomy. Let us return to Hart's thinking. Hart favours extending the notion of *mens* beyond the cognitive element of knowledge or foresight, so as to encompass the capacities and powers of normal persons to think about and control their conduct. he would endorse Stephen J.'s approach in the famous *Tolson* case and include negligence in *mens rea* because "it is essentially a failure to exercise such capacities".[19] Hart argues that when we say that an individual acted negligently we are in fact being quite specific: "we are referring to the fact that the agent failed to comply with a standard of conduct with which any ordinary reasonable [person] *could* and *would* have complied: a standard requiring him to take precautions against harm".[20] It is clear that this does not reject a subjective focus. Hart puts the matter pithily:

> "The kind of evidence we have to go upon in distinguishing those omissions to attend to, or examine, or think about the situation, and to assess its risks before acting, which we treat as culpable, from those omissions (*e.g.* on the part of infants or mentally deficient persons) for which we do not hold the agent responsible, is not different from the evidence we have to use whenever we say of anybody who has failed to do something 'He could not have done it' or 'He could have done it'. The evidence in such cases relates to the general capacities of the agent; it is drawn, not only from the facts of the instant case, but from many sources, such as his previous behaviour, the known effect upon him of instruction or punishment, etc.".[21]

Secondly, this constitutional framework would require that the law of criminal responsibility recognise various excuses and justifications.[22] In particular, it would provide an independent perspective through which the essential character of the insanity defence might be appreciated. Certain observers have urged the elimination of responsibility as an operational construct in the legal scheme of things and a change to a therapeutic regime in which all liability is strict.[23] The adoption of such a system would negate the moral premise that the individual is an autonomous moral personality. As Hart suggests, "we should lose the ability which the present system in some degrees guarantees us, to predict and plan the future course of our lives within the coercive framework of the law".[24] Under current law the *actus reus* requirement does not include forms of involuntary conduct (*e.g.* epileptic convulsions) and insanity may in certain circumstances involve such conduct. However, even if an offender meets the requirements of *mens rea* in the sense of intention, recklessness or negligence, insanity should still provide an excuse. Earlier a principle is stated that individuals should only be intruded upon by the criminal law if they have been given the greatest equal liberty and opportunity to avoid punishments if they so wish. The imposition of punishment on insane persons would violate this notion of distributive justice in the criminal law. The insane individual does not possess the capacity to conform his or her conduct to criminal standards, so he or she cannot fairly be punished. Our criminal jurisprudence evinces a judicial preparedness to infuse the law of insanity with modern medical insights.[25] The proper form of the defence will depend on assessments regarding human capacity. For the purpose of this article, however, it may reasonably be suggested that the defence as a requirement of fairness has constitutional justification.

Concluding this part, I may state that the requirements of *actus reus* and *mens rea* respect the individual as the ultimate entity of moral value. The principle of the greatest equal liberty and opportunity under Articles 40.1 and 40.4.1° of the Constitution respects the individual's ability to predict and plan the future course of his or her life consistent with the like liberty for all other humans. Therefore, the distribution of punishments, which are frustrations of personal liberty, must be organised in a way which accords the greatest equal liberty, opportunity and capacity to people to avoid such punishments, if they choose, or to undergo them, if that is the cost of their acting according to their own dictates.

The principle of proportionality

It is notable that, consistent with its focus upon the individual as an autonomous moral personality, constitutional principle requires that punishment should be in proportion to the blameworthiness of the decisive informing circumstance of criminal culpability, and derivatively as a proper element of sentencing discretion in the hands of judges. The trial constitutes an individualised hearing procedure which advances the cause of personal dignity and autonomy, and ensures that the individual convicted of an offence will be dealt with as a uniquely moral being. In this respect, the principle of proportionality obviously demands a determinate scale of punishment for a particular type of offence, but, within the limits thus set, fair sentencing discretion has an essential role.

It is necessary now to explain the requirement of proportionality between the relative seriousness of the offence and the relative harshness of punishment. The criminal law seeks to satisfy the demands of certain moral

considerations, and the punishments provided in this regard should have a correspondence to the moral gravity of the offences punished. Ó Dálaigh C. J. stated that "an offence of obliquity even if punishment by a small penalty and made triable only summarily nevertheless should, probably, not be considered a minor offence".[27] In view of the differences in force of the moral imperatives obliging individuals not to do certain acts or omissions, punishments should differ in degree relative to the sort of crime perpetrated. Punishment should also vary relative to the criteria of blameworthiness. In consonance with this, in this jurisdiction, intentional killing is treated as more blameworthy than reckless killing, and reckless killing more so than careless killing. In this scale, the operative distinction is that there is a greater degree of volunariness, in the moral sense, in intentional killing than in reckless killing, and so on.

The Courts have recognised that the selection of punishment is an inherent part of the judicial power. In *Deaton v. Attorney General,*[28] the Supreme Court considered the consistency with the Constitution of s.186 of the Customs Consolidation Act 1876 which gave the Revenue Commissioners power to elect which of two penalties should be imposed by a court. Holding that such a power was unconstitutional, Ó Dálaigh C. J., giving the judgment of the Court, said:

> "The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts ... The individual needs the safeguard of the Courts in the assessment of punishment as much as on his trial for the offence. The degree of punishment which a particular citizen is to undergo for an offence is a matter vitally affecting his liberty;... The selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive ...".[29]

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In *Deaton*[28] the Court asserted the primacy of judicial power once there was an element of discretion in the selection of punishment.

It is notable that the Court showed no favour to the respondents' argument, when the legislature prescribes a fixed penalty it selects the penalty for a particular case. Ó Dálaigh C. J. responded:

> "In my opinion this argument is unsound. There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. It is here that the logic of the respondents' argument breaks down. The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the Courts. If the general rule is enunciated in the form of a fixed penalty then all citizens convicted of the offence must bear the same punishment. But if the rule is stated by reference to a range of penalties to be chosen from according to the circumstance of the particular case, then a choice or selection falls to be made. At that point the matter has passed from the legislative domain".[30]

With deep respect, it is submitted that O Dálaigh C. J.'s response does not persuasively meet the respondents' point. Firstly, his language could be recast to make the respondents' argument: a mandatory sentencing scheme, which specifies the exact punishment that will follow conviction of a specified offence, provides an example of the legislature selecting a punishment following conviction in a particular case. Secondly, it foreshortens the principle of proportionality as applicable to the distribution of punishments. It reads the idea of the seriousness of the crime in terms of the harm produced or risked by the action. Thus it ignores the blameworthiness of the actor. This coheres with Beccaria's opinion that "crimes are only to be measured by the injury done to society. They err, therefore, who imagine that a crime is greater, or less, according to the intention of the person by whom it is committed ...".[31] Thirdly, it fails to have regard to the independent constitutional imperative to respect moral autonomy. As indicated above, in terms of blameworthinesss, offenders vary from each other in ways that the legislature cannot anticipate. The differences of human behaviour are so significant that a legislative definition of crime must standardly cover acts involving different degrees of blameworthiness. The personal circumstances of the individual offender are significant in a criminal justice system based on desert (as well as regards the aims of rehabilitation and social defence). Fourthly, the constitutional principle animating *O'Callaghan*[2] objects to the utilitarian (or instrumental) employment of human persons to achieve general social goals. It would be more consistent with invididual dignity to punish an offender because he or she, deserves it morally, than to deal with the offender for the purpose of important social goals. Sentencing accused persons of varying degrees of blameworthiness alike for the sake of certainty in the sentencing scheme would appear to implicate an instrumental view of the individual, treating him or her, as a means rather than an end. Thus, in a mandatory sentencing scheme, individual cases would inevitably present themselves in

which the fixed "tariff" would be unfair, and thus work a gross inequality.

Accordingly, since it seems that the true constitutional vision requires a recognition of factors other than the harm produced by a particular offence, it is submitted that a mandatory sentencing scheme is constitutionally suspect since it precludes individualised sentencing. There is a constitutional need for a judicial response to variations in blameworthiness with regard to specific offences.

The subjective emphasis questioned

The analysis carried out above clears the way for a more acceptable vision of the role of the principle of legality, the conditions of criminal responsibility and the principle of proportionality in the criminal law. That vision is extracted from, and grounded in, the ultimate norm, the Irish Constitution. It may be mentioned at this point that a recent work of Professor George Fletcher questions such a subjective approach.[32]

Fletcher investigates the archaeology of the criminal law, his gaze searching out the categories of thought governing the structure of doctrine about crime in "Western" culture and beyond. Building on historical and comparative sources he suggests two "patterns of criminality reflected in doctrinal statements about the law of theft. Firstly, the "pattern of manifest criminality" evinces as its crucial feature "that the commission of the crime can be objectively discernable at the time it occurs".[33] The assumption is that an impartial observer could identify the conduct as criminal even if he did not know precisely what the offender's intention was. Secondly, in contrast, the "pattern of subjective criminality" starts from the assumption "that the core of criminal conduct is the intention to violate a legally protected interest".[34] Fletcher traces the influence of these contrasting "patterns" upon matters of doctrine in areas of offences against property, attempts, crimes of possession, conspiracy, and several other offences.

He rejects, rather peremptorily, the critical role of moral philosophy in the criminal law as a method of examining the soundness of popular conceptions about criminal responsibility. His patterns of criminality simply present themselves as distillations of historical community experience; and the theorist simply discovers the principles of liability implict in the system of criminal law. His view is also normative however, in that it is a theory about the proper conditions of just punishment; "for each [pattern] states a plausible and coherent theory for prohibiting and punishing conduct as criminal".[35] In the fashion of Savigny the theories are extracted from, yet justified by, the accretion of legislation and judicial judgments. The patterns of subjective criminality would represent, in the main, the theme of criminal responsibility outlined in this article and prevailing in the jurisprudence in view of critical moral philosophy. Fletcher, however, sees dangers lurking in the pattern of subjective criminality.

The gravamen of Fletcher's complaint against the subjective focus is that it hinges on an overriding desire to prevent future harm. As regards "subjective criminality" Fletcher states that the requirement of intent "refers to an event in the subject's consciousness that provides a basis for predicting that the actor will violate a legally protected interest".[36] He reiterates that the processes of the criminal law are different and ought to be kept distinct from administrative processes, such as civil commitment of the dangerously insane. The law operates "by means of pre-announced standards of behaviour that are interpreted and applied in particular cases".[37] It would be wrong to consider "whether in a particular case a person ought to be held criminally liable according to whether he is dangerous".[38] Referring to the law of attempts, he makes the point that the move to subjectify the criminal law rejects the "principles of legalism". The problem is, he thinks, that subjectivists are marked by a failure to differentiate between the systemic goals of the criminal law (i.e., to isolate and imprison dangerous persons) and the standards for judgment in individual cases. That failure he concludes betokens a collapse of the distinction between criminal punishment and civil commitment.

It is suggested that Fletcher's criticism is misplaced. Firstly, his criticism contradicts the premise of his analysis that the current data of legal experience provide a paradigm of thought in regard to the criminal law. Currently the subjective focus prevails, so this would appropriately be recognised as the paradigm. Yet Fletcher rejects it. Secondly, it is true that a distorted version of "subjective criminality" involved a technique of criminalising substantively innocent conduct. For example, under the draconian Vagrancy code it was routine to punish an individual if he was a "suspected person" (i.e., having previous convictions) found "loitering" and who entertained a legislatively proscribed intent (*i.e.*, to rob and steal). It was not necessary for the prosecution to prove the existence of actual intent.In Fletcher's terms, the character and the location demonstrated irrebuttably the accused's intent. Guilt hinged on an unmanifested intent, and was "proved" by an inference from the condition of the accused. Judgment was really made by the police who arrived at a probalistic conclusion that the suspected person had the prohibited intent at the relevant time. But it is evident from *King* that this approach is indefensible

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from the perspective of critical moral philosophy involved in constitutional analysis. Thirdly, the *O'Callaghan*[2] premise resists an attempt to collapse the distinction between criminal punishment and civil commitment. In a criminal case, the subjective approach does not employ all the factors relevant to the mental composition that might suggest future dangerousness. The judicial process focuses on a definite quality — the offender's intent — associated with a past occurrence. Without an awareness of this attribute the court would be incapable of framing conclusions as to the harm-producing potential of the conduct, the blameworthiness of the offender, nor even the magnitude of the harm caused to the victim. Accordingly, the very factors that compelled the Supreme Court to question preventive detention in *O'Callaghan* would make it morally troublesome to eschew the concern with subjective intention.

Conclusion

This article is not intended to suggest that correct principles of criminal justice emerge full-blown from the Constitution. It is common sense that constructive analysis of constitutional principles in the domain of criminal justice begins *in medias res*. For example, we adhere to many important carryovers from common law doctrine.[39] However, my stance has been that all elements of our system of criminal justice must be evaluated in the light of basic constitutional values. Central values are the freedom and dignity of the individual as a morally autonomous personality. Implicit in this is the view that those who assert that the Constitution should be kept off-limits in a review of the criminal process have matters askew. Recently, attacks have been directed at the constitutional constraints on police powers on the basis that they diminish the efficiency of the criminal law and its enforcement.[40] Disregarding the point that that is precisely what the Constitution is designed to do, the critics also fail to take the moral philosophy of *O'Callaghan* seriously. And, as I have attempted to show, the moral perspective operative in that case governs the legislative power with regard to the definition of crime. □

Footnotes

*I wish to thank Raymond Byrne, BCL, LLM, Barrister-at-Law, who contributed to my understanding of the matters considered in this article. I, of course, am solely responsible for its faults.

1. See J. M. Kelly, *The Irish Constitution*, pp. 286 ff.
2. [1966] I.R. 501.
3. *Ibid.*, at 513-4.
4. *Ibid.*, at 508-9.
5. *Ibid.*, at 513 (emphasis is added).
6. Laurence H. Tribe, "An Ounce of Detention: Preventive Justice in the World of John Mitchell", (1970) 56 *Va. L. Rev.* 371, 404.
7. *Ibid.*, at p. 379.
8. [1966] I.R. 501, 517.
9. In our legal system the principle has been regarded as a more or less self-evident requirement of justice: see *A.G. v. Cunningham* [1932] I.R. 28, where O'Byrne J. declared that the court "must have regard to the fundamental doctrine recognised in the courts that the criminal law must be certain and specific, and that no person is to be punished unless and until he has been convicted of an offence recognised by law as a crime and punishable as such". See also *The People v. Edge* [1943] I.R. 125.
10. Unreported, High Court (McWilliam J.), 24 October 1978; and unreported, Supreme Court, 31 July 1980.
11. As amended and applied in Ireland by the Prevention of Crimes Act, 1871, and the Penal Servitude Act, 1891.
12. At p. 12 McWilliam J.'s judgment.
13. The majority invalidated three of the claimants' convictions. McWilliam J. had invalidated two.
14. At pp. 7 and 8 of Hency J.'s judgment (Griffin and Parke JJ. concurring).
15. See *The Morality of Law* (1964) p. 53.
16. 283 U.S. 25, 27 (1931).
17. See, *e.g.*, *People v. Murray* [1977] I.R. 368 (homicide); *People v. MacEoin* [1978] I.R. 365 (manslaughter) and *People v. Dwyer* [1972 I.R. 416 (self-defence).
18. H.L.A. Hart, *Punishment and Responsibility*, (Oxford, 1968) p. 182
19. *Ibid.*, at p. 140; see also the judgment of Stephen J. in *R. v. Tolson* (1889) 23 Q.B.D. 168.
20. *Ibid.*, at p. 147.
21. *Ibid.*, at pp. 150-151.
22. An example of an excuse is the defence of insanity. Self-defence is an example of a justification.
23. See Barbara Wooton, *Social Science and Social Pathology*, esp. Ch. VIII.
24. Hart, *Punishment and Responsibility*, p. 181.
25. See *Doyle v. Wicklow County Council* [1974] I.R. 55. See also R. J. O'Hanlon, *"Not Guilty Because of Insanity"* 3 *Ir. Jur. (N.S.)* 61. In *The People (Attorney General) v. Hayes* (Central Criminal Court, 30 November 1967), Henchy J., noting that "legal sanity does not necessarily coincide with what medical men would call insanity", said "but if it is open to the jury to say, as say they must, on the evidence, that this man understood the nature and quality of his act, and understood its wrongfulness, morally and legally, but that nevertheless he was debarred from refraining from assaulting his wife fatally because of a defect of reason, due to his illness, it seems to me that it would be unjust, in the circumstances of this case not to allow the jury to consider the case on these grounds".
26. *State (Healy) v. Donoghue* [1976] I.R. 325, 353.
27. In *Melling V. O Mathgamhna* [1962] I.R. 1, at 48.
28. [1963] I.R. 170.
29. *Ibid.*, at 182-183.
30. *Ibid.*, at 182-183.
31. See Cesare Beccaria, *An Essay on Crimes and Punishment* 26 (London 1767).
32. See George Fletcher, *Rethinking Criminal Law* (Boston 1978).
33. *Ibid.*, at pp. 115-116. Fletcher argues, for example, that "manifest criminality" requires that larceny be found only where the conduct "bears the mark of a forcible or stealthful act of thieving" (at p. 86).
34. *Ibid.*, at p. 118.
35. *Ibid.*, at p. 389.
36. *Ibid.*, at p. 120.
37. *Ibid.*, at p. 170.
38. *Ibid.*, at p. 171.
39. *e.g.*, the presumption of innocence.
40. See McLaughlin "Legal Constraints in Criminal Investigation" (1981) XVI *Ir. Jur. (NS)* 217.

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   OR
   (c) Ordnance Survey Map.
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3. Development Schemes — The Registry have special requirements details of which can be obtained from the Maping Branch.

NOTES:

1. Photocopies of Maps are not acceptable due to distortion caused by photocopying. Filed Plans themselves, although photocopies, are prepared on special copiers which minimize distortion and accordingly are acceptable for subdivision purposes. Of course a photocopy of a Filed Plan would not be acceptable.
2. It occasionally happens that property in a Folio is subject to or has an appurtenant right of way and of course the copying process will not show the yellow markings indicating the right of way. A special application has to be made for Maps to have rights of way or such like marked. Any application for a special Map should be addressed to Mr. F. Slattery, Chief Superintendent (Mapping) Land Registry, Chancery Street, Dublin 7.
3. All Maps should be marked by qualified Personnel and the property being transferred identified by means of a thin red line.
4. To avoid future boundary problems the boundaries to the property being transferred should be marked prior to Mapping and the stakes encased in cement and a Map should then be prepared by reference to these markings. □

Searches

The Dublin Solicitors' Bar Association asked whether it was reasonable to expect Lenders' Solicitors to accept Searches carried out by Solicitors, rather than Searches prepared by a recognised firm of Law Searchers. In the case in question, the practitioner had confirmed in writing that the Solicitor had professional indemnity insurance which covered searching.

The Joint Committee of Building Societies' Solicitors and the Law Society was unaminously of the opinion that it would be unreasonable to refuse searches in such circumstances. □

Stamping of Stock Transfer Forms

Practitioners should note the position concerning the stamping of Stock Transfer Forms from subscribers to the Memorandum and Articles of Association. The position is that these transfers attract stamp duty under two possible heads of charge:—

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In many cases, however, the market value of the shares may be quite different from that shown on the transfer. Therefore in certain cases the Revenue Commissioners may raise various queries to establish the actual position as regards the duty chargeable. It should be noted that, since the passing of the Finance Act, 1982, transfers in the second category above would be stamped at the fixed duty of £5 (previously 50p). These are cases where the transferors hold the shares in a nominal capacity pending transfer to the beneficial owners. No beneficial interest passes,as transferors do not hold legal and beneficial title.

Finally, it is of course the duty of the solicitor concerned to ensure as far as possible that the correct duty is paid on the stock transfer forms. □

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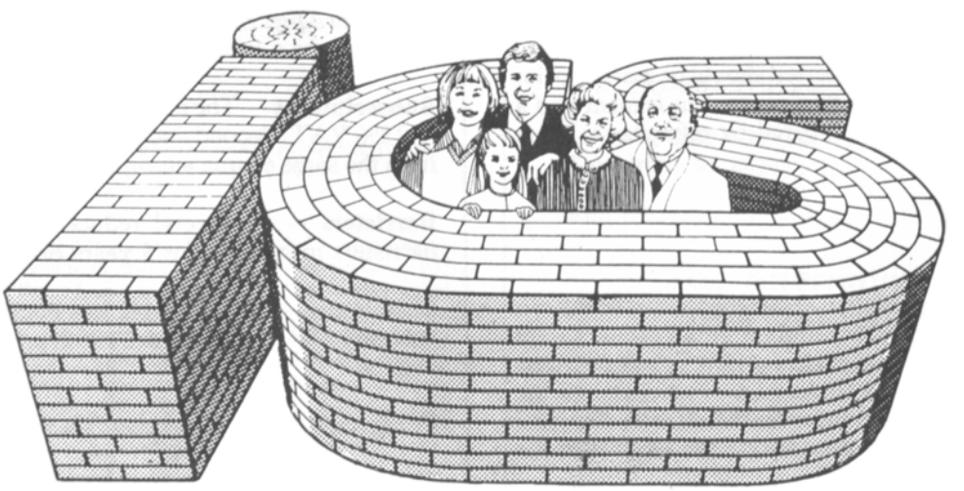

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Freedom to Speak — or Sell?

by
Anthony Kerr, Lecturer in Law, U.C.D.

IF a solicitor were to advertise his/her services, disciplinary action would undoubtedly be taken which could result in the person concerned being struck off the Roll.Readers of the Gazette therefore will note with interest the conclusion of a Mr.Jabour's legal proceedings against the Law Society of British Columbia. Disciplinary action had been taken against him by reason of his having advertised his services in local newspapers and having installed an illuminated sign.He applied for a declaration that the rulings and orders of the Discipline Committee of the Law Society of British Columbia were null and void as being, *inter alia,* in violation of his freedom of speech. The judgment of the full Supreme Court of Canada (Laskin C.J.C., Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Choinard and Lamer JJ.) was delivered by Estey J. on August 9, 1982. It is now reported at 137 D.L.R. (3d) 1.

The structure of the Law Society of British Columbia is familiar. Its membership comprises all those persons called to the Bar in British Columbia who have remained in good standing under the Barristers and Solicitors Act (R.S.B.C. 1979, c.26) and applicable regulations, together with retired members. The Society is governed by the Benchers, being 23 members elected by the membership together with the Attorney-General of the province, as an *ex officio* member.

The Benchers are directed by statute to "govern and administer the affairs of the Society" and to take "such action ... as they may consider necessary for the promotion, interest, or welfare of the Society". The Benchers are also directed to establish a discipline committee for the investigation into the conduct or competence of members and for determining whether a member (or former member) has been guilty of, *inter alia,* "conduct unbecoming a member of the society". Such conduct is defined as any matter, conduct or thing that is deemed, in the judgment of the Benchers, to be contrary to the best interest of the public or of the legal profession, or that tends to harm the standing of the legal profession.

Rulings of the Law Society provided that it was "improper for a member to advertise in any publication or on radio and television or in any other media of communication". Members were permitted to place a card in a directory, law reports, legal magazine or review or text intended primarily for circulation amongst lawyers. They were also permitted to announce in a local newspaper commencements of practice, changes of address, etc. The rulings concluded that the "best advertisement" for a lawyer was "the establishment of a well merited reputation for personal capacity and fidelity to trust."

Donald Jabour, a member of the Society, placed four advertisements in local papers stating that he was opening a law office providing legal services at prices middle-income families could afford. A sample of prices was included. He also installed an illuminated sign measuring 3 feet in height by 16 feet in length on the exterior of the office building in which his office was located.

Jabour was disciplined for 'conduct unbecoming a member of the Society'. He sought a declaration that the rulings and orders were void and an injunction restraining the Society from implementing suspension of his licence to practice. A substantial part of the case turned on whether the Combines Investigation Act (RSC 1970, c.23) applied to the Law Society (it did not), but the major point of interest to us in this jurisdiction was Jabour's argument that the rulings which prohibited him from informing the public about the type and cost of the legal services he provided were a violation of his right to freedom of speech.

The Supreme Court of Canada was emphatic that freedom of speech was valued as a fundamental right in Canada. This right was, however, subject to various restrictions, such as laws against defamation, sedition and blasphemy, etc.Free speech, *per* Lord Wright in *James v. Commonwealth of Australia* [1936] A.C. 578, 627, meant "freedom governed by law". The Court held that they were dealing with the right of "economic free speech" and that the provinces of Canada were entitled to regulate the ethical, moral and financial aspects of a trade or profession within its boundaries. The action taken against Jabour by the Law Society was authorised by the Statute, indeed "the regulation of advertising is an ongoing function of the Benchers under the statute". The reduction of the ability of a member of the Law Society to make public announcements concerning the practice of law was not, therefore, an unlawful violation of freedom of speech. □

EDITORIAL NOTES:

1. It will be recalled that it was upon the freedom of speech provisions contained in the First Amendment to the U.S. Constitution that the Supreme Court based its decision in the landmark *Bates & O'Steen v. State Bar of Arizona* case, where the Bar's restriction on lawyer advertising was declared unconstitutional.
2. The restrictions on advertising by Solicitors in the Republic of Ireland were investigated by the Restrictive Practices Commission in 1980/81. It is understood that the Commissioner's report is now with the Minister.

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Transfer of a Business and Protection of Employees' Rights

by

Gary Byrne, Solicitor

IN the event of a change in ownership of a business, an employee who remains in employment with the transferee retains his or her rights under the Redundancy Payments Acts 1967 to 1979, by virtue of the protections afforded by Section 20 of the 1967 Act, as amended, and the provisions of paragraphs 4 to 6 of the Third Schedule to that Act. Similar protection is afforded under the Unfair Dismissals Act 1977 and Minimum Notice and Terms of Employment Act 1973 by virtue of the provisions of the First Schedule to the 1973 Act, as amended by Section 20 of the 1977 Act. Apart from employment rights deriving from this legislation, there are a large number of other terms and conditions of employment covered by contract law. These rights were not specifically protected by law until the enactment of Statutory Instrument No. 306 of 1980, The European Communities (Safeguarding of Employees' Rights on Transfer of Undertakings) Regulations 1980. The purpose of this article is to outline the principle features of that Statutory Instrument. The Regulations were made for the purpose of giving effect to E.E.C. Council Directive No. 77/187/EEC of 14th February 1977 and took effect in Ireland on 3rd November 1980.

The Statutory Instrument is unfortunately very badly worded and, in some instances, incapable of precise interpretation. Some of the more difficult provisions are capable of interpretation by reference to the Directive itself but in some instances, the Directive is also unfortunately and imprecisely worded.

The first thing to note is that the Regulations are expressed to apply to a transfer of a business. The expression "transfer", however, is not defined in the Regulations. The Council Directive states that it shall apply to the transfer of an undertaking, business, or part of a business to another employer as a result of a legal transfer or merger.

There is no elaboration on this to explain what type of legal transfer or merger it is proposed to cover. The preamble to the Directive does state that it is necessary to provide for the protection of employees' rights in the event of a *change of employer*. In the explanatory memorandum to the Regulations, the Department of Labour stated, in November 1980, that the Regulations are aimed at safeguarding the rights of employees' in the event of the transfer of ownership of undertakings which entailed a change of employer. This point is further reinforced by the fact that Ireland inserted a statement in the Council Minutes of 31st January 1977, when the draft Directive was discussed, to the effect that the Irish Delegation was seriously concerned that the Directive, designed to safeguard the acquired rights of employees in the cases of mergers and take-overs, had failed to make provision in relation to mergers involving changes in control over undertakings. It appears clear, therefore, that the Regulations apply only to a legal transfer or merger which involves a change in identity of the employer. Share mergers by means of which one company acquires control of another without any change in identity of the employer company would, therefore, be excluded from the scope of the Regulations. As this is the most important and most common type of change of ownership in our system of company law, the Regulations might appear to have little effect in this country. There remain, however, a number of situations where a transfer is effected by asset merger, including between members of a group of companies. In the event of such mergers the Regulations would apply.

The Regulations to some extent aim at protecting certain statutory rights which are already protected by our domestic legislation, as stated above, but go further to protect various contractual rights which would not normally be protected in the absence of express agreement between the parties. This automatic protection takes a number of forms.

Paragraph 3 of the Regulations simply states that the rights and obligations of a transferor arising from contracts of employment, or employment relationships existing on the date of a transfer, shall, by reason of such transfer, be transferred to the transferee. There is, therefore, an automatic transfer of all contractual obligations. The Regulations do not totally prohibit the termination or variation of contracts of employment consequent on, or preceding, a transfer, subject to the provisions of paragraph 5, below.

Paragraph 4(1) states that a transferee shall continue to observe terms and conditions of any collective agreement until the termination of such agreement. There is nothing in this to prevent a transferee or a transferor negotiating a new collective agreement, either prior to the transfer or subsequent to the transfer. This would be an essential requirement for most employers who are taking over a business, if they were not satisfied with the provisions of an existing collective agreement. Re-negotiation of the collective agreement prior to the date of transfer would be unaffected by the provisions of these Regulations.

Regulation 4(2) purports to deal with the difficult problem of employees' rights to old age, invalidity, or survivors benefits under supplementary company or inter-company pension schemes outside the Social Welfare Acts 1952 to 1979 (now the Social Welfare Consolidation Act 1981). This sub-paragraph is most unfortunately worded, but the poor draftsmanship cannot be laid totally at the door of the Irish draftsman, as a

reference to the provisions of the Directive itself will show that the wording is identical to our Regulations. The wording concerned states "Regulation 3 of these Regulations and paragraph (1) above of this regulation shall not apply in relation to employees' rights to old age, invalidity, or survivors benefits under supplementary company or inter-company pension schemes outside the Social Welfare Acts 1952 to 1979, but the transferee shall ensure that the interests of employees and of persons no longer employed in the transferor's business at the time of the transfer in respect of rights conferring on them immediate or prospective entitlement to old age benefit including survivor's benefits under such supplementary company pension schemes are protected". The net effect of this Regulation would appear to be that employees' and former employees' rights existing on the date of transfer are effectively frozen. The transferee is under an obligation to ensure that rights existing on the date of transfer are capable of being fully honoured. There would seem to be no obligation on the transferee to continue whatever arrangement was in existence prior to the date of transfer. It must be the duty therefore, of the transferee fully to investigate the nature and extent of such rights as exist on the date of transfer and to satisfy himself that such rights are capable of being honoured; thereafter he would seem to be free to consider whatever future arrangement he considers appropriate. This view is borne out by the Commission's amended proposal for the Council Directive dated 25th July 1975, which states that it is not possible to lay down specific community rules in the Directive as to employees' acquired and future rights arising out of company, or inter-company schemes and, for this reason, the proposed Directive confined itself to requiring member states to ensure that employees do not lose accrued rights. There remains,however, a possibility that this sub-paragraph could be interpreted to oblige the transferee to continue such schemes. The interpretation by various countries of the community, in their domestic enforcement of the Directive, bears out the view that employees' rights are frozen as at the time of transfer and that the new employer is not obliged to continue the old pension arrangements. This is specifically provided in the British and Danish Regulations. The German Regulations do not deal with former employee's rights, but do make specific provisions to protect and maintain (continue) the rights of existing employees. The Department of Labour's explanatory memorandum simply states that protection of employees' and former employees' rights to ... benefits ... must be ensured by the new owner. Despite repeated requests to the Department, they have not elaborated on this statement.

Paragraph 5 of the Regulations provides that the transfer of an undertaking cannot in itself constitute grounds for dismissal. This would obviously also be the case under the Unfair Dismissals Act, 1977. The Regulation, however, goes on to state that nothing in the Regulation shall be construed as prohibiting dismissals for "economic, technical or organisational reasons entailing changes in the workforce". This allows for redundancies to be effected, consequent on a transfer, as would comply with the provisions of our Redundancy Payments Acts. The Regulations, therefore, would have no effect on redundancies. This Regulation further provides that, if a contract of employment is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee concerned, the employer concerned shall be regarded as having been responsible for termination of the contract of employment. It would appear,therefore, that an employee who suffers a substantial change, not coming within the statutory definition of redundancy, is in a position to claim unfair dismissal against the party responsible for initiating the change. This Regulation could allow an employee who is unsure as to the source or reason for the substantial change to claim under the Unfair Dismissals Act, 1977 against both transferor and transferee on the basis that they could be jointly and severally liable. Reasons for changes can be requested by the employee pursuant to Regulation 7, below.

Regulation 6 protects the status and function of employee representatives following a transfer. This Regulation should be of considerable interest in Ireland, in view of the many and varied agreements that exist between employers and trade unions on the right to recognition and negotiation. This regulation preserves the trade union's position after the date of transfer in the same position it was prior to the date of transfer.

Regulation 7 provides that the transferor and transferee concerned must inform the representatives of their employees affected by the transfer or, if there are no representatives, the employees themselves, of the following:—

(a) the reasons for the transfer
(b) the legal, economic and social implications of the transfer for the employees and
(c) the measures envisaged in relation to the employees.

The Regulations do not specify the exact extent, nature or detail of such information and appear to leave it to the parties to agree. In the event of no agreement being reached or in the event of no such information being furnished, it would appear that employees or their representatives are in a position to apply for injunctive

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relief to prevent the transfer being effected until the transferor and transferee have complied with this regulation.

The Regulation further requires that this information shall be given by the transferor in good time before the transfer is carried out and by the transferee "in good time" and, in any event, before the employees are directly affected by the transfer. There is further requirement that if the transferor or transferee "envisage measures in relation to the employees" they shall consult in good time on such measures with a view to seeking agreement. In the event of there not being employee representatives, it is a requirement of the Regulation that a statement in writing containing the required information be given to individual employees and that notices containing these particulars be displayed prominently at positions in the work-place of employees, where they can be read conveniently by the employees.

Regulation 8 empowers an Officer of the Minister, where he is of the opinion that a transaction constitutes a transfer, to request such information as he may reasonably require and to inspect such books and documents as he specifies. The parties to the transfer are obliged to furnish such information and to make available for inspection any books or documents as may be required and to permit the officer to inspect, copy and take extracts from such books and documents. The Regulations further empower the Minister's officer, at all reasonable times, to enter any place where there are kept books or documents to which a request by him relates. The Minister's officer is empowered to act under this regulation by way of a certificate issued by the Minister, such certificate to be produced on request to any person affected.

Regulation 9 provides that a person who contravenes any provisions of the regulations, other than regulation 8, shall be guilty of an offence and liable on summary conviction to a fine not exceeding £500. A person who contravenes regulation 8 shall be liable on summary conviction to a fine not exceeding £300. Proceedings for any offence under the Regulations may be instituted within 12 months from the date of the offence.

Regulation 10 provides that where an offence is committed by a body corporate or a person purporting to act on behalf of a body corporate or an un-incorporated body or person and the offence is proved to have been committed with the consent or approval of, or to have been facilitated by any neglect on the part of any person who is a director, member of the committee of management or other controlling authority of the body concerned, or the manager, secretary or other officer of the body at the time the offence was committed, shall also be deemed to have committed the offence and may be proceeded against under the Regulations.

English Regulations

As can be seen from the foregoing, the Regulations are going to cause problems in their interpretation. In the U.K., the enabling legislation for the implementation of the Acquired Rights Directive is the Transfer of Undertakings (Protection of Employment) Regulations 1981, which came into force on 1st February 1981. *The Sunday Times* of 31st January 1982 reported on a possible take-over by Burmah Oil of Croda International. Clive Jenkins, of the ASTMS, on hearing of the potential take-over, contacted the chairmen of both companies seeking satisfactory information about the bid, relying on the provisions of the regulations. The companies were informed that the ASTMS would, if necessary, apply for an injunction to have the take-over blocked if such information was not forthcoming. ASTMS suspected that Burmah intended to sell off large portions of Croda's business which would, of course, affect their members and they maintained that under the new regulations they had the right to know what Burmah's plans were.

The Sunday Times described the regulations as "an obscure new employment law". As it turned out, the take-over bid did not go ahead and nothing more was heard of the ASTMS threat. Considerable controversy surrounded the enactment of the regulations in the U.K., as it appears that few politicians appreciated the extent and effect of the regulations. The Conservative party were apparently against the enactment of the regulations, but Parliament was powerless as they were required by E.E.C. law to enforce the Directive. The regulations were passed by Parliament at a midnight session with only six Tory backbenchers at the Commons debate. Answering a question in Parliament subsequent to the enactment of the regulations, the Employment Under Secretary, David Waddington, stated that he did not expect the law to have a significant effect on business take-overs, because most transfers in the U.K. are by way of share transactions.

Irish EAT Cases

As stated previously, existing employment protection legislation in certain situations guarantees continuity of employment in the event of a transfer of a business. There have, to date, been a number of cases before the Employment Appeals Tribunal on the question of what is or is not a business and these presumably will be of considerable assistance, should the interpretation of the Acquired Rights Regulations be at issue. In the case of *Cunningham v. Tracey Enterprises (Dundrum) Ltd.*, Case no. 133/80, the claimant was employed by Company A in a yard off the Naas Road. Company A moved their business out of the yard and permission was given to Company B to move into the yard temporarily. The claimant did not move with Company A, but stayed in the yard and worked with Company B until they moved out of the yard some months later. The claimant was offered a job with Company B in County Wicklow but declined the offer. The claimant claimed a redundancy payment from Company B. The Tribunal held that as Company B did not take-over any goodwill or purchase any assets of Company A and as the businesses were totally different, the only connection being the use of the yard temporarily with no assignment or conveyance of title or interest, together with the use of certain machinery left behind by Company A, there was no transfer of a business as defined by the various provisions of the Redundancy Payments Acts, being Section 20 of the 1967 Act, as amended by Section 5 of the 1971 Act and paragraph 6 of Schedule 3 of the 1967 Act, as amended by the Schedule to the 1971 Act.

In *O'Shea, O'Sullivan & Cotter v. McInerney Civil Engineering Limited,* Case nos. 627, 629 and 639/1980, the claimants were employed by Public Works Limited in the carrying out of a contract with Cork County Council at Bantry. A receiver was appointed to manage the affairs of the company and it could not fulfil its obligations under the contract with the County Council. The Council then negotiated with the respondents for completion of the

works concerned in the contract. This was a new contract and not an uncompleted portion of an existing contract. The company in receivership was not a party to the contract between the Council and the respondents, nor did any consideration pass from the respondents to the company in receivership in respect of any matter other than the purchase of an earth moving machine from the receiver and the purchase of some other earth moving machines from the Finance Company, which hired the machines originally to the company in receivership. The claimants claimed that they had continuity of service in respect of their employment with the company in receivership and the respondent company. The Tribunal held that the work the subject matter of the contract between Public Works Limited and the County Council did constitute a "business" as defined in Section 2 of the Redundancy Payments Act, 1967. They held further that the company in receivership did not transfer any portion of its business to the respondent and that the respondent negotiated a separate contract with Cork County Council. The business of the company in receivership did not exist in relation to the contract work at Bantry when the respondent contracted to complete the outstanding work and there could not, therefore, be a transfer or change of ownership of a business or part of a business. The Tribunal held that the service of each of the claimants with the company in receivership could not be added to their service with the respondents and, as they did not,therefore, have the minimum service with the respondents necessary to qualify for a redundancy payment their claims were dismissed. Cases of this sort should be of help in interpreting the scope and applicability of the Acquired Rights Regulations, keeping in mind the added proviso that, under the Regulations, there must be a change in employer.

Coughlan v. Keane

It is believed the Regulations have only been raised once with the Employment Appeals Tribunal in this country, in the case of *Coughlan v. Keane, T/A Keaneland Hotel,* Case no. M373 UD256/1982. The claimant was employed as a receptionist at the respondent's hotel from 25th July, 1980 to 16th October 1981. The hotel closed on 7th October 1981 and the staff were paid up to 9th October 1981. The claimant maintained that she was informed on 7th October that the hotel was being sold. On 16th October she was sent home and, when she returned on 27th October, was informed by the hotel proprietor that the new owner would speak to her later about her job. On 3rd November 1981 the hotel re-opened. The new owner offered the claimant a job on 6th November 1981, but she refused the offer because the conditions of employment were radically different from what she had done previously. The claimant relied on the 1980 Regulations and maintained that she was unfairly dismissed. After considering the evidence, the Tribunal found that the Regulations did not apply in the case, as there was a break-in service, the contract of employment ending when the hotel closed. The Tribunal held that there was a redundancy situation and, under the provisions of Section 6(4)(c) of the Unfair Dismissals Act, 1977, dismissal due to redundancy was deemed not to be unfair and the claimant's claim was dismissed.It should be noted that the claimant was not legally represented and it would appear that the Regulations were not opened to the Tribunal in full. The Tribunal appears to have accepted that the transferor of the hotel terminated the claimant's employment. It would appear in that event that the transferor must justify such termination on the grounds of economic, technical or organisational reasons entailing changes in the work force, as required by regulation 5 of the Regulations. This does not appear to have been done in this case.

U.K. Industrial Tribunal Cases

A number of decisions have been given by Industrial Tribunals in the U.K. touching on the regulations. In *Bachelor v. Premier Motors (Romford) Ltd. and Petropolis Limited,* COIT 1359/181, the claimant was the manager of a petrol station. On 5th April 1982 his employers, the first named respondents, entered into an agreement for the sale of the petrol station to the second named respondents. Completion of the sale took place on 1st June 1982 and this included the sale of the premises, fixtures and fittings and other minor pieces of equipment and stock.

During the first month of occupation there was some disruption while M. & M. carried out various building operations and waited for the transfer of a British Leyland franchise. The Tribunal considered the following facts as relevant:

(a) after the sale Mr. Smith did not intend to set up a business elsewhere and it was unlikely that Mr. Smith would ever compete with M. & M., particularly as he had given up the B.L. franchise;
(b) apart from used cars, all assets were transformed;
(c) some of the employees were kept on after the transfer by M. & M.;
(d) although no goodwill had been transferred, this was because it had no monetary value and so was not included in the agreement.

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M. & M. argued that the business was in such poor financial state when they took over that there was effectively no business to transfer and that they had simply acquired the premises with a view to starting afresh. The Tribunal, however, held that the state of the business was not relevant and that there was a transfer as envisaged by the Acquired Rights Regulations and continuity of employment should be preserved for the two employees who were retained by M. & M. and that the two employees who were not kept on could claim unfair dismissal compensation from M. & M.

In *Pengelly v. Norm Cable Ltd.*, COIT 13 45/57, Ms. Pengelly worked as an assistant head waitress in a restaurant. Her employer sold the restaurant to new owners and the completion date was 1st June 1982. On that date, Ms. Pengelly was handed a letter of dismissal by her former employer, to take effect immediately. Ms. Pengelly continued to work for the new owners and some time later was dismissed. The question raised was whether or not the transfer of business and her dismissal by her former employers broke continuity of employment. If it did, Ms. Pengelly would not have had the necessary 52 weeks continuous employment to qualify for unfair dismissal protection.

The Tribunal held that under the regulations Ms. Pengelly's employment was not terminated by the transfer itself. Since completion took place on 1st June 1982 and on that date Ms. Pengelly became employed by the new owners, the purported dismissal by her former employer was ineffective because by 1st June 1982 she was no longer working for them. It was held that Ms. Pengelly was not dismissed on 1st June 1982 and should have been treated as having being employed by the new owners throughout under the provisions of the regulations. Continuity was preserved and she was entitled to proceed with her unfair dismissal claim.

In *Skilling v. Reed,* COIT 1345/1, Mrs. Skilling worked as a shop assistant in a small business which was sold to Mr. & Mrs. Reed. It was known that the business would be run by Mr. & Mrs. Reed as partners and that Mrs. Skilling would not be required. Mr. Reed gave Mrs. Skilling her pay in lieu of notice and she subsequently claimed unfair dismissal and a redundancy payment. The Tribunal held that the reason for dismissal was economic and/or organisational, as Mr. & Mrs. Reed had made a careful appraisal of the requirements of the business and come to the conclusion that Mrs. Skilling's work could be spread between them. The dismissal was not automatically unfair under the terms of the regulations and, as there were substantial grounds justifying the dismissal, the Tribunal considered the dismissal to be fair. The Tribunal, however, held that the reason for termination came within the definition of redundancy and awarded Mrs. Skilling a redundancy payment.

In *Shipp v. D.J. Catering Limited & Anor.*, COIT 1348/49, Mrs. Shipp worked for a small family company, D.J. Catering Limited, as a barmaid in a wine bar. The business was not successful and the wine bar was sold. The new owner decided the only way the business could succeed was for manning levels to be reduced and he made it quite clear to D.J. Catering Limited that he would not require any of the existing staff. D.J. Catering Limited wrote to Mrs. Shipp terminating her employment. The Tribunal held that the reason for dismissal was an economic one, the business being in a deteriorating financial position and that the dismissal was not, therefore, automatically unfair under the terms of the regulations.

The remaining question, however, was whether or not Mrs. Shipp had been fairly dismissed under the normal unfair dismissal provisions and, on this point, the Tribunal held that since all employees had been dismissed, there was no unfair discrimination against any one and, as there had been sufficient warning and consultation with Mrs. Shipp, her dismissal was found to be fair.

All of these cases deal with termination of employment consequent on a transfer. It should also be kept in mind that the regulations cover situations where employees remain in employment and where the regulations effectively preserve their contractual rights, be they expressed, implied, contained in a collective agreement, or arise by custom or practice. The provisions relating to pensions are also of considerable importance.

In relation to the termination of employment of employees consequent on or otherwise linked with the transfer of a business, there are three questions to be answered:—

(1) *Has there been a transfer of a business?* In *Kenmir v. Frizzel,* [1968] 1 WLR 329, Widgery J. stated that a transfer of a business only occurs if the effect of the transaction is to put the transferee into possession of a going-concern, the activities of which he would carry on without interruption and that the question of whether or not there was a transfer is one of substance rather than form, consideration being given to the whole of the circumstances by weighing *pro* and *contra* the transfer of a business. In *Evendon v. Guildford City Association Football Club,* [1975] QB 917, Lord Denning stated that transfer of a business means "that on the transfer, the whole complex of activity must be transferred from the old owner to the new owner; or a separate and severable part of them. It is not sufficient that the premises alone or the physical assets alone are transferred". A case of particular importance is *Port Talbot Engineering Company Limited v. Passmore,* [1975] ICR 234. In that case, a Steel Plant was maintained by a series of contractors.

The maintenance contracts each lasted for a 12 month period and a successful contractor had to re-tender at the end of each such period. The Court held that there was no transfer of the business of maintaining the plant when one contractor was replaced by another. There was nothing for the outgoing contractor to transfer. He had simply lost the contract to another contractor as a result of a competitive tender.

Mrs. Justice Griffiths stated that the relevant test to be applied was that found in the judgment of Widgery J. in *Kenmir Limited v. Frizzell & Others* and held that, in applying this test, the question must be asked what evidence was there that the employer, when they obtained the contract, were put in possession of a going concern previously owned by the outgoing contractor? The answer was that there was no such evidence and there was, therefore, held not to be a transfer of a business.

(2) *Has there been a change of employer?* This would seem to be the simplest question to answer. If the identity of the employer remains unchanged, the fact of the change in the controlling interest of the employer appears to be immaterial.

(3) *Is the termination justified by one of the allowable reasons in Regulation 5?* This, again, is a question of fact and would appear to come within the normal definitions of

redundancy. The termination coming within the definitions of redundancy would appear to satisfactorily meet the requirements of Regulation 5, otherwise there would appear to be a sustainable claim of unfair dismissal. □

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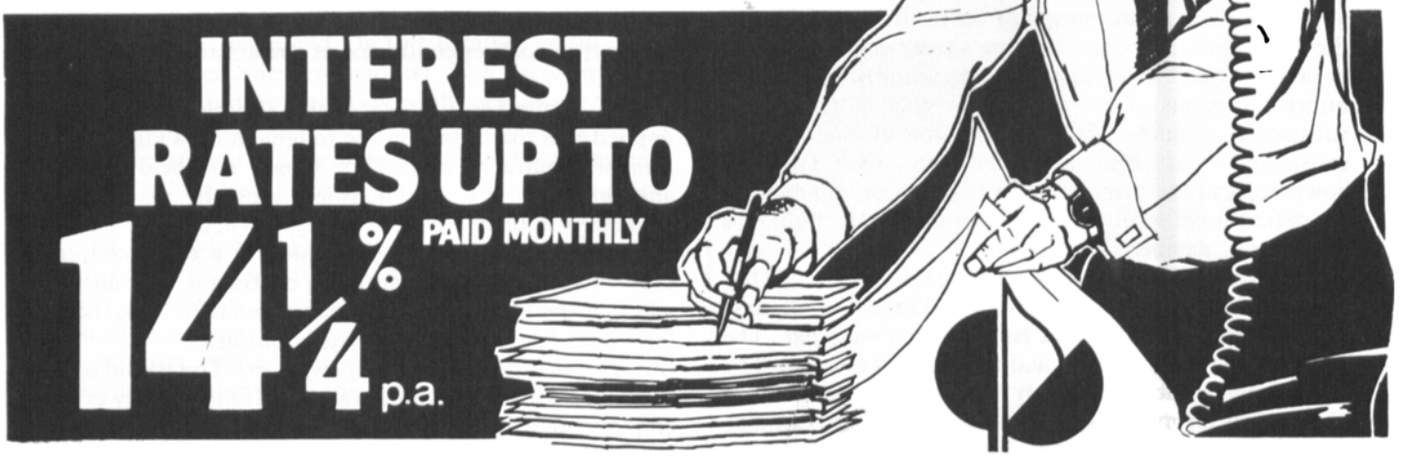

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BOOK REVIEW

An Introduction to the Principles of Morals and Legislation by Jeremy Bentham; edited by J. H. Burns and H. L. A. Hart, London, Methuen & Co. Ltd., 1982 (lxx, 343p.). Price £6.95p (Sterling).

Jeremy Bentham, the son of a solicitor, was born in London in 1748. On being called to the Bar in 1772 he applied himself to the theory of law and became perhaps the greatest critic of legislation and government in his day. His first publication *A Fragment on Government* (1776) contained the germs of most of his later writings and procured for him the acquaintance of the Marquis of Lansdowne at whose seat in Wiltshire he afterwards passed some of the most agreeable hours of his life.

"Nature", says Bentham, "has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*". The principle of utility, which recognises this subjection, is the foundation of his philosophy. By utility he meant the property in any object whereby it tends to produce benefit, advantage, pleasure or happiness or to prevent the happening of mischief, pain or evil to the party whose interest is considered. This principle approves or disapproves of every action whatsoever, either of a private individual or of a Government, according to the tendency which it has to augment or diminish the happiness of the interested party. While this doctrine of utility is the pervading principle in all his writings Bentham's favourite vehicle for it's expression was "the greatest happiness of the greatest number". Happiness for him consists in the enjoyment of pleasures and security from pain and the duty of government was to promote the happiness of society by punishing and rewarding. He was indeed a pioneer of liberalism and radicalism.

Those who have the occasion to study Bentham will find his extraordinary, minute and comprehensive diagnosis of man's nature and motives presented with care in the text and footnotes of this fine publication. Only in the *Maximes* of La Rochefoucauld do we find a match for Bentham's utilitarianism.

It is no easy task to peruse this volume with advantage. It's study is a labour of duty rather than of love and the student will find chapters dealing with the sources, kinds and measurement of pain and pleasure, the circumstances influencing sensibility, mischievous acts (including the non-payment of taxes), motives, consciousness, human actions and dispositions, division of offences and the proportion between them and punishment. An example of the quality and texture of his thinking may be found in his statement on the strength of intellectual powers to which he refers the several qualities of 'readiness of apprehension, clearness of discernment, accuracy and tenacity of memory, amplitude of comprehension and vividity and rapidity of imagination'.

After such labour is it any wonder that Bentham enjoyed his diversions at Bowood Park with Lord Lansdowne! A generation later the third marquis (Henry Petty Fitzmaurice) was the friend and patron of the poet Thomas Moore. Descended from the Fitzmaurices of Kerry and Sir William Petty of the Down Survey, this family entertained such varied people as Bentham, Mirabeau, Romilly and our own Tom Moore who composed many of the *Irish Melodies* when he lived in Sloperton Cottage on the estate.

(continued on p. 141)

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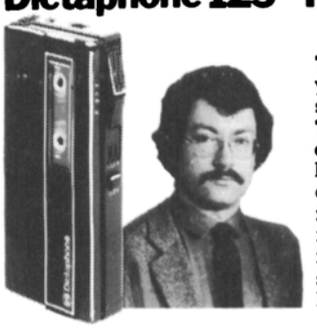

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Eric A. Plunkett, Solicitor, who died on 20 June, 1983 had been Secretary of the Incorporated Law Society of Ireland for thirty-one years when he retired in 1973. He succeeded William George Wakely who had held the office for fifty-four years. It was remarkable that the service of those two good men to the Society between them spanned eighty-five years.

At the Charter Centenary Dinner of the Society in 1952 the late Arthur Cox, the then President, in proposing a toast to Eric Plunkett said "I spoke to-night of Mr. Wakely. He died about ten years ago and it was then that Eric Plunkett succeeded him. At that time we certainly thought that Mr. Wakely would never be replaced, but it is no reflection on Mr. Wakely to say we have secured a treasure, only those who have taken some small part in the preparation of the Centenary can know all that Eric Plunkett has done." For the Society Centenary, Eric produced a record of the Society and contributed to it a most erudite article entitled 'Attorneys and Solicitors in Ireland'.

It was small wonder that as well as the President and Council, many past Presidents and members of the Society were present to pay tribute when Father Jack McDonald S.J., Eric's brother-in-law celebrated the funeral Mass. For many it seemed like the passing of an era for the legal profession.

When Eric was appointed there were just 1,000 Solicitors on the Roll and the members steadily increased until today there are 3,500.

Down the arches of the years Eric quickly, efficiently and apparently almost effortlessly discharged the ever-increasing diverse duties of his difficult office. He not only faithfully served his colleagues but also impartially served the public when required to pursue complaints requiring disciplinary action. He had the ability to serve two masters.

In 1968 the Twelfth Conference of the International Bar Association was hosted in Dublin attended by some twelve hundred conferees and their wives. The great success of the Conference was largely due to Eric's advance work of preparation and his organising ability.

He always maintained close liaison with the Law Societies of England, Scotland and Northern Ireland and was responsible for building up excellent rapport which exists with these Bodies today.

Eric's position necessitated attendance at many social functions particularly at Bar Association Dinners throughout the country, and these he obviously enjoyed. Being ever of a cheerful disposition, he always enjoyed good fellowship.

Eric was educated at Belvedere College and the National University and was in private practice until his appointment to the Society in 1942. He became a member of the St. Stanislaus Conference of the St. Vincent de Paul Society attached to Belvedere College and remained active in the Society all his life. He was also a Trustee and Director of the Solicitors' Benevolent Association and regularly attended its monthly meetings. He was present at a meeting a few days before his death. He will be a great loss to these two Charities. He will also be long remembered with gratitude and affection by his colleagues who have lost a real friend. It is hoped that these few lines of tribute will in some small way convey our sense of loss to Eric's dear wife, Stella and his children Arthur, Collette, Eric and Stella whom he so loved and be a little consolation to them at this time. May this good man rest in peace.

E. McC.

The Increasing Role of the Legal Profession in the Employment Appeals Tribunal

by

Deirdre Poole, College of Commerce, Rathmines
Winning Essay of The Law Society's Annual Journalism Award 1983

THE Employment Appeals Tribunal has become something of a boom area for the legal profession during the past five years and, however contradictory this is to the original aim of the Tribunal it shows that Labour Law is now an important growth area in Irish Law.

The original aim of the Tribunal, in the words of the Donovan Commission, was to provide "an easily accessible, informal and inexpensive procedure for the settlement of disputes." This meant that both parties could present their own cases with no involvement from the legal profession.

Legal knowledge and experience has always been recognised by the Tribunal. The Chairman is required to have a mimimum of seven years legal practice and although not required by law, the Vice-Chairmen appointed so far have all had legal experience. In addition, the Unfair Dismissals Act 1977 has its background in Common Law. A knowledge of adjectival law is also required, as distinct from substantive law, to ensure that hearings are conducted in accordance with the requirements of Natural Law. But the Tribunal was not designed to become a court with legal representation on both sides.

Both trade unions and employers' organisations provide services for representing members and in 1978 a total of 444 employees were represented by their unions. Only 211 cases were represented by the legal profession. By 1981 the number of union represented cases was 721 while the number of legally represented cases had risen to 672, three times the 1978 figure.

Legal involvement on the employer's side is much more pronounced and always has been. The legal profession represented 265 employers in 1978 while the unions represented only 154 cases. By 1981 the legal profession represented 724 cases while the unions represented 406 employers. (See Table).

"The law in relation to the Tribunal is complicated and will get more so in the future" says Mr. Ercus Stuart, SC, a leading labour law expert. "Because of our membership of the EEC more laws will be passed dealing with labour law. They will have all sorts of gaps in them so this is a growing area for solicitors."

"Younger solicitors in particular have an advantage in this area over older solicitors because for the past ten years they have had a special course at the Kings Inn in the whole area of dismissal law and practice.These solicitors will have more experience and knowledge and so will have more opportunity especially in larger firms. Larger firms now deal with more labour law cases because they represent large or multi-national companies."

"A number of solicitors and barristers though are not doing a good job" claims Mr. Gary Byrne, solicitor and expert in labour law. "Some members of the legal profession are just not offay with the Tribunal system. They tend to compare it with courtwork and because there is little paperwork they don't put enough work into it."

"Because there is so little paperwork involved and because there is so little information available beforehand I think the onus is on the solicitor or barrister to do even more work in the Tribunal hearings" argues Mr. Stuart.

"Also barristers are just as necessary as solicitors at hearings" says Mr. Stuart. "Solicitors don't have as much experience at advocacy. If a case is to be decided on whether someone is telling the truth then a barrister is the best person to establish it in cross examination."

"Solicitors are needed because in many cases the trade unions are appalling. They just haven't got a clue of the law. In many cases where the unions are winning they are not getting enough for their clients. People then go to solicitors expecting them to do better," agrees Mr. Byrne.

"Companies can afford to have their own solicitors and they more often than not use them to represent them,"

REPRESENTATION AT SITTINGS

	EMPLOYEES		EMPLOYERS	
	Representation by Trade Union.	Representation by Solicitor or Counsel.	Representation by Employer Organisation.	Representation by Solicitor or Counsel.
1978	444	211	154	265
1979	427	305	136	397
1980	801	387	258	776
1981	721	672	406	724

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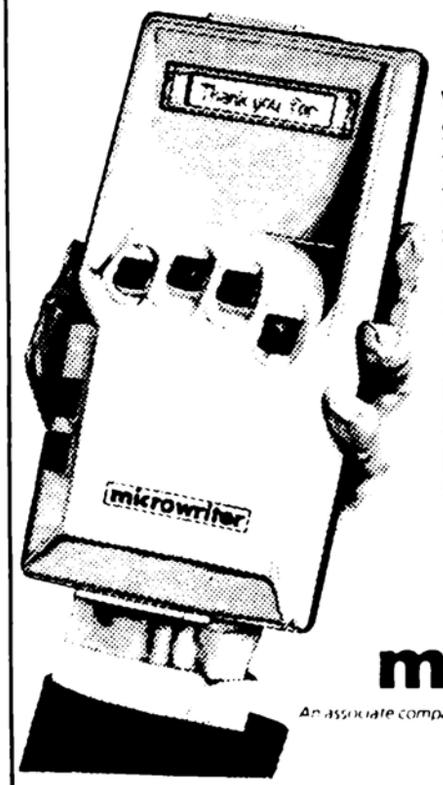

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explains Mr. Byrne commenting on the higher ration of legal representation on the employer's side. "Employers are under a false perception about the power of the Tribunal. They are afraid that they will lose a lot of money and also they don't want the publicity. Solicitors will make every effort to settle their cases before it gets to the Tribunal hearing," says Mr. Stuart.

Public perception of the Tribunal has changed radically over the past five yers, and this has caused people to call on the legal profession to represent them. "People think they are going to get huge sums of money in compensation so they turn to solicitors to represent them," according to Mr. Byrne. In fact the Tribunal can only award a maximum award of two year's salary and that is rarely given. Most of the awards are very small and the Tribunal does not award costs.

"This perception of the Tribunal is the fault of the media. The press are always printing all sorts of hairy cases. Very little is written about the employer's side and every detail of the employee is splashed out. This creates an unfair balance and complicates the whole issue" says Mr. Byrne. "In most cases the decision of the Tribunal is reserved and although many employers are winning their cases it rarely gets into the papers."

"The possibility of an award of what is sometimes a substantial sum appears to have resulted in a growing tendency for parties to employ members of the legal profession," says the Annual Report of the EAT in 1981. Although the minimum compensation is only two year's salary because of the recession many higher paid executives have been, and will be, made redundant. Therefore the amount of money at stake is now higher so more people are turning to the legal profession for representation. Many solicitors now take a percentage of the award as their fee because of the variance in awards.

Employment Tribunals in England have the additional power of awarding a Basic Award — damages for the manner of the dismissal — and Mr. Stuart believes that the EAT should also have this power.

The case of *R. T. Bunyon v. UDT* (UD66/1980) highlights the whole problem facing the Tribunal. Normally unfair dismissals hearings take a half a day, according to the annual report of the EAT. The Bunyon case however, took 32 separate hearings lasting from 15/5/80 to 22/7/81. Some 144 documents were produced as evidence and some witnesses were up to seven days giving evidence. Both parties were represented legally and there were many legal wranglings. The report of the Tribunal's decision in Bunyon's favour, ran to 22 pages, and the maximum compensation was awarded,some £44,454. The case was reported extensively and no doubt gave rise to much of the misconception the public now has. Bunyon was represented by a Solicitor, Senior Counsel and Junior Counsel.

Clearly this sort of case is not what the Tribunal was set out to deal with but it does serve as illustration of the increasing role of the legal profession and the loss of the "accessible and informal process" intended by the Donovan Commission. □

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Correspondence

The Editor, 27 May 1983
The Law Society Gazette,
Blackhall Place,
Dublin 7.

Dear Sir,

Overheard at Dunmanway District Court on the 25th inst., whilst the Defence Solicitor was cross-examining a witness — "I must put it to you that the van had not sufficient power left to mount the grass virgin".

I have heard of a grass widow or widower but a grass virgin?

Yours faithfully,

Grattan Neville,
Solicitor,
Clonakilty,
Co. Cork.

The Editor, 20 May 1983
The Law Society Gazette,
Blackhall Place,
Dublin 7.

Sir,

Through the medium of your columns, I would like to address an appeal to members of the profession to have regard to the limits of jurisdiction set by the Courts Act, 1981, when they are about to issue civil proceedings, especially those for liquidated demands, which are likely to terminate in judgment by default.

During the protracted dispute between the District Court Clerks and the Department of Justice, now happily ended, solicitors were of necessity obliged to enter cases in the Circuit Court which were in fact within the District Court jurisdiction, as enlarged by the 1981 Act. The effect was to overtax the resources of many Circuit Court Offices and hence to cause delays in the processing of litigation. Furthermore, efforts to cope with the pressure of court work frequently had a chain-reaction, lending to delays in the other types of legal business which are properly the function of the provincial Circuit Court Offices, e.g. Land Registry, Sheriff and in some cases Probate.

It is, of course, accepted that, subject to the risk of being penalised in costs, a litigant is entitled to proceed in whichever Court he chooses, provided it has jurisdiction. A County Registrar cannot refuse to accept a Civil Bill for entry simply because the amount claimed is within the District Court jurisdiction.

However, civil claims for sums less than £2,500 can now be dealt with at least as simply and expeditiously in the District as in the Circuit Court. Indeed, it can also be more profitable to a solicitor to proceed in the lower court because of the anomaly that the Circuit Court is still constrained to apply the 1972 scales of costs, whereas the District Court has new scales introduced in 1982. Just taking default, i.e. debt-collecting, cases as an example, the solicitor's professional fee works out as follows:—

On a Decree for £150: District Court — £16. Circuit Court — £10.80.
On a Decree for £600: District Court £29.50. Circuit Court — £15.00.
On a Decree for £1,500: District Court — £56.50. Circuit Court — £22.25.

The discrepancy grows, the higher the amount involved, and one might expect that, if this were fully appreciated, it would be a substantial inducement to move in the District Court in appropriate cases.

Likewise, most types of family law proceedings, which regularly involve repeated applications to Court, would seem, at least in provincial areas, to be more suited to the District Court, for the reason that it sits more frequently and at a far greater variety of venues than the Circuit, and is therefore more accessible to solicitors and their clients alike.

It has been suggested that metropolitan-based solicitors engaged in substantial debt collecting work, being unfamiliar with provincial arrangements, find difficulty in ascertaining the appropriate District Court Area in which to proceed. In the writer's view, this can only be due to inertia, because these Areas are well established and on record, not only in District Court Rules but also in the current Law Directory; if, despite this, doubt still remains, this could be speedily resolved by an enquiry to whoever appears to be the nearest District Court Clerk. That would be preferable to taking the easy way out, by issuing proceeings in the Circuit Court, thereby clogging up its resources.

Now that normal working has been resumed in the District Court Offices, it is hoped that solicitors will revert to the former practice of bringing their proceedings in the most appropriate forum, having regard to the limits of jurisdiction, unless there are very pressing reasons for doing otherwise. This would be in the interests of the profession as well as of the Circuit Court Offices, because the reduction in the work-load there will tend to minimise delays, especially in the area of default judgments.

My colleagues and I look forward to the co-operation of the profession in this regard.

Yours etc.,
T. G. Crotty,
Chairman, County Registrars' Association,
Circuit Court Office,
Kilkenny.

BOOK REVIEW

(continued from p. 135)

The editors are to be congratulated on producing a fully critical and annotated text of this difficult work. For the first time all of Bentham's modifications of the original text of 1780 are incorporated and identified and his references are elucidated. Professor Hart has added an introduction specially designed for students while an index of subjects and an index of names act as signposts for the traveller on his difficult journey through the text.This is a university paperback presented on the finest of paper and with the clearest of print.

Gerard A. Lee

Professional Information

Land Registry —
Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 8th day of July, 1983.

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

1. REGISTERED OWNER: James Kingston Smith, Derryfadda, Clonlara, County Clare, Folio No.: 8399; Lands: Derryfadda (Part); Area: 98a.2r.2p. County: **CLARE.**

2. REGISTERED OWNER: James Conway, Folio No.: 9049; Lands Cappaunac; Area: 30a.0r.25p.; County: **TIPPERARY.**

3. REGISTERED OWNER: Mary Jane Kingston (deceased), Folio No.: 18701; Lands: Crohane; Area: 88a.3r.4p.; County: **CORK.**

4. REGISTERED OWNER: John Raher, Folio No.: 3935F; Lands: Loughdeheen; Area: 1.900 acres; County: **WATERFORD.**

5. REGISTERED OWNER: Hubert Geelan, Carrigeen, Kilglass, Roscommon, Folio No.: 1667; Lands: Carrigeen; Area: 17a.2r.24p.; County: **ROSCOMMON.**

6. REGISTERED OWNER: Patrick Gallagher, Attimachugh, Foxford, Co. Mayo, Folio No.: 356, Lands: Attimachugh; Area: 296a.2r.35p.; County: **MAYO.**

7. REGISTERED OWNER: Vincent Connolly, Folio No.: 3579F; Lands: Tullyrain; Area: 0.500 acres; County: **MONAGHAN.**

8. REGISTERED OWNER: Andrew McNamara, Neggagh, Carron, Ennis, County Clare, Folio No.: 22209; Lands: Cahergrillaun; Area: 90a.1r.36p.; County: **CLARE.**

9. REGISTERED OWNER: Jonathan Moriarty & Margaret Moriarty; Folio No.: 31298; Lands: Farran; Area: ; County: **KERRY.**

10. REGISTERED OWNER: Joseph Brendan Scarisbrick, Folio No.: 2366F, Lands: (1) Talbotsinch, (2) Talbotsinch, (3) Talbotsinch; Area (1) 2a.0r.36p.; (2) 0a.3r.27p.; (3) 0a.0r.10p.; County: **KILKENNY.**

11. REGISTERED OWNER: Thomas McGowan and Mary J. McGowan, Fairfield Lower, Crossmolina, County Mayo, Folio No.: 50504; Lands: Fairfield Lower, Fairfield Lower; Area: 16a.1r.31p.; 12a.2r.35p.; County: **MAYO.**

12. REGISTERED OWNER: Patrick Collins, Mill View House, Ballyvaughan, County Clare, Folio No.: 12944; Lands: Knocknagroagh; Area: 24.700 acres; County: **CLARE.**

13. REGISTERED OWNER: Patrick McGovern, Folio No.: 90R; Lands: Derrynananla Lower; Area: 40a.2r.28p.; County: **CAVAN.**

14. REGISTERED OWNER: Roko Investments Limited, Folio No.: 17352; Lands: situate on the North side of Navan Road in the Parish of Castleknock and/District of Cabragh **DUBLIN.**

15. REGISTERED OWNER: John Mulcahy, Folio No.: 12880; Lands: (1) Ballyloundash, (2) Ballyloundash; Area: (1) 32a.0r.6p.; (2) 13a.0r.15p.; County: **LIMERICK.**

16. REGISTERED OWNER: Mary Shields, Folio No.: 774F; Lands: Kilmalogue: Area: — ; County: **OFFALY.**

17. REGISTERED OWNER: Delia Burke, Folio No.: 27636; Lands: Kilpeacon; Area: 1a.1r.35p.; County: **LIMERICK.**

18. REGISTERED OWNERS: Rev. Francis Canon Carolan, Rev. Patrick Monsignor Lyons, Rev. John Canon Harmon and Rev. Joseph Pentony, deceased, Folio No.: 578; Lands: Tullyallen; Area: 25a.1r.0p.; County: **LOUTH.**

19. REGISTERED OWNER: John Keane, Folio No.: 15603; Lands: Knockadea; Area: 31a.2r.30p.; County: **LIMERICK.**

20. REGISTERED OWNER: Patrick Walsh, Folio No.: 1151 now closed to 4781F; Lands: Stonepark; Area: 17,356 acres; County: **TIPPERARY.**

21. REGISTERED OWNER: Daniel Holland, Folio No.: 27681; Lands: (1) Derrycreigh, (2) Derrycreigh; Area: (1) 13a.3r.39., (2) 296a.2r.3p.; County: **CORK.**

22. REGISTERED OWNER: John Thomas McDonnell & Kathleen McDonnell, Folio No.: 1818; Lands: Moranstown; Area: 4a.1r.10p.; County: **WESTMEATH.**

23. REGISTERED OWNER: Elizabeth Rachel Farrell, Folio No.: 25996; Lands: (1) Athlumney, (2) Balreask Old; Area: (1) 131a.0r.0p., (2) 1a.3r.0p.; County: **MEATH.**

24. REGISTERED OWNER: Maurice Neilan, Folio No.: 4211R; Lands: Bawnmore; Area: 71a.1r.28p.; County: **KERRY.**

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Lost Wills

Bruen, Miss Lily, deceased, late of Creff, Sligo. Will any person having knowledge of the whereabouts, of the Will of the above-named deceased, who died on 13 March, 1979, please communicate with Messrs. Kelly & Ryan, Solicitors, Manorhamilton, Co. Leitrim.

Carter, William, deceased, late of Kilmeague, Naas, Co. Kildare. Will any person having knowledge of the whereabouts of the original Will dated 15th April, 1981, of the above-named deceased, who died on 2 December, 1981, please communicate with Brown & McCann, Solicitors, Naas, Co. Kildare.

Keating, Thomas, deceased, late of 67 Walter Macken Place, Galway, and formerly of 6 Ceannt Avenue, Merview, Galway. Will any person having knowledge of the whereabouts of the Will of the above-named deceased, who died on 27 May, 1983, please communicate with Owen M. Carty, Solicitor, Irishtown, Athlone, Co. Westmeath.

McCarthy, Mary, deceased, late of Lehud, Tuosist, Killarney, Co. Kerry, and formerly of 79 Glasthule Buildings, Sandycove, Co. Dublin, and 125 Larkfield Gardens, Terenure, Dublin 6. Will any person having knowledge of the wherabouts of the Will of the above-named deceased please communicate with Messrs. P. T. O'Driscoll & Sons, Solicitors, 41 South Main St., Bandon, Co. Cork.

O'Donovan/Donovan, Michael, deceased, late of Cooldrishogue/Shrough, Lismore, Co. Waterford. Will any person having knowledge of the whereabouts of the Will of the above-named deceased, who died on 11 February, 1983, please communicate with Messrs. Joseph P. Gordon & Co., Solicitors, Burgery, Dungarvan, Co. Waterford.

Professional Information

Crean & Co., Solicitors wish to advise that they are moving to 10 Rostrevor Terrace, Rathgar, Dublin 6. Tel. 970105. Temporary Offices are at 15 Leinster Road, Rathmines, Dublin 6. Tel. 961989.

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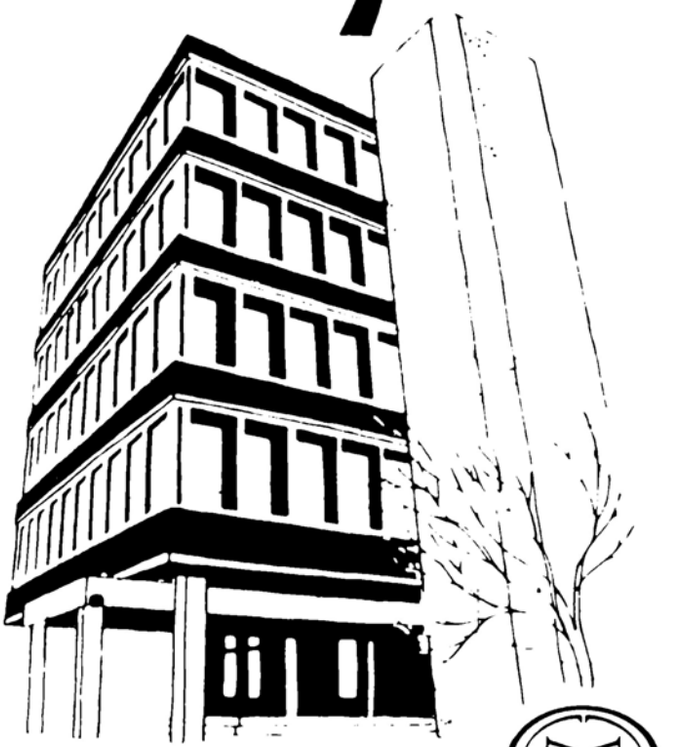

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 6. July/August 1983

Family Law — Coping with the Growth

Some interesting statistics on the number of Family Law cases were given in the Dail last June by the Minister for Justice in a series of Replies to Questions from Dr. Michael Woods. The statistics are set out on page 166. It should be noted that, while the trend is clearly on the increase, the latest figures are artificially reduced by the impact of the recent Court Clerks' dispute.

Two obvious conclusions may be drawn from the published figures. Firstly, that Family Law cases are on the increase, and, secondly, that the Courts dealing with these types of cases must be geared to cope with the increase. Now that the changes brought about by the Courts Act 1981 are fully operational and the District and Circuit Courts are the primary Courts dealing with Maintenance, Barring and Guardianship cases, the question must be asked whether those Courts will be able to cope, without adversely affecting the handling of other types of cases.

In recent years, the administrative efficiency of the Dublin Circuit Court has been the subject of well-deserved praise - due in no small way to the President of the Circuit Court, Mr. Justice Neylon - with civil actions coming on for hearing within *weeks* of notice of trial being served.

However, the Circuit Court in Dublin is already feeling the administrative strain of the new Family Law jurisdiction. One fully-fought Family Law case can be expected to last two to three days. What then happens to the number of civil actions which could be disposed of in the same period of Court time? The same query applies equally to the Dublin Metropolitan District Court and, perhaps in a lesser way, to every Circuit and District Court in the country.

In their very nature, Family Law cases must receive priority in the Court listing system. There is, therefore, an immediate need for the appointment of several new Circuit Judges and District Justices - primarily for the Dublin area but, if required, movable on an 'ad hoc' basis, to deal with such cases in other parts of the country.

In the longer term, serious consideration must be given to the establishment of a "Family Court", which could be based on the present Circuit Court structure, which would have jurisdiction at first instance in all Family Law matters, to be serviced by Circuit Judges who would soon become "specialised" in such cases and who would, in turn, have a specialist back-up staff to assist them.

There is, of course, another possible way of dealing with the growth of Family Law cases, which take up so much of the time of our Courts - that is by the provision of a Family Conciliation Service, which would assist the parties to an irretrievably broken-down marriage amicably to resolve their differences. At a recent Family Law Symposium in Sligo, the Minister of State at the Department of Justice, Mrs. Nuala Fennell, strongly supported the setting up of such a Conciliation Service on the lines of the now well-established prototype, the Bristol Family Court Conciliation Service. The Minister rightly made reference to the reality that, whereas the role of each party to a broken marriage may have ended as a marraige partner, their respective roles as parents continued. How often must the obvious be reiterated that the Courts' system of adjudication on Family Law disputes, by its very nature, gives rise to confrontation rather than conciliation - resulting more often than not in mutual dissatisfaction and unhappiness, with innocent children the ultimate sufferers? How much better for trained conciliators to resolve with the parties themselves the issues of custody and access to children, maintenance and property entitlement - with agreement so reached being given subsequent sanction by the Court. Agreements reached amicably and rationally are more likely to be honoured in spirit and in fact than imposed solutions, following a bloodletting session in Court. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Too Unconventional ?

The recent welcome, if belated, announcement that Ireland is to ratify the United Nations Convention on Human Rights is a reminder that Ireland's record in introducing into domestic law conventions in the making of which it has participated is hardly distinguished. This is particularly true of International Conventions relating to legal matters. There have been 28 conventions adopted by the Hague Conference on Private International Law since 1954. Ireland has introduced into domestic legislation only one of those, that relating to the Form of Wills. While a number of the conventions might not fit conveniently into our Common Law system, it is significant that the United Kingdom has ratified seven conventions and signed a further one. Those which are of particular interest to lawyers and would therefore be of service to their clients, include conventions on the Service of Documents Abroad, the Taking of Evidence Abroad and, most important, the Enforcement of Maintenance Agreements.

Our record in respect of Council of Europe conventions is not so poor in numerical terms, though there does seen to have been a lessening of enthusiasm for ratifying conventions in recent years. These conventions cover a whole range of governmental activities but, again, it is in those relating to legal matters that Ireland appears to move particularly slowly. We have the dubious distinction of being the only country which has not ratified the Convention on Information on Foreign Law; perhaps not surprisingly we are one of few countries which has not ratified the Convention on Legal Aid nor have we ratified the Conventions on Data Protection and the Legal Status of Children.

The Convention on the Service of Judicial and Extra Judicial Documents Abroad, by providing that a central authority in each of the contracting States will either serve or arrange for the service of these documents, makes the service of such documents a much simpler task than it is for litigants in non-contracting States.

Similarly, the Convention on the Taking of Evidence Abroad provides that a central authority in each State will be available to arrange for the taking of such evidence. Most of the principal States in Europe, together with the United States have ratified these two Conventions.

The Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations provides a simple procedure for invoking the judicial processes of a contracting State against a maintenance debtor resident in that State to compel payment due under a Maintenance Decision made in another contracting State. While there are reciprocal arrangements for the enforcement of Maintenance Orders between this country and the United Kingdom, the failure to ratify the Hague Convention deprives spouses and children of the opportunity of invoking the procedures established by the Convention against a maintenance debtor resident in one of the other contracting States, which now include most of the major European countries.

It would be easy to argue in relation to the Hague Conference that the value of our participation in the conferences is dubious if we do not propose to adopt a reasonable proportion of its conventions.

In passing, it may be commented that Irish delegations to the Conference have tended to be composed of public servants. Other countries' delegations regularly include academic and practising lawyers. One beneficial result of which is that such countries achieve greater public awareness of and discussion in legal journals of the Conferences proceedings.

It is, however, more important to raise the question of why the State has not ratified conventions in the making of which is had played an active part and which have been adopted by other Common Law jurisdictions. □

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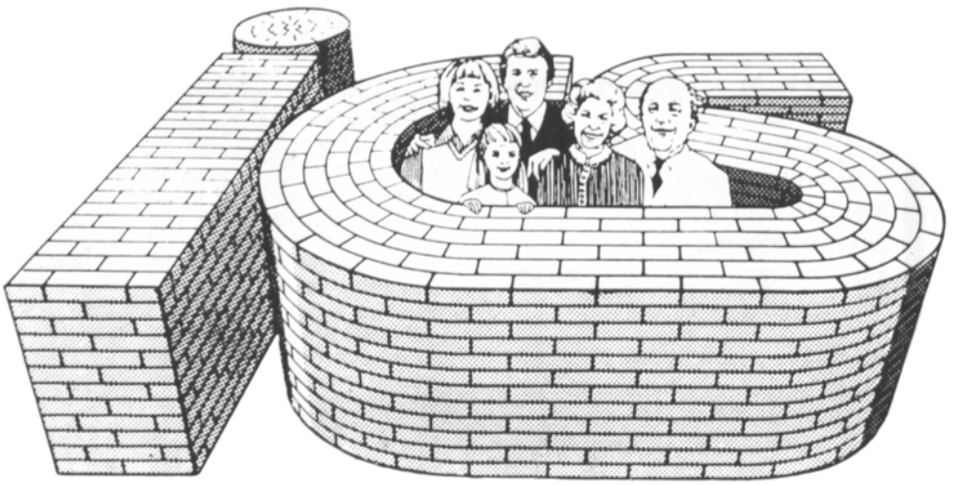

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Trade Disputes (Amendment) Act 1982 — "Definition of Workmen"

By
Gabriel Daly B.C.L.

Practitioners are aware that the concept of "Trade Dispute" is crucial in Labour Law. Those engaged in industrial action will to a certain extent be protected from tortious liability where they act "in contemplation or furtherance of a trade dispute". This "Golden Formula", as it is known was first introduced by the Conspiracy and Protection of Property Act 1875 but "Trade Dispute" was not defined until the Trade Disputes Act 1906.

1906 Act

There is no positive right to strike in Irish Law. There are some defences and immunities provided by the Trade Disputes Act 1906 which can be relied upon by workers and their representatives if employers take action against them in the Courts as a result of a strike. Thus, section 1 of the 1906 Act provides that "an act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done, without any such agreement or combination, would be actionable". This Section, in effect, overrules the decision of the House of Lords in *Quinn V. Leathem*[1] where it was held that if two or more persons combined without justification to injure another they would be liable in tort. Section 2 allows for peaceful picketing as follows - "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working". Section 3 of the 1906 Act provides that "an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment; or is 'an interference with the trade, business or employment of some other person'....." The above Sections of the 1906 Act deal with the liability of individuals engaging in industrial action. However, s.4 of the 1906 Act relieves trade unions, as such, from liability in tort altogether whether acting in contemplation or furtherance of a Trade Dispute or not. Section 4 effectively overrules the decision of the House of Lords in *Taff Vale Railway Company V. Amalgamated Society of Railway Servants*[2] where the plaintiff Company in 1901 successfully sued their employees' trade union the A.S.R.S. for £23,000.00 damages for wrongful picketing and £12,000.00 in legal costs. Section 5 (3) of the 1906 Act defines Trade Dispute as "any dispute between employers and workmen or between workmen and workmen, which is connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person." Section 5 (3) of the 1906 Act goes on to define "workmen" as "all persons employed in trade or industry". Thus it can be seen that the definition of "workmen" formed the basis of all the protections and immunities contained in the Trade Disputes Act 1906. The Trade Disputes (Amendment) Act 1982[3] amends the definition of "workmen" contained in the 1906 Act and it is the purpose of this article to examine what changes the new provisions will make.

Interpretation of "workmen" under s.5 of the 1906 Act

The Irish judiciary have, in the past, given a restrictive interpretation to the definition of "workmen" in the 1906 Act in a different manner to their judicial brethren in the U.K.

In an *obiter dictum* in *National Association of Local Government Officers V. Bolton Corporation*[4] Lord Wright placed a wide interpretation on the words "trade or industry". His Lordship stated, "Indeed, 'trade' is not only, in the etymological or dictionary sense, but in legal usuage, a term of the widest scope. It is connected originally with the word "tread" and indicates a way of life or occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. It may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman, but the word "trade" is used in the widest application in the appellation "Trade unions". Professions have their trade unions".

Employer activities

In deciding whether or not a person is engaged "in trade or industry", the Courts in Ireland have looked to the employer's activities rather than to the actual work done by the individual employee. Thus in *B & I. Steampacket Co. Ltd. V. Brannigan*[5] the Carlingford Lough Commissioners were held not to be involved in "Trade or Industry". Another example of this restrictive

approach is the earlier case of *Smith V. Beirne*[6] which concerned a workingmen's club. It was held by Dixon J. in the High Court, that the club was not engaged in trade or industry as it was a "non profit making" concern. The club not being engaged in trade or industry, it followed that its employees could not be so engaged and were, therefore, not "workmen" within the meaning of the Trade Disputes Act 1906; the dispute between the club and its employees was therefore not a protected "trade dispute" and any picketing of the club was unlawful. Dixon J. stated that "... to concede the claim of a Trade Union to regulate the relations of employers and employees, not engaged in any branch of trade or industry solely because the employees happened to be doing work of a similar character to that of workers in a particular branch of trade and industry would give a very wide and extended scope to the 1906 Act and give a Trade Union a broader field of legalised intervention and activity than could reasonably be supposed to have been contemplated by the 1906 Act".[7]

A recent view

In more recent times, McWilliam J.[8] granted a temporary injunction prohibiting the picketing of University College Galway. Negotiations had been going on between the I.T.G.W.U. and officers on behalf of the college with regard to the conditions of employment of about 80 employees. The Secretary of the U.C.G. branch of the union informed the college authorities that he and his fellow members would place pickets on the college. The injunction was granted against the secretary of the U.C.G. branch of the Union and against his servants or agents. Counsel for U.C.G. submitted that the college did not carry on a trade or business and, consequently, any picketing of its premises by its employees was not protected by the Trade Disputes Act 1906. This submission proved to be successful.

Excluded Employees

It can be seen from the above decisions that "trade or industry" according to the Irish Courts implies a "trade or industry in the sense of profit making enterprise and no other. The range of employees excluded from the protection of the Trade Disputes Act 1906 by this restrictive interpretation of "workmen" was very considerable. Those engaged in nursing, teaching (including university staff), civil servants, local authority workers, domestic employees and employees engaged in private employment of a non profit making nature were not protected by the Trade Disputes Act 1906. Any picketing by such persons, could, on the basis of the decisions quoted above, be restrained by injunction and the employer would be prohibited by the 1906 Act from seeking damages or compensation for wrongful action.

Legislative change

This narrow construction of "trade or industry" by the Irish Courts was noted by the Royal Commission on Trade Unions and Employers' Associations chaired by Lord Donovan.[9] The Donovan Commission recommended that the definition of "workmen" be amended as follows:

"The expression 'employee' means any person who has entered into or works under (or in the case of a contract which has been terminated worked under) a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing; and whether it be a contract of service, of apprenticeship or a contract personally to execute any work or labour".

In this country the Trade Union Bill of 1966 intended to delete the words "in trade or industry" from the definition of "workmen" contained in s.5 (3) of the Trade Disputes Act 1906. This measure was never carried through, and the Bill is now defunct. However, clause 13 of the National Understanding (1980) provided a commitment by the Government to introduce such a change by legislation. The provisions of section I of the Trade Disputes (Amendment) Act 1982 would appear to fulfil that commitment.

1982 Act

Section one of the Act provides as Follows:—

"Section 5 of the Trade Disputes Act 1906 is hereby amended by the substitution of the following definition for that of 'workmen' in subsection (3):

"and the expression 'workmen' means all persons employed, whether or not in the employment of the employer with whom a trade dispute arises, but does not include a member of the Defence Forces or of the Garda Siochana".

The Act deletes the words "in trade or industry" from the definition of "workmen" as defined in s.5 (3) of the Trade Disputes Act 1906 and by substituting in their place "all persons employed", now extends, to all members of authorised trade unions holding a negotiation licence,[10] the protection of the 1906 Act. Section 2 of the 1982 Act merely provides for its short title and for its collective citation as the Trade Union Acts 1871 to 1982. These are the only two sections in the 1982 Act.

Desirability of the change

The amendment to the definition of "workmen" contained in the 1982 Act is to be welcomed in so far as it clarifies the judicial uncertainty which surrounded the question of who was or was not a "workman" within the meaning of the Trade Disputes Act 1906 and brings within the definition of "workmen" many employees who, previously would have been denied the rights and immunities accruing to "workmen" under the Trade Disputes Act 1906.

It would be fair to say that the interpretations given to the Trade Disputes Act 1906 have led to results of truly labyrinthine complexity.[11] The 1906 Act has been looked upon with disfavour by the judiciary in Ireland and this is evident from the following judicial observations:

Kenny, J.[12] has referred to the 1906 Act as having been introduced "to redeem an election pledge of the Liberal party to overrule the decision of the House of Lords in *Taff Vale* and there are many indications in it that it was hurriedly drafted and that its wording did not receive adequate consideration".

Parke, J.[13] stated in the same case "the Trade Disputes Act 1906 was a child of political expediency, hastily conceived and prematurely delivered. It has now survived more than the allotted span of life with all its inbred imperfections still uncorrected".

The Trade Disputes (Amendment) Act 1982 while it

attempts to cover over some of the more obvious cracks and fissures which have appeared in the 1906 Act, nevertheless, retains in force in all other respects what is unquestionably an unsatisfactory piece of legislation. It is unfortunate that the opportunity of reviewing this whole area of our Labour Law was to some extent frustrated by the withdrawal of the Trade Unions from the Commission on Industrial Relations. □

Footnotes

1. [1901] A.C. 495.
2. [1901] A.C. 426.
3. Introduced in the Dail on 11/6/82. Passed by both Houses of the Oireachtas on 13/6/82.
4. [1943] A.C. ar pp. 184-185.
5. 90 ILTR 98 [1958] IR 128.
6. [1955] 89 ILTR 24.
7. [1955] 89 ILTR 24.
8. High Court unrept. 18th Jan 1977 McWilliam J.
9. Paragraph 821 pp 220-221. CMND 3623.
10. See Section II trade Union Act 1941.
11. Compare the decisions of the Court of Appeal and the House of Lords in the following Cases:-
    Express Newspapers v. McShane [1979] IALLER 79 (CA)
    [1980] I ALL ER 65 (HL)
    Duport Sheets Ltd. v. Sirs [1980] IALL ER 529 (HL).
    Note also the difference in interpretation between the House of Lords decision in *N. W. L. V. Woods* [1979] 3 ALL ER 614 (HL) and the Court of Appeal decisions in P. B. D. S. v. Filkins [1979] IRLR 356.
    Associated Newspapers Group Ltd. v. Wade [1979] IRLR 201.
    Beaverbook Newspapers v. Keys [1978] ICR 582.
    From an Irish point of view compare the judgements of McLoughlin J. in the High Court with, on the one hand, Walsh J. in the Supreme Court and on the other with Fitzgerald J. and Henchy J. in *Becton Dickinson and Company Limited v. Patrick Lee and Others* [1973] I.R.I.
12. [1977] I.R. 211.
13. [1977] I. R. 211.

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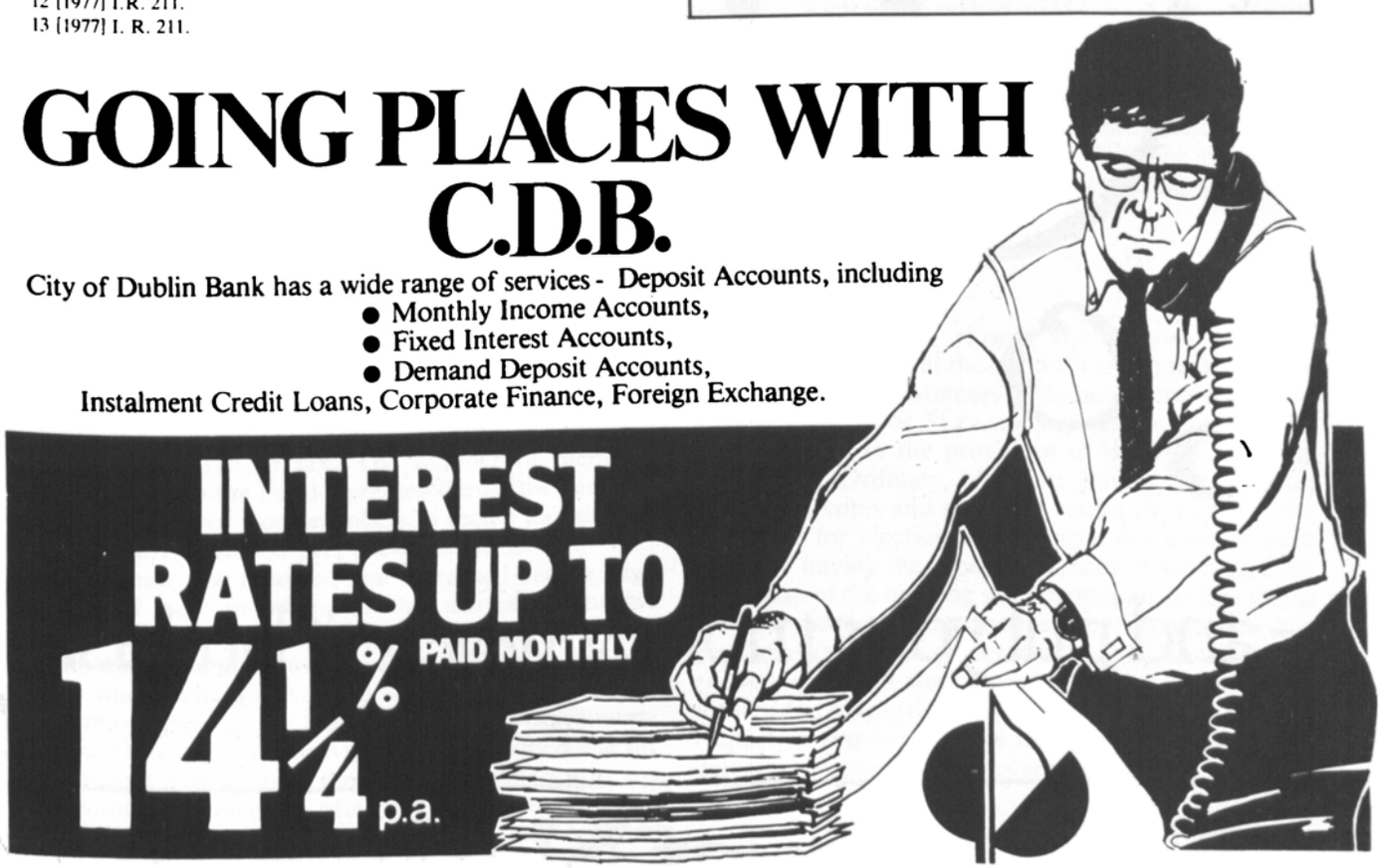

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Society's Half Yearly General Meeting Report

TWO amendments to the Bye-laws of the Incorporated Law Society of Ireland were passed at the general meeting of the Society held in Dromoland Castle, Co. Clare, on 7 May, 1983. The amendments arose out of the desire of the scrutineers to have it clear that if there are more votes cast than there are vacancies, the ballot paper will be rejected; and the option which the Senior Vice-President has of not serving as President. This option means that until he has exercised his option, it is not known whether there would be 30 or 31 candidates.

The amendments, proposed by Mr. J. F. Buckley and seconded by Mrs. Moya Quinlan were passed unanimously. One member, Mr. J. Mangan, suggested that the voting for the election to the Council should be on the basis of proportional representation, but the President (Mr. Michael J. Houlihan) pointed out that for such a proposal to be considered it would be necessary to put it forward as a formal proposal before a General Meeting.

Before the meeting opened Mr. Joseph Maloney, President, Clare Bar Association, welcomed the members of the Society and the overseas visitors.

All members stood in silence before the business of the meeting commenced in memory of the late Mr. Michael O'Morain, a former colleague and one-time Minister for Justice, who died recently.

The address of the President to the meeting has been circulated to members as a supplement to the May edition of the *Gazette*.

Presenting the report on the Society's Retirement Fund Mr. T. Shaw said that the current value is approximately £3 million, and that the average annual increase over the eight-year period since the Fund was founded was 27.99% free of tax. The number of members participating in the Fund increased during the year and the contributions from members in recent months had significantly increased over previous years.

Mr. Shaw also reported that there had been a large influx of new members to the associated income Continuance Plan. Rates under the Plan have been maintained and the non-medical limits have been raised. The underwriters have also agreed to increase the maximum permissible benefit to £40,800 per annum, subject to a suitable illness structure. He added that the terms and conditions of the Plan were superior to any individual contracts on offer in the Irish market and provided for partial disablement in both one's own and other occupations. This feature was of paramount importance to all solicitors. If illness or accident left an individual in a situation where only part-time working was possible it was more than likely that this activity would be in the legal profession. The Plan paid benefit in this type of situation, based on loss of earnings; the normal policy paid benefit only if the solicitor worked in another occupation. Members of the Law Society who have effected this type of cover on an individual basis should ensure that this protection was included in their arrangements.

Premiums payable under the Income continuance Plan, as with those payable under the Retirement Fund, are subject to tax relief at the individual highest rate.

The following were appointed scrutineers of the ballot for the Council of the Society for 1983/84:Messrs L. Branigan, G. Doyle, J. R. C. Green, E. McCarron, A. J. McDonald, P. C. Moore, P. D. M. Prentice and R. T. Tierney.

The amended bye-laws, approved by the general meeting, are:

Bye-Law 35
In voting, each member shall make a mark (thus X) with ink or pencil on his voting paper opposite the name of the candidates for whom he intends to vote. If any member votes for more candidates for ordinary membership of the Council, than the number to be elected in any year, or for more than one provincial delegate, as the case may be, his voting paper shall be rejected.

Bye-Law37
When the poll has closed, the scrutiny shall be proceeded with and at the last ordinary general meeting in each year the scrutineers of the ballot shall return the names of the 30 or 31 candidates (as the case may be having regard to the provisions of Bye-Law 29(g) for election as Ordinary Members having the greatest number of votes and shall also return the name of the candidate for election as provincial delegate for each province having the greatest number of votes and the Chairman of the meeting shall thereupon declare the 30 or 31 candidates (as the case may be) first returned duly elected as the ordinary members to the Council for the ensuing year and shall also declare the candidates so returned as having the greatest number of votes for their respective provinces to be duly elected as provincial delegates for such provinces respectively.

Schedule C. Para. 1
The voter may vote for any number of Candidates not exceeding the number of the ordinary members of the Council to be elected (in this election); if he votes for more than such number his paper will be rejected. □

Practice Notes

Housing Finance Agency Loans — a Caution

Criticisms of delays in implementing the Housing Finance Agency scheme of house purchase loans have tended to overshadow the inherent dangers of the scheme for certain categories of borrowers. While the risks which such borrowers took were mentioned in the Society's newsletters, their primary purpose was to alert solicitors to the difficulties which clients who either could or could not get bridging finance would face because of the long gap then existing between approval and payment of the loans. Now that this gap has reputedly lessened considerably, it may be apposite to renew the warnings about the inherent risks for such borrowers. Repayments of loans under the scheme differ radically from any other house purchase mortgage scheme previously operated in Ireland. The factors which determine the amount of the annual repayments are:—

1. any increase in the consumer price index during the previous year (interest is not to exceed the rate of inflation plus 3.25%) and
2. the borrower's gross income in the previous year (payments not to exceed 18% of such income).

The aim of the scheme is a desirable one, namely, to reduce the burden of mortgage repayments in the early years of the loan, but this inevitably means the capital mortgage debt will rise. The Agency has published an example showing an original debt of £22,500 increasing to £58,000 in the 10th year and £101,358 in the 15th year. Using projections of average annual inflation of 15% and average annual salary increases of 16% over the period, the Agency shows that the ratio of the borrower's debt to his current income will decline from the figure of 2.90 to nil over the 25 year period.

Leaving aside doubts about the inevitability of salary increases bettering inflation (and economists have usually been rather better at pathology than prophecy) is it necessarily true that there will be a commensurate increase in house prices, particularly in the short term? If there is not, then it may prove very difficult for a borrower to sell his house. Taking the agency's calculations and assuming a purchase price of £26,000 and a loan of £22,500, the borrower would at the end of the third year have to repay £31,647 to the agency and, therefore, to have the same percentage of the sale price in his pocket as he had of the initial purchase price would require to achieve a selling price of £35,147, or an increase over the three-year period of 40% over the initial price. Present trends in house prices would not encourage the belief that there would be such an increase.

What is certain, however, is that a borrower will not be able to refinance the mortgage from a normal source of mortgage finance. The most obvious case would be a purchaser who is enployed by an institution with its own house mortgage scheme, but who does not immediately qualify for the scheme by reason of his short service with the institution. If he qualifies for the scheme within a few years, he will be faced with precisely the same dilemma as the borrower who wishes to sell, namely, that he is not going to be able to borrow enough under the usual terms of such institution schemes to discharge the loan to the Housing Finance Agency. Even the ordinary borrower, who wishes to turn to a building society or other similar institution for a long term loan, will almost certainly find that the amount necessary to discharge the Housing Finance Agency loan will be in excess of what he could borrow from a building society.

These are points which should be clearly explained to prospective borrowers from the Agency. The Agency's own explanatory memorandum is in general very fair, but it must be said that it could perhaps improve its answer to hypothetical question 12 — "what happens if the borrower wants to sell the house?" — the answer "this problem will be treated in the same way as a conventional mortgage. The borrower must redeem the outstanding loan, there will be no special charge for this purpose" might reasonably include some reference to the particular situation created by the fact that there is no repayment of debt in nominal terms for the first 18 years of the loan, in the example supplied by the Agency.□

Editorial note: it has been suggested that the warning contained in this article, which was published in the Gazette of December 1982, is of such importance as to warrant its re-publication.

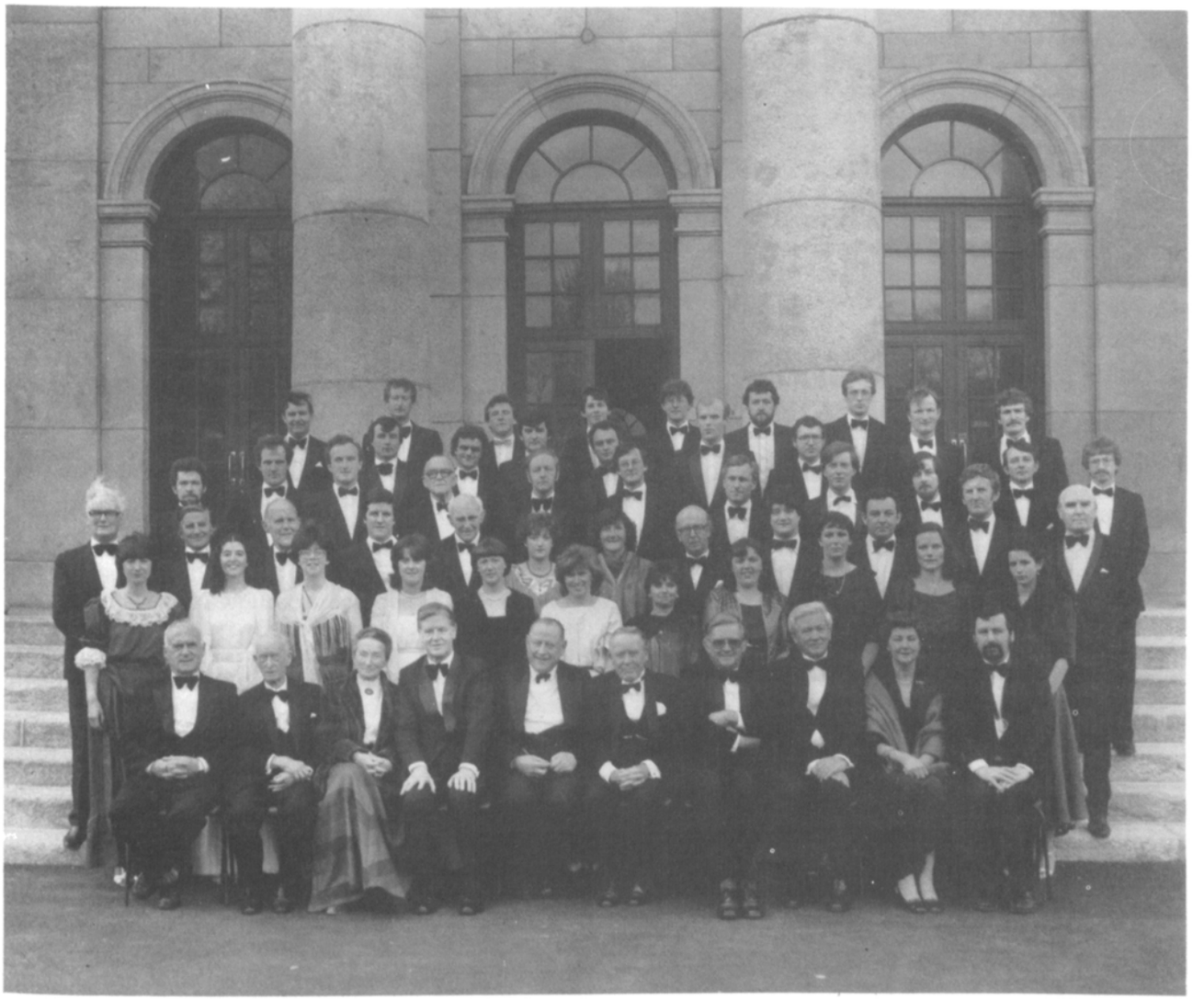
Conveyancing Note

V.A.T. on lending institutions solicitors fees: Change of Practice.

The Principal Inspector of the Dublin V.A.T. District has made a ruling that Lending Institutions Solicitors are not entitled to issue V.A.T. Invoices to Borrowers or their Solicitors in respect of fees for the taking up of documents or the preparation and completion of releases of Mortgages. The Revenue's view is that the Lending Institutions' solicitors' contract is with his client and he is therefore entitled only to issue Invoices to that client.

Accordingly, the V.A.T. Invoice must be issued by the Lending Institutions Solicitor to the Lending Institution and the amount of the V.A.T. can only be included in the total fee charged to the Borrower or Borrowers Solicitor and should not be set out separately.

This reverses the recommendation made by the Conveyancing Committee in the March, 1983 Gazette. □



Opening of Renovated Courthouse, Waterford, 7 May, 1983

Opening of new Courthouse, Waterford, 7th May 1983. Starting from left to right, front row, seated: Mr. John Cooke, County Registrar; Mr. R. J. Farrell; Mr. Mary Kenny; District Justice Patrick Keenan Johnson; His Hon. Judge Sean Mc D. Fawsitt; The Hon. Mr. Justice Thomas Doyle; His Hon. Judge Diarmuid P. Sheridan; District Justice W. F. O'Connell; Mrs. Joan Lardner; Mr. Brian Swift, President, Waterford Law Society. Second Row: Mrs. Mairead Lavin; Miss Bernadette Cahill; Miss Therese Clarke; Miss Maire nic Craith; Miss Morette Kinsella; Miss Nora Kelleher; Miss Terry Quinn; Miss Rosario Walsh; Mrs. Ann Murran; Miss Elizabeth Dowling; Miss Helen Bowe. Third Row: Mr. Eamon P. King; Mr. Fred Morris S.C.; Mr. Maurice W. Keller; Mr. John Purcell; Mr. Fergus Power, Miss Jacqueline Heffernan; Miss Elizabeth Purcell; Mr. Iain Farrell; Mr. Donal O'Connell; Mr. Patrick Gordon; Mr. Nial Fennelly S.C.; Mr. Frank Hutchinson. Fourth Row: Mr. Pat Newell; Mr. Emmet Halley; Mr. Niall Rooney; Mr. Michael Morrissey; Mr. J. P. Mulhern; Mr. Declan Budd S.C.; Mr. Tom Teehan B.L.; Mr. Niall King; Mr. Robert Potter-Cogan; Mr. Joseph Curran; Mr. Myles O'Connor. Fifth Row: Mr. Aidan Barron; Mr. Bryan Chesser; Mr. Joe Lavin; Mr. Frank Heffernan; Mr. Mark Keller; Mr. Ray Finucane; Mr. Gerard Halley; Mr. Michael Hanrahan. Sixth Row: Mr. John P. C. Goff; Mr. Vincent Maher; Mr. Joseph Quirke; Mr. Gerard O'Connor; Mr. Justin McCarthy; Mr. Michael P. Bourke; Mr. Tom Murran.

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Don't panic — write a report

The following report from a ship's Master is reproduced by kind permission of the anonymous author who appears to be gifted with remarkable 'sang-froid'.

IT is with regret and haste that I write this letter to you, regret that such a small misunderstanding could lead to the following circumstances, and haste in order that you will get this report before you form your own pre-conceived opinions from reports in the world press, for I am sure that they will tend to overdramatise the affair.

We had just picked up the pilot, and the apprentice had returned from changing the "G" flag for the "H" and, it being his first trip, was having difficulty in rolling the "G" flag up. I therefore proceeded to show him how. Coming to the last part, I told him to "let go". The lad, although willing, is not too bright, necessitating my having to repeat the order in a sharper tone.

At this moment the Chief Officer appeared from the Chart room, having been plotting the vessel's progress, and, thinking that it was the anchors that were being referred to, repeated the "let go" to the Third Officer on the forecastle. The port anchor, having been cleared away but not walked out, was promptly let go. The effect of letting the anchor drop from the "pipe" while the vessel was proceeding at full harbour speed proved too much for the windlass brake, and the entire length of the port cable was pulled out "by the roots". I fear that the damage to the chain locker may be extensive. The braking effect of the port anchor naturally caused the vessel to sheer in that direction, right towards the swing bridge that spans a tributary to the river up which we were proceeding.

The swing bridge operator showed great presence of mind by opening the bridge for my vessel. Unfortunately, he did not think to stop the vehicular traffic, the result being that the bridge partly opened and deposited a Volkswagen, two cyclists, and a cattle truck on the foredeck. My ship's company are at present rounding up the contents of the latter, which from the noise, I would say were pigs. In his efforts to stop the progress of the vessel, the Third Officer dropped the starboard anchor, too late to be of practical use, for it fell on the swing bridge operator's control cabin.

After the port anchor was let go and the vessel started to sheer, I gave a double ring Full Astern on the Engine Room Telegraph and personally rang the Engine Room to order maximum astern revolutions. I was informed that the sea temperature was 53° and asked if there was a film tonight; my reply would not add constructively to this report.

Up to now I have confined my report to the activities at the forward end of the vessel. Down aft they were having their own problems.

At the moment the port anchor was let go, the Second Officer was supervising the making fast of the after tug and was lowering the ship's towing spring down onto the tug.

The sudden braking effect on the port anchor caused the tug to "run in under" the stern of my vessel, just at the moment when the propeller was answering my double ring Full Astern. The prompt action of the Second Officer in securing the inboard end of the towing spring delayed the sinking of the tug by some minutes, thereby allowing the safe abandoning of that vessel.

It is strange, but at the very same moment of letting go the port anchor there was a power cut ashore. The fact that we were passing over a "cable area" at that time might suggest that we may have touched something on the river bed. It is perhaps lucky that the hightension cables brought down by the foremast were not live, possibly being replaced by the underwater cable, but owing to the shore blackout, it is impossible to say where the pylon fell.

It never fails to amaze me, the actions and behaviours of foreigners during moments of minor crisis. The pilot, for instance, is at this moment huddled in the corner of my day cabin, alternately crooning to himself and crying after having consumed a bottle of gin in a time that is worthy of inclusion in the Guinness Book of Records. The tug captain, on the other hand reacted violently and had to forcibly be restrained by the Steward, who has him handcuffed in the ship's hospital, where he is telling me to do impossible things with my ship and my crew.

I enclose the names and addresses of the drivers and insurance companies of the vehicles on my foredeck, which the Third Officer collected after his somewhat hurried evacuation of the forecastle. These particulars will enable you to claim for the damage that they did to the railings of the No. 1 hold.

I am closing this preliminary report, for I am finding it difficult to concentrate with the sound of police sirens and their flashing lights.

It is sad to think that had the apprentice realized that there is no need to fly pilot flags after dark, none of this would have happened.

For weekly Accountability Report I will assign the following Casualty Numbers T/750101 to T/750199 inclusive.

Yours truly,
Master.

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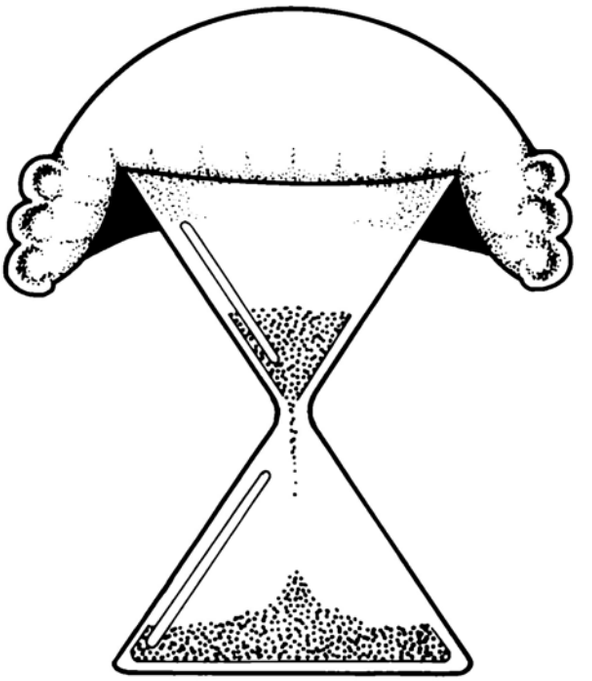

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An Irish Law Student Visits Wall Street

Impressions of the Practice of Law in the United States

by

Brian F. Havel B.C.L.

IN 1982, for the duration of my summer associateship with a Wall Street law firm, the United States temporarily obtained the services of its 574,001st lawyer. Unlike in Ireland, where unease about lawyer overproduction has been translated into restrictive entry quotas, the legal profession in the United States seems unable to check the spread of what the Northwestern University Law Review aptly called 'hyperlexis' — too many lawyers and too much law. It has been said that every time the U.S. Government unloads a bundle of new regulations on automobile safety, Toyota and Datsun hire an extra hundred engineers and General Motors takes on another hundred lawyers (apocryphal, of course, but the U.S. does have twenty times more lawyers *per capita* than Japan). This self-conscious questioning of our worth as a profession may be quite diverting but, as one of my new colleagues commented very early in my stay, Wall Street law firms are not in the habit of paying their attorneys large salaries to philosophize whether they would all be better off on a commune in Wyoming (where one of the firm's receptionists was apparently planning to flee).

Wall Street is a dizzying mix of soaring height and constricting narrowness, set deep among the concrete canyons of America's most expensive piece of real estate, the financial district of Manhattan. The undisputed nerve-centre of American corporate law, Wall Street is a vital reason why the New York Bar has always been the most prestigious in the United States (why else would our new Attorney-General have seen merit in joining it?). The concept of the 'Wall Street law firm' conveys a blue-chip assurance of the highest professional standards — and, consequently, the highest professional charges. It has been correctly stated that at no other time and in no other place throughout human history have lawyers been generating incomes as massive as they earn at this moment in New York City. That observation, by the way, appeared in a journal for neophyte legal 'fast-trackers', who were naturally incredulous when told of the low average earnings of junior members of both branches of the Irish profession.

I worked at a medium-size firm formed by the recent merger of two long-established firms and, therefore, in transition to a much bigger operation. Just how big some Wall Street law firms become is shown by the leviathans of the business, superfirms which employ from 250 to 500 lawyers. They are so large that many of their attorneys are assigned to the 'graveyard shift', from midnight to 8 a.m., with full secretarial support services, so that a round-the-clock legal furnace can be kept ablaze.

Having graduated from law school and passed the State Bar exams, the young lawyer, now usually in mid- to late-twenties, seeks employment and training as a first-year associate. Like new Irish barristers (though unlike new Irish solicitors since the revamped professional course was launched in 1978) U.S. legal graduates enter their profession so unskilled in the actual practice of law (rarely having read a real contract or will) that a New Jersey federal judge has contended that 'if the medical profession trained, qualified and licensed doctors in this way, we lawyers would want to put them in jail'. Unlike here, however, lack of experience is not reflected in starting salaries for new Wall Street associates. Last October the biggest firms were offering between $45,000 and $50,000 p.a. to beginning attorneys, but even the smaller firms were paying more than $30,000. The ideal résumé, which can almost command its own price, will feature graduation in the top ten per cent of one of the top ten law schools, membership of the editorial board of a university law review (even the law school equivalent of 'The People's Court' must publish a law review or perish) and a period as 'clerk' (not pronounced 'clark', as I was often reminded) to a supreme court judge, most desirable one of 'The Brethren' in Washington D.C. Literally thousands of unsolicited résumés pile on the desks of Wall Street hiring partners during each 'fall recruiting season', most of them considerably less awesome than the paragon I have just sketched (though American law students are so expert at presenting their résumés, often using agencies that specialize in helping them put together the most flattering format, that it is not always easy to separate wheat from chaff). Obviously, as one of our senior partners continually insisted, a brilliant academic record is no guarantee of success in the hardnosed practicalities of a New York law firm, but it does at least assure its holder of the earliest and best opportunity of proving his or her competence.

Colossally strenuous demands are made on Wall Street's tyro lawyers. Partnership, their common target, demands at least seven to eight years of truly dogged application. The superfirms extract maximum 'burnout', somehow churning out enough legal work to keep their associates on 12 to 14-hour days, seven days a week. Called 'sweatshops' in Wall Street argot, their price for high salaries is life in a legal pressure cooker. My firm differed 'attitudinally', as the Americans say. Long hours were expected when particular projects required it, rather than as a matter of daily routine (though I should add that most of our associates did drive themselves to make marathon working days a

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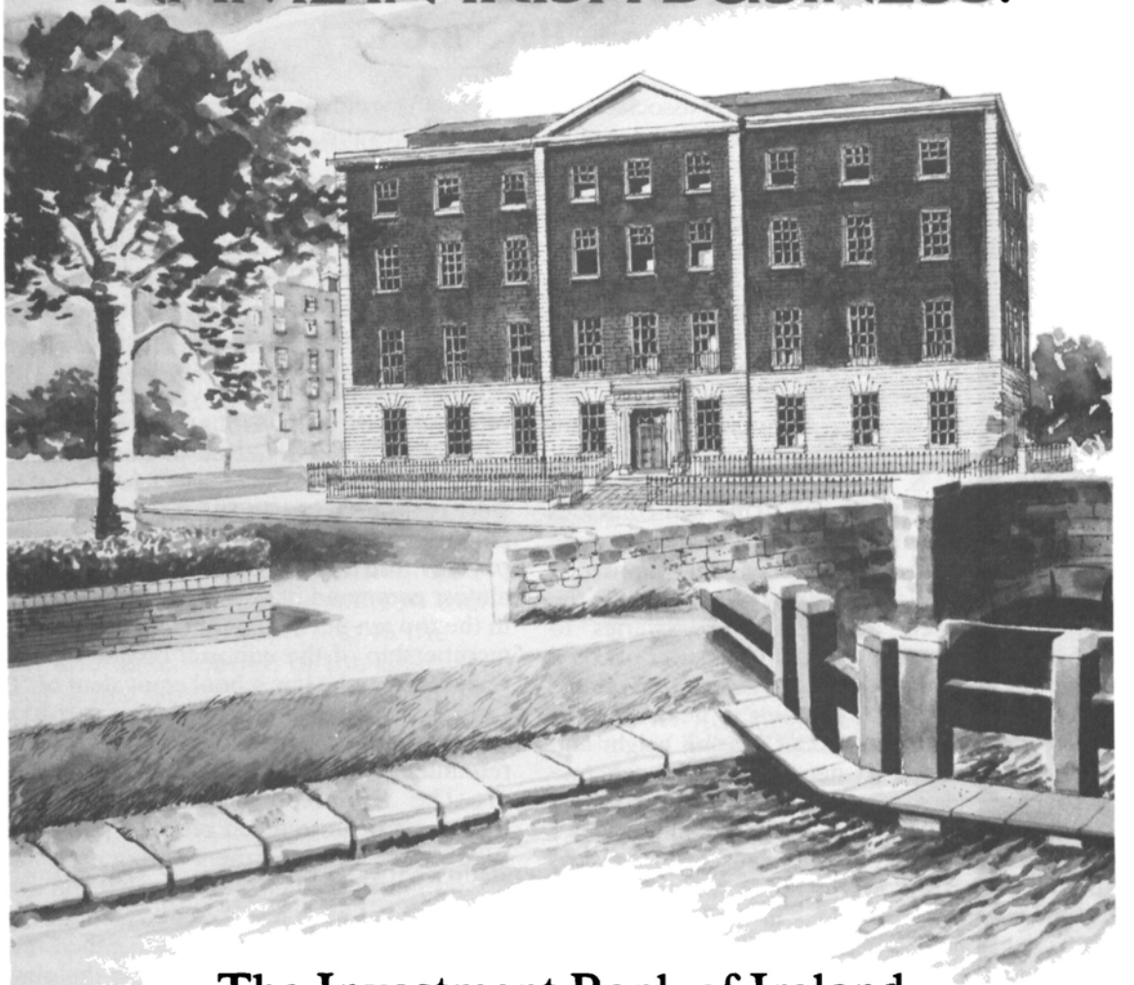

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matter of routine). Becoming a partner depends on ability (the U.S. legal profession considers itself a bastion of meritocracy), good connections with potential clients and a little luck. Wall Street itself seems the physical embodiment of the high expectations of its daily denizens.

Corporate Lawyers and Litigators

Apart from partners and associates, the other great dichotomy in a Wall Street law firm is that between the corporate lawyers and the litigators. The latter, whose natural loquaciousness is said to be linked to the preponderance among them of people of Irish and Jewish descent, are the courtroom specialists. Corporate attorneys, on the other hand, the master draftsmen of contracts, securities, licenses and deeds of trust, regard it as a matter of professional pride to keep their clients out of undignified courtroom wrangles. One of the oldest and most distinguished of the giant firms tried to establish the notion early in this century that the best corporate law firms could dispense with litigation departments altogether. Contracts would henceforth be lapidarian, pellucid and shorn of the tiniest ambiguity, so that no dispute could ever arise as to their terms or meaning. As the litigators relate with evident satisfaction, the reality of America's adversarial culture quickly asserted itself and restored the importance of expert forensic skills. Litigation is in fact the fastest-growing area of current Wall Street practice, since during a recession businessmen are more willing to bring cases to court which previously they might have settled or even ignored. Indeed, business activity in some sectors is so slack, one partner told me, that some corporate executives seem only too pleased to forego dull days in the office in order to give evidence and watch the spectacle of a courtroom entertainment presented by their expensive Wall Street impresario! Nirvana for the corporate lawyers is a giant corporation merger or a major issue of shares or Government securities and young associates can scan the shelves of their in-office libraries for outstanding examples of past corporate deals — the documents flowing from each transaction are put together in enormous leather-bound volumes, embossed on the spine with the names of the responsible attorneys in gold lettering. It is the instinctive 'AOC' ('abundance of caution') of the corporate lawyers that makes their department a much calmer and cooler environment than the frantic pace of the litigation section, where life is measured out in terms of the next impossible deadline for lodging papers in court.

The litigators have been responsible for the so-called 'document explosion' in U.S. law, which happened when they were given astonishingly wide powers of pre-trial discovery and deposition-taking. Any document can be sought or question asked which, in the opinion of the requesting attorney, is *or may be* relevant to the later trial, an openended indulgence which has the obvious consequence that quite literally *every* document will be sought and *every* question asked, so that each side can decide retrospectively what is or is not relevant! One senior trial lawyer told me of a witness who proved to be every American attorney's dream — clearly anticipating future legal battles and the descent of swarms of inquisitorial lawyers, he had carefully recorded on index cards of three different colours the date, time and key points of every single conversation in which he was involved that concerned the disputed transaction, choosing the colour of the card on the basis of how important he felt a conversation to have been! Attorneys try hard to coach their clients for long deposition sessions, and very often a stream of 'I don't know' or 'I can't remember' responses is the result. This can, in turn, provoke quite extraordinary (and, in Irish terms, quite unprofessional) exchanges of abuse between each side's attorneys, though a freewheeling use of derogatory language in describing your opponent's arguments is a common enough tactic, even in written legal briefs, in New York. The trial, if it ever manages to take place (the New York courts are utterly besieged by eager litigants) will be a much-abbreviated summary of all that has been going on for years during depositions and discovery.

Paralegals

The Americans have invented a new breed of legal specialist called the 'paralegal', a neologism which presumably works by analogy with the longer-established 'paramedical'. Paralegals ensure the smooth operation of the nuts and bolts of legal work, getting papers served on opponents or lodged in court at the due time and keeping track of the Everests of paper which flow from depositions and discovery. Not usually lawyers themselves (though one of ours had the almost unique distinction of being called to the New Mexican Bar), qualificationitis has nevertheless caught up with them and a diploma for paralegals is now available at many law schools. They sometimes drift into law from other callings — one of our best was a dissatisfied schoolteacher. In this yearning to become involved with the law they show an inclination completely opposite to that which exists among not a few lawyers. 'Attorneys here are people who never decided what they wanted to be when they grew up', one associate told me (referring no doubt to the profession as a whole, rather than just to his colleagues at the firm). Certainly, some of those I met had allowed their inner thoughts to inhabit other, not necessarily loftier, planes of existence. Apart from the associate who dreamed of being a train driver on the Long Island Railroad, there was a brilliant trial lawyer who, though relishing the trappings of Wall Street success (the sleek yacht, the magnificent gentlemen's clubs perched atop all the best skyscrapers), in his heart felt his true vocation to have been as an austere classics professor in the mould of A. E. Housman.

Although all the firm's partners met once a month for a general strategy session, day-to-day control was vested in a discreet troika of the hightest-earning partners, known as the 'Executive Committee'. One of the top three was among the first woman partners in a Wall Street law frim and in 1975 she spearheaded the launch of a quite spectacular outreach of the American feminist movement, a commercial bank founded and governed entirely by women and still flourishing today in midtown Manhattan. But even the Executive Committee cannot devote itself too deeply to administration and the trend in Wall Street law offices since the mid-70s had been to bring in a full-time professional office manager to organize the network of legal secretaries (a profession growing even faster than the legal profession itself), file-room personnel, telephonists and messengers who form

the vital 'support services'. New technology is constantly arriving and the spirit of inter-firm competition is such that no rival can be allowed to gain the slightest advantage in this area (not easy when the latest word processing equipment will be obsolete in six months). Already the word processor is standard, a boon to fastidious attorneys who may require as many as twenty drafts of a single client letter (the abolition of typist's cramp, however, has brought word processor operator's blindness in its wake, since the work always expands to fill the machine capacity available). Legal research is speeded by the 'Lexis' system, a computerized treasury of all current federal and state law. Even as the attorney is interviewing a client, he can use his desk-top Lexis terminal to call up the latest law on any given problem - type in a request for 'all cases on contributory negligence decided by Judge Doe in 1982', and the cute little machine obliges (at enormous cost, I might add). All client billing is also computerized. Instead of the rather quaint 'bill of costs' supplied by an Irish solicitor, the Wall Street corporate client receives a lengthy computer printout detailing hour-by-hour what the attorneys have been doing on its behalf. Filling out timesheets (using a special computer code which requires full-stops *before* the abbreviation — .prep .lgl .memo on .q of .plt's .clm) was by common agreement the most aggravating activity in a busy legal week. One senior litigation associate billed 27 hours for one day in September, thereby confirming the impression I had formed that New York lawyers have somehow broken the ancient laws of time that govern lesser mortals (of course, lest any suspicion of sharp practice be aroused by my disclosure that a Wall Street day can have 27 hours, true though that often seems, I should quickly explain that the computer accepts aggregations of more than one day's billing which an attorney may for convenience assign to a simple day!).

My work was divided between both sides of the practice, but it was felt that as an intending barrister I should spend my time principally with the litigators. Judges were extremely courteous in welcoming me to their courtrooms, readily giving permission to sit at 'counsel's table' and lamenting the loss of the wig and gown and the awe that these Anglo-Irish accoutrements supposedly inspire among the laity. At the federal court in Brooklyn, I met one of the very few black judges on the federal bench, who had plenty of time to show me around his exquisitely appointed chambers, a riot of plush leather and mahogany panelling, while his work was being done by three beavering law clerks and a spanking new Lexis terminal. The state court, where leather and mahogany are as absent as wig and gown, is not highly regarded. A visit to the Staten Island version showed me that the suave word-wizardry of Wall Street lawyers has a diametrical opposite in legal bush country. The surprise of the hole in the opposing lawyer's gleaming white trousers was exceeded only by the shock of hearing him fumble the most elementary facts of his brief. I did feel complimented that he chose to address our side as 'learned counsel' rather than the customary 'Counsellor' or simply 'Mr'. That case, incidentally, illustrated the crippling burden of costs in U.S. courts. It was worth $10,000 to the client, but cost $12.500 to bring to court. Amazingly, U.S. courts do not (unless deliberate abuse of the legal process by your opponent can be shown) award any costs to the winning side. It is futile to venture into a Wall Street office with a case worth less than $15,000 unless you persuade someone to act on a contingent fee basis (the lawyer is paid only if he wins the case) — a popular American practice which is nevertheless regarded by Wall Street firms as smacking of professionalism. T.V. advertising has helped the rise of the so-called 'fast-food' law firms. One of them, Jacoby Myers (which is actually known as the McDonald's of U.S. law), was celebrating its tenth year of existence last summer by urging viewers between bits of the 'The Lucy Show' to get their divorces before October 1st and save 50% on normal fees.

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To take their minds off the seriousness of working life, U.S. lawyers can dip into the gossip-drenched pages of their very own scandal sheet, 'The American Lawyer'. It has instituted what it grandly calls the 'Ammy Awards' for the best and worst annual performances by a lawyer in each of a string of categories of practice — Best Antitrust Lawyer (usually a Wall Street Preserve), Worst Civil Rights Lawyer (also perhaps a Wall Street preserve!), Best Criminal Defence Lawyer, Worst Matrimonial Lawyer, and so forth. They can benefit also from something that is sorely lacking in this jurisdiction — continuing legal education, or CLE as it's called, which the American Bar Association organizes on a huge scale. I can hardly conceive of senior counsel in this country taking time out to lecture the junior bar on their

accumulated expertise, yet it is typical in American law, as one of the Executive Committee partners puoudly informed me, that its best practitioners are keen to go public with their professional knowledge and to share it with fellow lawyers through the CLE system. Firms can also hire 'Videolaw' seminars, taped demonstrations of specific skills such as 'the cross-examination of a witness with immunity in a federal narcotics case'. Some characteristically American touches are added — one of the courses in antitrust (anti-monopoly) law is presented in a 'gameshow' format, in which the contestants answer questions about their business deals and a big plastic dial lights up every time an answer reveals a potential antitrust violation.

'Time' Magazine in April 1978 carried a famous cover story entitled 'Those ☘!?!☘ Lawyers' (or expletive-substitutes to that effect), and some 'Irish Times' readers may recall Doonesbury's general testifying that America could come through a nuclear war and bounce back within two years — unless a disproportionate number of lawyers survived. The American legal profession is constantly under critical public scrutiny, unsurprisingly in an adversarial society, where litigation has become the new secular religion. But although people complain about the profession in general, American Bar Association surveys consistently show that they tend to be very satisfied with their own lawyer. Melvin Belli, a San Francisco attorney known as the 'King of Torts' for his success in winning major malpractice and negligence suits, recently declared that the United States "is in the golden age of the law". "The law is better here than ever before", he told U.S. News & World Report last October. "That includes the schools, the books, and the seminars given for lawyer re-education. The number of incompetent lawyers is decreasing. Lawsuits help ensure that Americans have a good life. We protect our rights if anyone attempts to trample on them. One of the colonial flags included a rattlesnake with the legend 'Don't Tread On Me'. That's the American mind of today as expressed by lawyers. We don't let anyone tread on us". If Belli is right about the golden age, and my Wall Street experience gave me no reason to doubt that he is, then my return visit in summer 1983 will be happening at just the right time. □

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Growth in Family Law Cases

(Extract from Dáil Debates, 19 June 1983)

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Number of Petitions presented to the High Court in each of the past ten years, claiming a decree of nullity of marriage.

Year	Number of High Court Petitions for nullity of marriage presented
1973	3
1974	8
1975	8
1976	3
1977	11
1978	11
1979	10
1980	16
1981	21
1982	21

Number of Petitions claiming divorce presented to the High Court in each of the past ten years.

Year	Number of High Court Petitions for divorce *a mensa et thoro*
1973	26
1974	51
1975	43
1976	37
1977	29
1978	39
1979	34
1980	27
1981	25
1982	20

Number of Applications made to the District Court in each of the past four years under the Family Law (Maintenance of Spouses and Children) Act, 1976, Family Law (Protection of Spouses and Children) Act, 1981 and Guardianship of Infants Act, 1964.

Year ending 31 July	Number of applications for original Maintenance Orders or for variation of existing Maintenance Orders under the Family Law (Maintenance of Spouses and Children) Act, 1976	Number of applications for Barring Orders under the Family Law (Maintenance of Spouses and Children) Act, 1976.	Number of applications for Protection Orders under the Family Law (Protection of Spouses and Children) Act, 1981.	Number of applications under the Guardianship of Infants Act, 1964
1979	1,935	1,493	—	—
1980	2,121	1,917	—	—
1981	2,708	2,225	—	—
1982	2,433	2,428	56 (in the Dublin Metropolitan District)	Nil

Notes:

The Information sought in respect of applications under the Married Women (Maintenance in Case of Desertion) Act, 1886 is not available because separate statistics relating to such applications were not compiled in the District Court. That Act was repealed by the Family Law (Maintenance of Spouses and Children) Act, 1976, which came into operation on 6 May 1976.

Annual statistics in respect of maintenance and barring applications have been kept only since the year which commenced on 1 August 1978.

The figures for applications made to the Provincial District Courts for Protection Orders under the Family Law (Protection of Spouses and Children) Act, 1981, during the year ended 31 July 1982, are not yet available. The information will be supplied to the Deputy as soon as possible.

The District Court did not have jurisdiction under the Guardianship of Infants Act, 1964, until the commencement of the Courts Act, 1981, on 12 May 1982.

Number of summonses issued in the High Court in each of the ten years, 1973 to 1982 inclusive, seeking relief under any one or a combination of the Acts referred to in the headings.

Heading	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
The Guardianship of Infants Act, 1964.	28	69	107	86	182	211	285	384	505	169
The Family Law (Maintenance of Spouses and Children) Act, 1976.	—	—	—	—	148	196	263	370	428	165
The Married Women (Status) Act, 1957[1]	—	—	—	—	—	114	151	238	269	148
The Family Home Protection Act, 1976[2]	—	—	—	—	—	83	121	242	341	139
The Partition Acts, 1542 to 1876[3]	—	—	—	—	—	—	—	—	75	61
The Guardianship of Infants Act, 1886[4]	—	—	—	—	—	—	—	—	—	—
The Family Law (Protection of Spouses and Children) Act, 1981[5]	—	—	—	—	—	—	—	—	21	27
The Married Women (Maintenance in case of Desertion) Act, 1886[6]	4	6	32	50	—	—	—	—	—	—

Notes:
[1]Figures have been maintained separately only since 1978.
[2]Figures have been maintained separately only since 1978.
[3]Figures have been maintained separately only for the last two years.
[4]This Act was repealed by the Guardianship of Infants Act, 1964.
[5]In force since 1981.
[6]This Act was replaced by the Family Law (Maintenance of Spouses and Children) Act, 1976. Figures for the year 1977 onwards would, therefore, relate only to the latter Act.

Correspondence

The Editor, 28th June 1983
The Incorporated Law Society of Ireland Gazette,
Blackhall Place,
Dublin 7.

I remember, about fifteen years ago, coming across a little book which set out a kind of legal shorthand which had come to be used by practising lawyers. I think the book would have been published maybe fifty or sixty years ago. The system outlined was not a shorthand in the sense of using signs such as in Pitman or Gregg but rather a well worked out system of abbreviations for words, especially abbreviations for legal expressions continually in use.

I have always regretted that I did not buy that little book on the occasion in question and I have since made many attempts to trace it both by mentioning the matter to colleagues and also by writing to various London bookshops which deal in both new and secondhand legal books but always without success. I write this letter in the hope that somebody may have a copy of such book and if so I would very much like to have the opportunity of perusing it.

Few solicitors or barristers have shorthand and it strikes me that, if there was at one time a well worked out type of legal shorthand of the kind I have mentioned above, it might well be worthwhile reviving it.

Yours etc.,

Maurice J. Kenny,
Solicitor,
Córas Iompair Eireann,
St. Johns,
Islandbridge,
Dublin 8.

The Editor, 14 June, 1983
Incorporated Law Society of Ireland Gazette,
Blackhall Place,
Dublin 7.

Dear Editor,

I was more than a little surprised to read about the newspaper comment on, and the actual text of, what I assume is the editorial in your April, 1983 edition, entitled "Fit the Crime", especially that part of it which referred to the Dail debate which took place in relation to what has come to be known as the Fairview Park case. It is clear to me that whoever wrote the editorial was neither present in the Dail at the time, nor took the trouble to actually read the Dail report on the proceedings, but based his or her commentary on the more lurid aspects of the media coverage given the debate.

The editorial said "Our Judges have, since the inception of the State, served its people well — far better than its Legislators have." Would the writer like to indicate what evidence exists to bear this out. I find it a rather strange statement indeed, especially when one bears in mind that all members of the judiciary have been appointed by Legislators at some stage or another.

The standard of the Dail debate was described in your Gazette as being "deplorable": you said "It seemed as if Deputies were vying with each other in advocating punitive sanctions, almost regretting that transportation is no longer available as a punishment. It is not the duty of politicians merely to echo each popular catch cry." I enclose herewith a copy of the Dail Report involved and I challenge the writer of this emotive commentary to point out to me where that statement is borne out in the contributions of the *vast majority* of those who took part, including the undersigned — your blanket condemnation admitted no exceptions.

In fact, the tone and content of the contribution made by *most* of the speakers was extremely moderate, very controlled, in no way emotive and for most of us was entered into with very many misgivings. As you will appreciate, it is most unusual to hear any politician discussing or debating in the Dail a judgement given in the Courts and this particular constraint, along with the very strict rules which apply in the Oireachtas — but which clearly are not observed when it comes to editorials in the I.L.S. Gazette — relating to order and propriety in debate, ensured that, for the most part, moderation and responsibility were the order of the day.

Accordingly, I will be grateful if your writer would now read the debate (which he clearly had not done previously) and indicate to me and to your readership whether he still asserts that "Deputies were vying with each other in advocating punitive sanctions etc . .". One is entitled to expect a higher standard from your eminent publication than this level of abuse.

Sincerely yours,

Michael Keating, T.D., Alderman
Dáil Eireann,
Baile Atha Cliath 2.

Editorial Note: Deputy Michael Keating is correct when he states that the official Dail Report does reveal that a number of deputies made contributions to the motion which were moderate and controlled. Unfortunately, circulation of the Dail Reports is not such as to have any influence on public opinion in general. The reports of the debates in the national newspapers were carefully considered before the article was written and the Editorial Board is satisfied that the comments made in the article were fair and were based on the evidence available to the public generally. - Ed.

MARRIAGE COUNSELLING SERVICE

A conference on **"MARRIAGE ISSUES IN IRELAND"** will take place on 14 October, 1983 at Irish Management Institute, Sandyford, Dublin. Speakers will include Nicholas Tyndall, B.A., Chief Officer of the National Marriage Guidance Council, England and John Haynes, Ph. D., President of Mediation Training Institute.

Cost £12.00 incl. Lunch.

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All contributions will be gratefully received.

Enquiries to: The Registrar, Royal College of Surgeons in Ireland, St. Stephen's Green, Dublin 2.

Seminar on Maritime Law

The Irish Maritime Law Association will be holding a one-day Seminar on Maritime Law at the Law Society, Blackhall Place, on Thursday, 6 October next.

Lectures will be given on the following topics:

1. **When can one arrest a ship?**
2. **How to arrest a ship.**
3. **Limitation of shipowner's liability under the Merchant Shipping Act, 1894.**
   (a) What does it mean?
   (b) Does it apply in Ireland?

Registration forms will shortly be available from the following:

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Irish Maritime Law Association,
Merrion Hall,
Strand Road,
Dublin 4. Tel. 695522.

Petria McDonnell,
McCann Fitzgerald Sutton Dudley,
28 - 32 Upper Pembroke Street,
Dublin 2. Tel. 765888.

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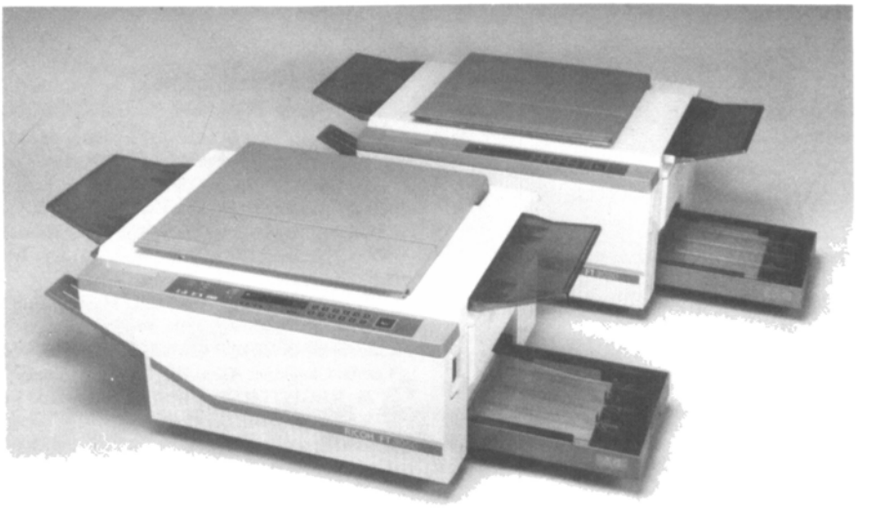

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Professional Information

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

Dated 15th day of August, 1983.

B. Fitzgerald (Registrar of Titles)

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

1. REGISTERED OWNER: John J. O'Reilly, Folio No.: 6392 & 4122 now closed to 15677F; Lands: (1) Ballinvreena, (2) Ballinvreena; Area: (1) 25.588 acres, (2) 26.969 acres.; County: **LIMERICK.**

2. REGISTERED OWNER: George Tighe, Folio No.: 9226; Lands: Kilpedder West (part); Area: County **WICKLOW.**

3. REGISTERED OWNER: Michael O'Loughlin (deceased), Folio No.: 15831; Lands: Rathcarran; Area: 20a. 1r. 15p.; County: **MEATH.**

4. REGISTERED OWNER: Norman Fitzgerald, John O'Callaghan, Cornelius Cremin, Folio No.: 54104; Lands: Gogganstown; Area: 0a. 0r. 19p.; County: **CORK.**

5. REGISTERED OWNER: Patrick O'Sullivan, Folio No.: 9287; Lands: Knocknagornagh; Area: 62a. 2r. 22p.; County: **LIMERICK.**

6. REGISTERED OWNER: Patrick Lane, Junior, Folio No.: 1864; Lands: Port; Area: 58a. 2r. 6p.; County: **LIMERICK.**

7. REGISTERED OWNER: John Smith, Folio No: 251F; Lands: (1) Croghan Demesne, (2) Croghan Hill, (3) Croghan Demesne; Area: (1) 1a. 3r. 39p.; (2) 15a. 2r. 30p.; (3) 1a. 2r. 20p.; County: **OFFALY.**

8. REGISTERED OWNER: William Hennessy & Mary Hennessy, Folio No.: 5324F: Lands: (1) Ardmore, (2) Raheenmadra; Area: 41a. 1r. 26p; (2) 5a. 0r. 35p; County: **LIMERICK.**

9. REGISTERED OWNER: Patrick Maye, Aclare, County Sligo, Folio No.: 12432; Lands: Lislea; Area: 0a. 0r. 22p.; County: **SLIGO.**

10 REGISTERED OWNER: The Most Reverend Thomas P. Gilmartin D. D., Archbishop of Tuam, The Reverend Joseph A. Walsh, Tuam, County Galway, and James McGarry, Mount Street, Claremorris, Co. Mayo.; Lands: Ballyfarnagh; Folio No.: 6737; Area: 0a. 3r. 15p.; County: **MAYO.**

11. REGISTERED OWNER: Monica Noonan and others, Sisters of Mercy and the Most Reverend James Fergus of St. Nathy's, Ballaghaderreen, County Roscommon, Catholic Bishop of the Diocese of Achonry.; Lands: Carrowcauly or Earlsfield; Folio No.: 2029; Area: 25a. 1r. 15p.; County: **SLIGO.**

12 REGISTERED OWNER: Michael and Marie Regan, 27 Blackthorn Park, Lisbeg Lawn, Renmore, Galway. Folio No.: 7953F; Lands: Rooaunmore; Area: 0a. 0r. 0p.; County: **GALWAY.**

13 REGISTERED OWNER: Robert O'Donoghue, deceased. Folio No.: 3262; Lands: Kew Gardens, Lucan; Area: ; County: **DUBLIN.**

14 REGISTERED OWNER: John Weir, Folio No.: 34 (R); Lands: Castletown; Area: 40a. 2r. 1½p.; County: **KERRY.**

15 REGISTERED OWNER: Patrick and Dolores Walsh, Folio No.: 16416F; Lands: Ballinfoile; Area: 0a. 0r. 0p; County: **GALWAY.**

16 REGISTERED OWNER: Dorothea J. Hickling, Folio No.: 3385; Lands: Monatray East (part); Area: 2a. 2r. 34p; County: **WATERFORD.**

17. REGISTERED OWNER: Thomas Meagher, Folio No.: 1017L; Lands: situate in the District of Glasnevin and Parish of St. George, Co. Dublin; Area: ; County:**DUBLIN.**

18 REGISTERED OWNER: John Corbett (deceased). Folio No.: 10990; Lands: Lisheen; Area: 60a. 2r. 36p.; County: **LIMERICK.**

19. REGISTERED OWNER: Margaret O'Connor (deceased) Folio No.: 22410; Lands: Shinnagh; Area: 0a. 0r. 20p; County: **KERRY.**

20. REGISTERED OWNER: John Carmody, Folio No.: 16383; Lands: Crotta; Area: 54a. 3r. 7p.; County: **KERRY.**

21. REGISTERED OWNER: Patrick Murnaghan, Folio No.: 15141; Lands: (1) Garrybane, (2) Cooltrim; Area: (1) 12a. 1r. 34p; (2) 0a. 0r. 26p.; County: **MONAGHAN.**

22. REGISTERED OWNER: Maureen Elizabeth Cahill, Folio No.: 692F; Lands: Dromhale; Area: 0a. 0r. 13p.; County: **KERRY.**

23. REGISTERED OWNER: Daniel Clifford (deceased), Folio No.: 11468; Lands: Cloghene; Area: 20a. 2r. 16p.; County: **KERRY.**

24. REGISTERED OWNER: Wynnefield Furnishings Limited, Folio No.: 475, 3861 & 3867; Lands: (1) Boleynass Upper, (2) Knockadreet (part), (3) Knockadreet (part); Area: (1) 24a. 1r. 13p.; (2) 49a. 1r. 31p.; (3) 15a. 3r. 34p.; County: **WICKLOW.**

25. REGISTERED OWNER: John and Annie Sheridan, Folio No.: 30204L; Lands: 35 Walnut Court, Griffith Ave., Dublin 9.; Area: 0a. 0r. 20½p.;County: **CITY OF DUBLIN.**

Lost Wills

Cotter, Roger, deceased, late of Kilbrien, Rathcormac, County Cork. Will any person having knowledge of the whereabouts of the Last Will of the above named deceased please communicate with Messrs. Healy, Crowley & Co., Solicitors, 83 Patrick Street, Fermoy, County Cork.

Mrs. Mary Price (Nee O'Donoghue) deceased late of Sallins, Co. Kildare and formerly of 3, Emmets Tce., Killarney, Co. Kerry. Would any person having knowledge of a Will of the above named deceased who died in the year 1944 please contact Messrs. Michael J. O'Connor & Co., Solicitors, 20, New Street, Killarney, Co. Kerry.

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Professional Information

G. J. Moloney & Company Solicitors, 27/29 Washington Street, Cork. Telephone: (021) 25261 Telex: 24980. Wish to advise that as and from the 4th of July, 1983 their address will be as above. Telephone and Telex numbers remain unchanged.

Mehigan Browne & Company wish to advise that as and from Tuesday 2nd August 1983 their new offices will be located at 45 Upper George's Street, Dun Laoghaire, and their new phone numbers shall be 808292 and 807848.

Nell Corbett & Co. Solicitors wish to advise that they have now moved to new premises at No. 1, O'Brien Street, Mallow, Co. Cork, Telephone 022/22862.

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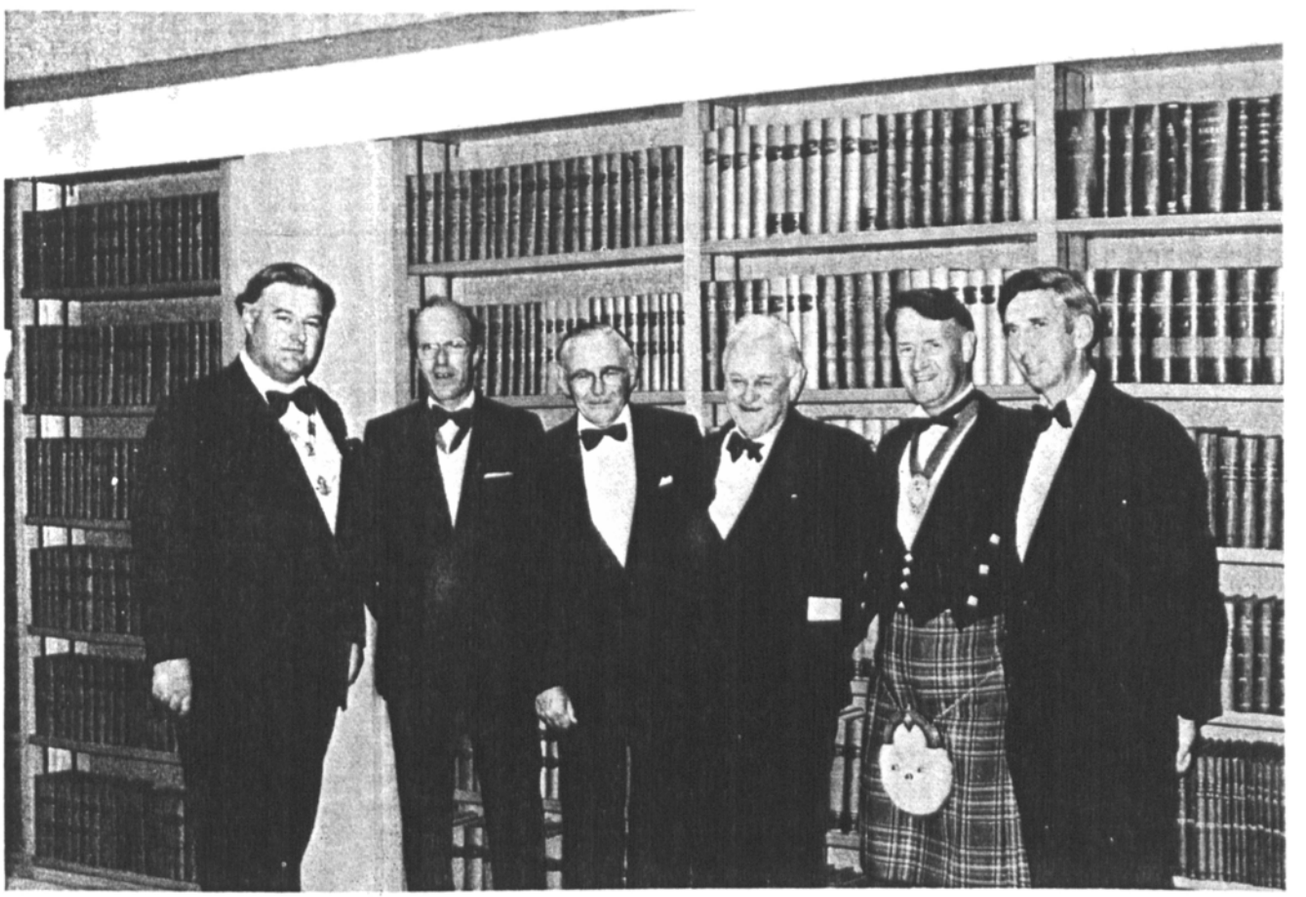
INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 7. September 1983

Law Society of Northern Ireland

Opening of New Premises.



During August 1983 the Law Society of Northern Ireland moved premises from the Royal courts of Justice to Law Society House. 90 - 106 Victoria Street. Belfast. The new premises. acquired in January 1981. were officially opened on Monday 5th September byLord Lowry. Lord Chief Justice of Northern Ireland.Facilities include the Society's offices. library. and limited conference and consultation accomodation. The premises also house the Northern Law Club. Attending the opening ceremony were L. to R. Mr. Michael P. Houlihan. President of the Incorporated Law Society of Ireland; Mr. W. A. Logan. President of the Law Society of Northern Ireland; Lord Lowry. Lord Chief Justice of Northern Ireland; Lord Hailsham. Lord Chancellor; Mr. A. E. McIlwain. President of the Law Society of Scotland and Mr. Christopher Hewetson. President of the Law Society of England and Wales.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77. No. 7. September 1983

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Published at Blackhall Place, Dublin 7.

Comment . . .

. . . Saving Their Deposits?

That the people who paid "Booking Deposits" for the apartments which the failed Barrett Apartments Ltd., never did build were fortunate is clearly hinted at in Mr. Justice Keane's well reasoned judgment in the matter of Barrett Apartments Ltd., (The High Court 15th July 1983 unreported). His decision that the deposits paid to Barrett Apartments Ltd. at a stage at which that company had created only a floating charge over its assets, gave the prospective purchasers a lien over the company's lands and priority over the subsequently created equitable mortgage by deposit of the title deeds and appointment of a receiver. His comment that the position might well have been different if the bank had stipulated for a legal mortgage of the property as a condition of making their advance shows not only how lucky the Barrett depositors were, but points the way for lending institutions to avoid the recurrence of similar situations in the future.

Solicitors acting for purchasers of yet-to-be-built houses and apartments regularly advise clients of the danger of paying substantial deposits or stage payments over to the builders. Equally regularly, the client is presented with a simple choice: either he pays the money over or he does not get the house or apartment. While the Barrett decision will clearly be helpful to persons who have already paid such deposits, it is certain that lending institutions will take steps to close the gap in their protection which this case has exposed.

The fact that purchasers' deposits are at risk has been of concern to the Law Society for some years. It was critical of the ministerial approval given to the National House Building Guarantee Scheme, which did not (as its English counterpart does) provide security to purchasers for their deposits. The introduction of a scheme of deposit protection consisting of the creation of a mutual fund, topped up by insurance cover, is long overdue.

The NHBG Scheme is now well established and the construction industry deserve considerable credit for the liberal way in which the scheme has been operated. The only obvious defect is the absence of protection for depositors; indications have been given that the inclusion of an arrangement for the protection of deposits in the scheme would be considered. It is time that such consideration was urgently given. With the inclusion of such protection in the Scheme the industry could be justly proud of its work. □

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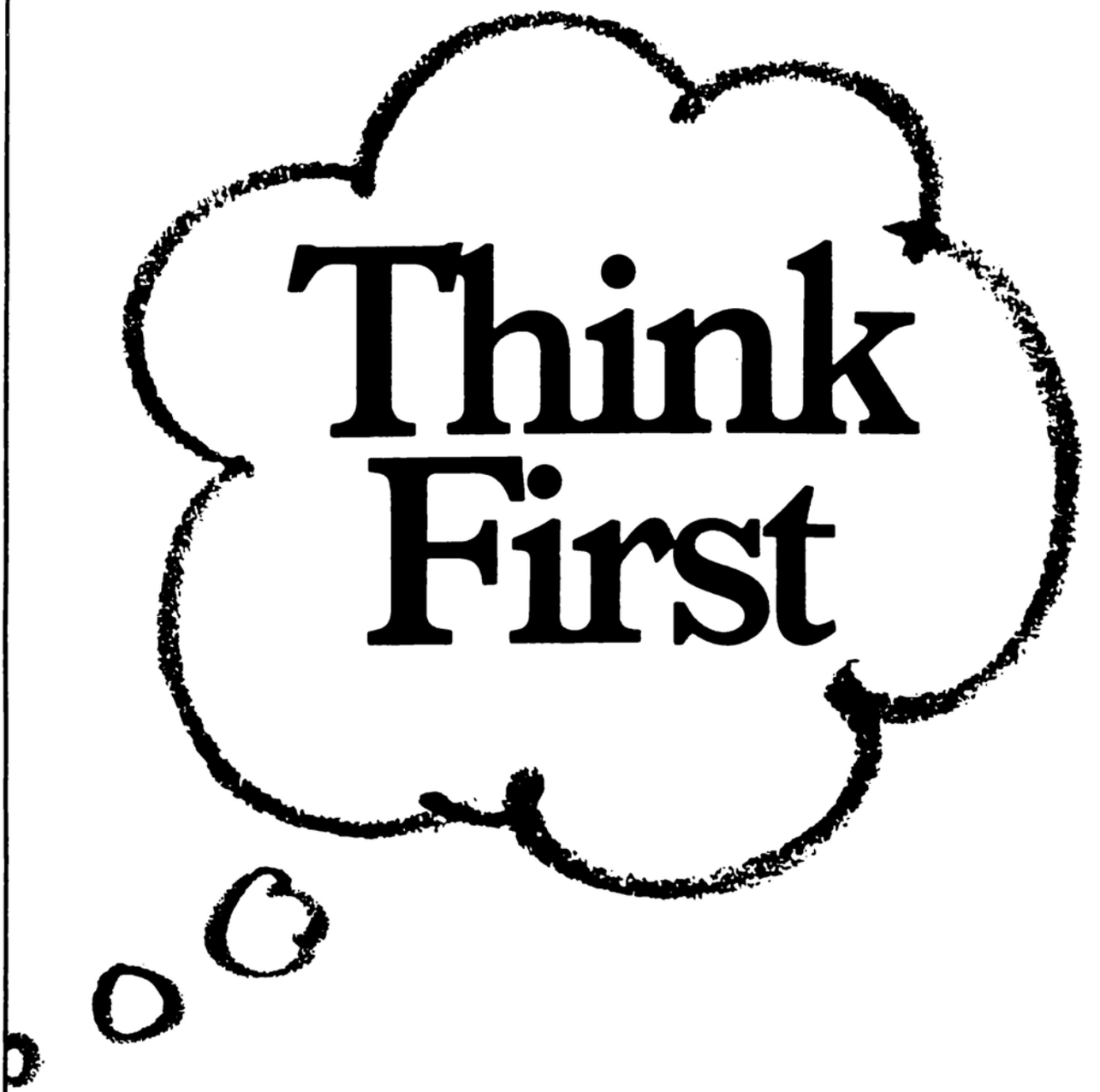

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The Right to Jury Trial in Cases of Contempt

Part 1

by

Gerard McCormack, B.C.L.

Article 38.5 of the Constitution provides that subject to certain specified exceptions no person shall be tried on any criminal charge without a jury. This imperative reflects a profound judgment about the way in which law should be enforced and justice administered. The jury trial guarantee fulfills a number of important functions. It ensures, *inter alia*, an element of lay participation in the administration of criminal justice. However lay participation in the determination of criminal cases has been judicially regarded in this jurisdiction as something less than an incontrovertible *desideratum*. This is so even where no express exception has been made to the constitutional guarantee of trial by jury. Judicial approval of the jury trial system in criminal cases has not been absolute and unqualified. More especially, at particular points, it has come into conflict with another judicially desired end, namely, the resolve to maintain the independence, impartiality and integrity of the judiciary through a summary power of putting persons in prison for contempt of court. The constitutional command concerning jury trial has been subject to far-reaching limitation in contempt cases. It is intended in this article to assess the legitimacy and constitutional propriety of this substantial retrenchment on the scope of procedural protection. The issue of the distinction between civil and criminal contempt will also be addressed.

The Jury in Criminal Cases; Merits and demerits

The jury affords ordinary citizens a valuable opportunity to take part in a process of government. It ensures that the standards of the law do not become remote from the concerns of the ordinary individual. The jury injects a democratic element into the law.[1] This element is vital to the effective administration of criminal justice not only in safeguarding the rights of the accused, but also in encouraging popular acceptance of the laws and the necessary general acquiescence in their application. Above all, the jury trial guarantee is in accord with the constitutional command of criminal due process. The following extract from *Duncan v Louisiana* [2] is no less true in this jurisdiction:

> "Providing an accused with the right to be tried with a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the commonsense judgment of a jury to the more tutored but perhaps less sympathetic reaction of single judge he was to have it. Beyond this, the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power - a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence".

The jury is of course not without its vices. Indeed in certain situations the requirement of trial by jury might conceivably work to the disadvantage of an accused. The jury, it has often been argued is prone to popular prejudice and untrained jurors are presumably less adept at reaching accurate conclusions of fact than judges, particularly if the issues are many or complex. In *Duncan* v *Louisiana* arguments were advanced to the effect that juries are incapable of adequately understanding evidence or determining issues of fact, and that they are unpredictable, quixotic, and little better than a roll of dice. The court rejected these considerations as being of little weight or importance. It referred to Kalzen & Zeisel's exhaustive and then recent study *The American Jury* (1966). This concluded that juries do understand the evidence and come to sound conclusions in most of the cases presented to them and that when juries differ from the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed. It might also be said that opportunity exists for the correction of erroneous convictions on appeal. The social degradation that accompanies a criminal conviction is a deadly serious business. It is difficult to disagree with the principle that a conviction on a serious charge should only follow meticulous proof and that the jury is as good an institution as any other, despite its drawbacks, for charging with the responsibility of deciding if the proof is adequate. To have to convince twelve people is more of a task than to have to convince but one.

The Contempt Power

It is axiomatic that the administration of justice must be preserved free from improper interference and obstruction and there are a number of substantive criminal offences relating to the administration of justice such as perjury and subornation of witnesses. Nevertheless our judges have also arrogated to themselves a significant role in securing this end. This is manifested in the power of the superior courts to punish contempts. The contempt power is of wide and uncertain scope; a proposition illustrated by the following observations of Johnston J. in *In Re M.M. and H.M.*[3]

> "The tricks and turns by which justice may be obstructed or perverted are so numerous and varied, and the ingenuity of mankind is so constant, that it is

impossible to define in a comprehensive way or rather to delimit the circumstances under which a contempt of court by the obstruction of justice may be committed, and no judge or court has ever presumed to lay down any such limitation".

This statement ill-resides with the idea expressed in *King* v *D.P.P.*[4] that the criminal law must be certain and specific so that an individual is capable of ascertaining what is required of him so as to adjust his conduct to the dictates of the law. It also leaves scope for arbitrary and discriminatory enforcement and the ill-defined and uncertain potentialities associated with the exercise of the contempt power may operate to deter persons from engaging in otherwise unobjectionable activities.

Civil and Criminal Contempt

Considerations of imprecision aside, the existence of a summary power to commit persons to prison for contempt of court has often been asserted by our judges. A basic distinction must be drawn at the outset between civil and criminal contempt. This differentiation has the authority of the Supreme Court. O'Dalaigh C.J. put the matter thus in *Keegan* v *De Burca:*[5]

"The distinction between civil and criminal contempt is not new law. Criminal contempt consists of behaviour calculated to prejudice the due course of justice, such as contempt in *facie curiae*, words written or spoken or acts calculated to prejudice the due course of justice or disobedience to a writ of *habeas corpus* by the person to whom it is directed[6] - to give but some examples of this class of contempt. Civil contempt usually arises where there is disobedience to an order of the court by a party to the proceedings and in which the court has generally no interest to interfere unless moved by the party for whose benefit the order was made. Criminal contempt is a common-law misdemeanour and as such, is punishable by both imprisonment and fine at discretion, that is to say, without statutory limit, its object is punitive....Civil contempt, on the other hand, is not punitive in its object, but coercive in its purpose of compelling the party committed to comply with the order of the court, and the period of committal would be until such time as the order is complied with or until it is waived by the party for whose benefit the order was made".[7]

In this case during the hearing of a motion following civil proceedings the defendant refused to answer a relevant question which the judge had asked. The latter thereupon sentenced her to be imprisoned "until she purge her said contempt". The Supreme Court, on an appeal brought by the defendant accepted the contention that her conduct in refusing to answer the learned judge's inquiry amounted to criminal contempt in *facie curiae* which could be disposed of summarily. The court reserved its opinion as to those categories of criminal contempt which would not be triable summarily. However O'Dalaigh C.J. with whom Walsh J. agreed, opined that the President, at first instance, was in error in imposing a sentence of imprisonment of indefinite duration instead of a determinate sentence. The case should be remitted to the High Court for the imposition of an appropriate penalty. McLoughlin J., in what has been described as a persuasively argued judgment,[8] dissented. He was of the view that in such a case as this the purpose of a sentence is not primarily punitive but coercive. Refusal by a party sworn to answer a question was not an act complete in itself, but was an offence which continued so long as the refusal continued and could not be appropriately measured while the offence continued; if dealt with by a fixed sentence, the sentence might be oppressive on the offender, whereas a sentence which ended when the offence ceased and the contempt was purged could not be oppressive. It was not the declaration of refusal to answer the question but the failure to comply with the requirement which was the gist of the offence.

Keegan v *De Burca* is cogent testimony to the fact that the dividing line between the two forms of contempt is not clearly drawn. Grey areas exist. Above all, while the distinction is a time-honoured one, the justification for its existence may be questioned especially in a jurisdiction with a written constitution incorporating a Bill of Rights. A modern Constitution for a New State should not be construed in the light of judicial survivals of an earlier age. In *Melling* v *O'Mathghamha*[9] conduct meriting condemnation was classified as civil or criminal largely according to the consequences with which it was visited. Both forms of contempt may involve the loss of an individual's liberty; this being so, the argument can be made for the assimilation of the two branches of contempt. According to Professor Glanville Williams,[10] a crime is an act capable of being followed by proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal. In a marginal case the court

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may have to balance one feature which may suggest that the proceeding is criminal against another feature, which may suggest the contrary. Although this pragmatic case-by-case approach has been trenchantly criticised as constituting a confession of intellectual bankruptcy [11] other eminent jurists may stand convicted on the same charge. Lord Atkin in *Proprietory Articles Trade Association* v *A.G. for Canada* [12] said that it was important to ask the question, "Is the act prohibited with penal consequences?".

It is said that where the complaint is of non-compliance with a court order or an undertaking, the purpose and intended outcome of the proceedings will typically be remedial or coercive. In the leading American case *Gompers* v *Bucks Stove and Range Co.*[13] the matter is stated thus:-

> "It is not the fact of punishment but rather its character and purpose that often serves to distinguish between the two classes of case. If it is for civil contempt the punishment is remedial and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court".

It is submitted that the sentiments contained in this statement are misleading in that they tend to obscure the punitive element which may lie behind civil contempt proceedings. Civil contempt cases are not concerned simply with matters of private right. Civil contempt plays an important part in our legal system in aiding the enforcement of court orders. The value of a right to a litigant is no greater than the available remedy. Lord Diplock has recently recognised [14] that there is an element of public policy in punishing civil contempt since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity. This aspect of contempt has come to the forefront in recent times with the reluctance on the part of some trade unionists to comply with the terms of injunctive relief granted against them, as in the Ranks dispute.

It has been demonstrated that there are public interest considerations in the punishment of civil contempt. Also the consequences committal entails for an individual are heavy and burdensome. After taking cognisance of these factors, one can seriously question the exclusion of a civil contemnor from the pale of protection afforded the criminal defendant. In partial recognition of this, proceedings for civil contempt have been held to have acquired safeguards usually associated with a criminal trial. [15] The alleged contemnor cannot be compelled to answer interrogatories or to give evidence against himself and the presiding judge has a discretion to disallow cross-examination on an affidavit where this would operate unfairly. There does not seem any reason in justice, equity or fairness for not providing the alleged contemnor with the full panoply of protection made available to his criminal counterpart.

A.G. v O'Kelly

In *A. G.* v *O'Kelly* [16] the proper interpretation of Article 72 of the Free State Constitution was at issue. This provided for trial by jury and the exceptions to this principle envisaged in it did not encompass cases of contempt. Nonetheless it was held by a Divisional High Court (Sullivan P., Hanna J. Meredith J. dissenting) that this right only applied to trials of criminal offences by ordinary criminal process and did not concern the jurisdiction of the High Court to deal summarily with contempt, a jurisdiction that was inherent in it as a Court of Record. Sullivan P. quoting Palles C. B. in *A. G.* v *Kissane* [17] said:-

> "The trial by jury is one part ot the system; the punishing of contempts of court by attachment is another; we must not confound the modes of proceeding and try contempts by juries and murders by attachment". [18]

The power of the courts concerning contempts was described as being coeval with their first foundation and institution. The rationale of summary jurisdiction was that [19]

> "if we are to wait for [punishment for contempt] to be done by ordinary criminal process and an ordinary trial, there might be great mischief done, because that process is slow, and before that process could come into train, the mischief would be done by the due administration of justice being hampered and thwarted".

This statement is somewhat ironical in light of the fact that in the *O'Kelly* case the Attorney General did not start proceedings until 13 days after the publication. This lack of promptitude moved Meredith J. to dissent from the holding of his brethren. He suggested that the procedure should have been by way of information [20]

> "if the case was one which could have afforded the delay occasioned by these proceedings and of having this court constituted it could have afforded the delay of proceeding by way of criminal information, which would have been no greater".[21]

From the accused's point of view, the advantage of the procedure by way of information is that it would mean trial by jury.

The principles enunciated in *A. G.* v *O'Kelly* in relation to the constitution of the Free State Constitution insofar as it affected cases of contempt were considered and approved by the then Supreme court in *Re Earle* [22] Fitzgibbon J. expressed himself as follows:-[23]

> "Whatever the source of the exercise of judicial power in Courts of Record to fine or imprison by summary process contempts in court or out of court may be, whether immemorial usage as asserted by Wilmot J. in *Almon's* case and those great judges and commentators who have followed him, or a gradual process of development, the existence of such a power has, as regards Superior Courts of Record at any rate, received the sanction express or implied, of so many authorities including the legislature itself, that it must now be recognised as part of the law of the land".

In this connection it is also apt to appreciate the observations of Frankfurter J. in *U.S.* v *Green* [24] where the learned judge pertinently remarked that law is a social organism, and evolution operates in the sociological domain no less than in the biological. The vitality and therefore validity of law is not arrested by the circumstances of it origin. What Magna Carta has become is very different indeed from the immediate objects of the barons of Runnymede. Be that as it may, it is interesting to note that the summary procedure, as applied to the general range of contempts, appears to

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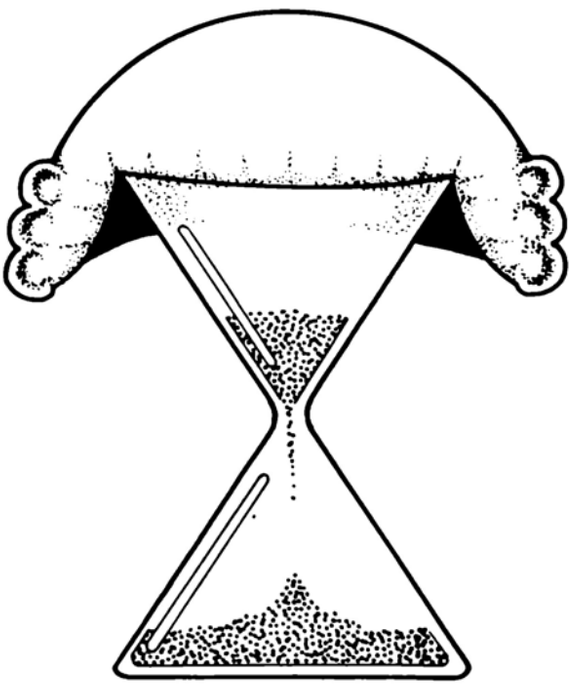

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have been demonstrated by historical scholarship to be based on historical error. The most authoritative student of contempt of court has impressively shown the myth of immemorial usage to be a mere fiction. [25] Indeed it seems clear that until at least the late Seventeeth or early Eighteenth century the English Courts, excepting the ill-famed Court of Star chamber to which many approbrious epithets have been applied neither had nor claimed power to punish contempts committed out of court by summary process. Prior to this period such contempts were tried in the normal and regular course of the criminal law including trial by jury. Then in 1765 Wilmot J. declared in an opinion prepared for delivery in the Court of King's Bench (but never actually handed down) that courts had exercised the power to try all contempts summarily since their creation in the forgotten past, [26] a proposition that won uncritical acceptence in *A. G.* v *O'Kelly*. Although Wilmot J's observations were not adopted as the basis for a decision by an English Court until the case of *Clement* [27] in 1821, they have exercised a baleful influence on the law of contempt. While they were subjected to searching criticism by Fletcher J. of the Court of Common Pleas in the Irish case *Taafe* v *Dowes* [28] of 1813, subsequently they have secured the enthusiastic approval of the Irish Bench. Historical inaccuracy seems to have been transformed into constitutional dogma.

The decision in *A. G.* v *O'Kelly* is open to further objection. Sullivan P. placed heavy reliance upon *Cox* v *Hales* [29] and the principle therein contained to the effect that the mere fact of a general word being used in a statute does not foreclose all inquiry into the object of the statute or the mischief which it was intended to remedy. In some instances statutes have been construed quite contrary to the letter. Sullivan P. appears to have been of the opinion that principles of statutory interpretation were equally apposite to the construction of our Constitution. This assumption was not shared by Walsh J. in *The State (Browne)* v *Feran*. [30] There the learned judge pointed out that what was being construed in *Cox* v *Hales* was a statute and it could not be suggested that the canons of construction applicable to a statute are equally applicable to a written Constitution. In the latter case words, which in their ordinary meaning, import inclusion or exclusion, cannot be given a meaning other than their literal meaning save where the authority for doing so can be found in the Constitution itself. [31] The Constitution represented a new departure in respect of fundamental principles. The High Court must mould its own *cursus curiae*.

A. G. v Connolly

In *A. G.* v *Connolly*, [32] the *O'Kelly* case was regarded as a precedent governing the High Court in the construction of the new Constitution. Article 38.5 had not taken away the jurisdiction formerly held by the Court and its predecessors to punish summarily for criminal contempt. It required clear and unequivocal language to effect a depritation of this necessary and inherent jurisdiction. However, it is respectfully submitted that Gavan Duffy P's interpretation of the earlier authority is in some respects erroneous. The learned President stated that Sullivan P. in the *O'Kelly* case considered the nature, origin and purpose of the jurisdiction and showed that a motion for attachment had not been regarded as a criminal trial. This was not the position. On the contrary Sullivan P. was prepared to assume for the purposes of the *O'Kelly* case that the terms of Article 72 of the Free State Constitution, literally construed, were sufficient to include applications to commit for contempt of court.

American Influences

Here the matter rested until the 1970's in this jurisdiction but the intervening period witnessed the occurence of major developments in the law of contempt across the Atlantic. In the United States of particular importance to the question of jurisdiction and procedure is the right to a jury trial guaranteed by Article 111 Section 2 of the Constitution and by the Sixth Amendment which binds state courts under the Fourteenth Amendment. Until comparatively recent years contempt of court was regarded as falling outside the protection afforded by the Constitution. In *U.S.* v *Green* Frankfurter J. adverted to the fact that in at least two score cases in the U.S. Supreme Court not to mention the vast mass of decisions in the lower Federal Courts the power to punish summarily had been accepted without question. In *U.S.* v *Barnett* [33] the proceedings were fought against the background of an attempt by the coloured student James Meredith to enter the University of Mississippi. A policy of deliberate non-compliance with court orders on the part of the State Governor led to a contempt citation in respect of which the Supreme Court held that the petitioner was not entitled to trial by jury. The decision was that of a bare majority of the Court and doubts were expressed by members of the majority as to whether penalties in excess of those provided for petty offences could be imposed without affording an opportunity for a jury trial.

This *caveat* was seized upon in *Bloom* v *Illinois* [34] where a lawyer filed a spurious will for probate. This was charged as a criminal contempt and an Illinois State Court denied a request for a jury trial. On an appeal to the Supreme Court from a sentence of 2 years imprisonment, White J., delivering the opinion of the court, agreed with the *Barnett* decision insofar as it held that [35]

> "Criminal contempt, intrinsicially and aside from the particular penalty imposed, was not deemed a serious offence requiring the protection of the constitutional guarantees of the right to jury trial".

He added however [36]

> "...that the traditional rule is constitutionally infirm insofar as it permits other than petty contempts to be tried without honoring a demand for a jury trial...[In] our view, dispensing with the jury in the trial of contempts subjected to severe punishment represents an unacceptable construction of the Constitution".

In *Cheff* v *Schnackenberg* [37] the Supreme Court has already indicated that it would limit the length of summary punishment for criminal contempt through the exercise of its general supervisory power to review proceedings in Federal Courts. The rationale of the right to jury trial in contempt cases was succintly stated in *Bloom* v *Illinois*. [38]

> "[In] terms of those considerations which make the right to jury trial fundamental in criminal cases, there

is no substantial difference between serious contempts and other serious crimes. Indeed in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority or an interference with the judicial process or with the duties of officers of the court".[39]

This represents a reiteration of the points made by Black J. (dissenting) in *U.S* v *Green* where the learned judge stated that when the responsibilities of law maker, prosecutor, judge, jury and disciplinarian are thrust upon a judge he is obviously incapable of holding the scales of justice perfectly fair and reflecting impartially on the guilt or innocence of the accused. No official regardless of his position or the purity and nobleness of his character should be granted such autocratic omnipotence. Judges are not essentially different from other public functionaries. Like all the rest of mankind they may be affected by pride and passion, by pettiness and bruised feelings, by improper understanding or by excessive zeal. Frank recognition of these common human characteristics, undoubtedly led to the determination of those who framed our Constitution to fragment the power to define and enforce the criminal law, among different departments and institutions of government in the hope that each would tend to operate as a shield against their excesses thereby securing the people's liberty. The force of these considerations cannot be underestimated.

The preponderance of judicial opinion in the United States is now to the effect that summary proceedings in cases of contempt are permissible only where they are sanctioned by the historical exception to entitlement to jury trial covering petty offences and where no maximum penalty is statutorily authorised the penalty actually imposed is the best indication of the seriousess of the offence. This state of affairs is not above objection in that it requires the court to exercise what is in effect, a prosecutorial function of designating the alleged contempt as "petty" or "serious" before proceeding to deal with it.[40] Nevertheless notwithstanding this theoretical imperfection the American approach has the obvious advantage of ensuring compliance with the spirit and essence of the constitutional command regarding jury trial.

Part 2 of this article will be published in the October Gazette.

Footnotes.

1. See *De Burca* v *A. G.* [1976] I.R. 38, *The State (Byrne)* v *Frawley* [1978] I.R. 326
2. [1968] 391 U.S. 145 at pp. 155 -156
3. [1933] I.R. 305, 341.
4. Supreme Court, unreported 31 July 1980, noted by T. A. M. Cooney 15 Irish Jurist 289 (1980).
5. [1973] I.R. 223.
6. See *Re Earle* [1938] I.R. 485 cf. Henchy J. in *The State (D.P.P.)* v *Walsh and Connelly* Supreme Court, unreported 6 February 1981 at page 3 of his unreported judgment where he states that the case was concerned with a question of what is pehaps now only a civil contempt i.e. failure to obey an order of *habeas corpus* in respect of a child whose custody was in issue.
7. [1973] I.R. 223, 227 See also the observations of Lord Denning in *Danchevsky* v *Danchevsky* [1974] 3 All E.R. 934 937 which were cited with approval in *The State (D.P.P.)* v *Walsh and Connelly* "It seems to me that when the object of the committal is punishment for a past offence, then if he i.e. the contemnor, is to be imprisoned at all, the appropriate penalty is a fixed term. When it is a matter of getting a person to do something in the future - and there is a reasonable prospect of him doing it - then it may be quite appropriate to have an indefinite order against him until he does it".
8. See J. M. Kelly *The Irish Constitution* (1980) p.207 footnote 50.
9. [1962] I.R. 1.
10. "The Definition of a Crime" (1955) C.L.P. 107 at 130.
11. See Osborough "Melling v O'Mathghamahna" (1964) 30 Irish Jurist 32 at 34 Footnote N.
12. [1931] A. C. 310 at 324.
13. 221 U.S. 418, 441 (1911)
14. *A. G.* v *Times Newspapers Ltd.* [1974] A. C. 173, 308.
15. See *Comet Products (U.K.) Ltd.* v *Hawkex Plastics Ltd.* [1971] 2Q.B.67.
16. [1928] I.R. 308.
17. (1893) 32 L.R.Ir. 220, 271.
18. [1928] I.R. 308, 313.
19. Ibid at 314 citing Blackburn L. J. in Skipworth's case L.R. 9Q.B. 230, 232.
20. On which see J. P. Casey *The Office of Attorney General in Ireland* (1980) pp. 125 - 128.
21. [1928] I.R. 308, 325.
22. [1938] I.R. 485.
23. Ibid at 493.
24. 356 U.S. 165 (1958).
25. See Sir John Fox *The History of Contempt of Court* (1927).
26. *R.* v *Almon* (1765) Wilm. 234, 97 E.R. 94 See also Sir John Fox "The King v Almon 1" (1908) 24 L.Q.R. 184.
27. 4 B & Ald. 219, 233 106 E.R. 918, 923 per Halroyd J.
28. 13 E.R. 15 discussed by Fox (1908) 24 L.Q.R. 184, 185 - 8.
29. 15 A.C. 506.
30. [1967] I.R. 147.
31. See also Henchy J. in *The State (D.P.P.)* v *Walsh and Connelly* at page 17 of his unreported judgment "Having regard to the fact that a number of important constitutional rights are implied, rather than expressly articulated in the Constitution, one must read that rule of constitutional interpretation as saying that the ordinary or literal meaning of an inclusion or an exclusion effected by the Constitution may be overborne not only by an express provision of the Constitution which is inconsistent with the inclusion or exclusion in question but also by a conflicting provision which has to be imported into the Constitution by necessary implication".
32. [1947] I.R. 213.
33. 376 U.S. 681 (1964).
34. 391 U.S. 194 (1968) See Note "Right to Jury Trial in Criminal Contempt Proceedings" (1968) 82 Harv. L.R. 153.
35. 391 U.S. 194, 197.
36. Ibid p. 198.
37. 384 U.S. 373 (1966).
38. 391 U.S. 194 (1968).
39. Ibid at pp. 201 - 202.
40. In determining whether or not an offence is a minor offence in this jurisdiction so as to constitutionally triable summarily the most important criterion for the consideration of the Court is the amount of the penalty. In *In Re Haughey* [1971] I.R. 217 the Supreme Court stressed the test relates to the severity of the penalty authorised by law, not to that of the penalty actually imposed.

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Practitioners should be aware that this certificate should be requested only in cases where portion only of the vendor's land is being sold. Its principal purpose is to assure the purchaser that no pendings relate to lands being sold to the purchaser. Strictly speaking, the correct wording on the certificate should be that "none of the dealings pending (if any) affect the site in sale to the purchaser". This certificate can of course only relate to the facts within the knowledge of the solicitor giving it and should be so qualified. There could be dealings pending on the folio of which the vendor's solicitor was unaware. The committee therefore recommends that these certificates should be given in cases of sub-division only and should not be asked for or given in the cases of the sale of all of the lands on the folio. This recommendation should be read in conjunction with the practice note published with the January/February issue of the Gazette 1982 relating to undertakings to discharge queries. □

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St. Louis University Law School Seeks 'A Little Irish' Collection

by
Martha Baker

Reprinted from St. Louis Business Journal, April, 1983.

When Eileen Haughey Searls visited her mother land not too long ago, she returned with an idea: establish a complete working Irish law library at St. Louis University School of Law.

Searls, 58, is a St. Louis University law professor and librarian who decided that to complete the law school's Irish holdings would take very little investment and organizing. "The library has the basis collection. To complete and maintain it, we need an endowment of $52,000. I know that's ridiculously low, but that's all they (The Irish legal system) publish."

In order to establish a library as up-to-date as any law office in County Cork, Searls said the Irish Law Center would need, among other works, the "Acts of the Oireachtas," records of legislation; the "Irish Tax Cases and Digest of Cases" (the law library already has the "Irish Reports," "Irish Jurist"); the "Custom and Excise Tariff," tax sets; and the official biweekly gazette, the "Iris Oifigiuil."

Searls and the members of the law center's committee hope such a working library would assist St. Louis-area companies with branches in Ireland. Those companies include Alton Packaging Co., Emerson Electric Co., General Dynamics, Monsanto Co., The Seven-Up Co. and Mallinkrodt Inc.

A counsel for Emerson said an Irish law library might be useful for initial research, "depending on the problem." In most cases, he added, any company would follow the advice of its lawyers in Ireland in the long run. "But the library would contain information about tax holidays (forgiveness of tax for a period of time) set up by the country to encourage investment."

He added that an additional advantage to research materials being handy is that the center would carry publications pertaining to the European economic community because Ireland is a member of the Common Market.

"Companies using Ireland as a base sell to the whole European community. The Irish law library could provide material for companies interested in establishing a subsidary there."

Neasa Gibbons Rohlik, an Irish solicitor in St. Louis and a member of the law center's committee, said she imagines that most companies with Irish subsidiaries call corresponding attorneys in New York who, in turn, contact their counterparts in Ireland. "But they pay for that. The St. Louis University School of Law Library is free."

Because of St. Louis University's membership in Online Computer Library Center, all Irish legal matter will be listed in the data base available to the 7,000 libraries in the network.

The Law School Library has all curent Irish court reports; most old reports and statutes would be purchased with the endowment. More than $5,000 has been contributed so far to the endowment, Searls said.

Robert Staed, 68, a St. Louis lawyer of Irish descent in general practice with Kappel Neill & Staed, said, "We never intended to pick out the glamorous little country of Ireland to build up the library, but merely to make the library we now have much more complete." □

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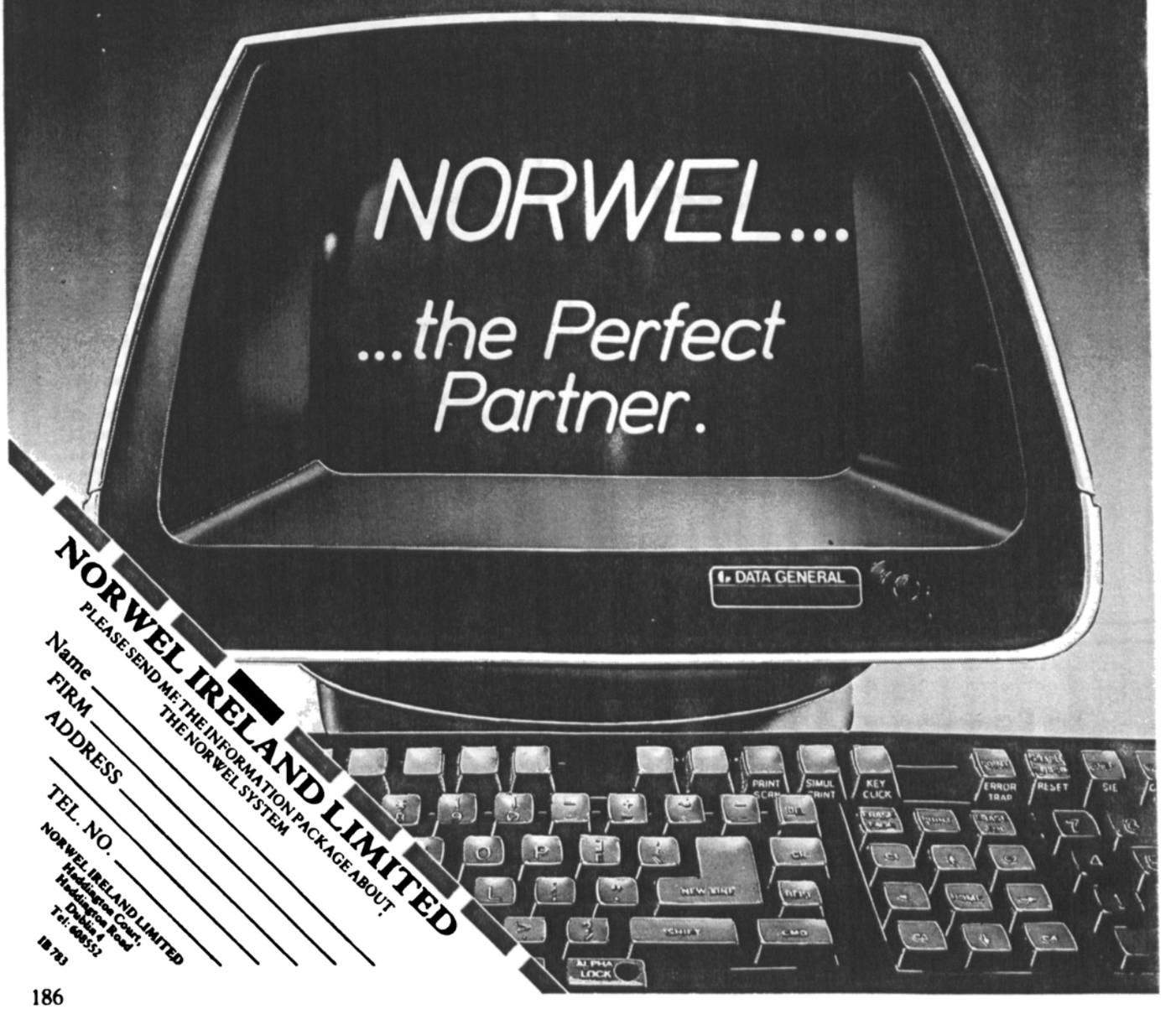

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The Medico - Legal Society of Ireland

At the Annual General Meeting of the Medico-Legal Society of Ireland the following members were elected to the council for the 1983 - 1984 session.

President:	Carmel Killeen, Solicitor.
Vice Presidents:	District Justice Cassidy, Dr. Liam Daly, Dr. John Harbison, Thelma King, Solicitor, Dr. Towers.
Honorary Secretary:	Eamonn G. Hall, Solicitor.
Honorary Treasurer:	Cliona O'Tuama, Solicitor.
Medical:	Mr. Anthony Brown, Dr. Declan Gilsenan, Dr. Sarah Rogers.
Legal:	Mr. Matthew Russell, B.L., Mr. Leslie Kearon, Solicitor. Mr. Brian Murphy, Solicitor. Mr. Brendan Garvan, Solicitor.
Forensic Scientist:	Dr. Sheila Willis.

THE MEDICO - LEGAL SOCIETY OF IRELAND

Patron: Professor P. D. J. Holland, President, Royal College of Physicians in Ireland.

President: Miss Carmel Killeen, Solicitor.

1983 — 1984 Lecture Programme

1. **Thurdsay, October 27th 1983.** Mr. John Mulcahy, Editor of "The Phoenix" magazine, on **"The Professions - Are They Fair Game?"**
2. **Thursday, November 24th 1983.** Mr Eamonn G. Mongey, B.L., Chief Registrar of the High Court and Dr. John F. Fleetwood on **"The Challenge of Old Age - The Legal and Medical Viewpoints".**
3. **Thursday, January 26th 1984.** Dr. John Wall, MB, BS, DObst RCOG, Deputy Secretary of The Medical Defence Union on **"Doctors and the Courts in the 1980's".**
4. **Thursday, February 23rd 1984.** Mrs. Mary O'Connor of the Forensic Science Laboratory, Department of Justice and Dectective Inspector John J. McGroarty of the Drugs Squad, Dublin Castle, on **'Drugs of Abuse'.**
5. **Thursday, 22nd March 1984.** Mr. Desmond O'Mahony, Principal Psychologist of the Department of Justice, on **"Incest".**

Members are invited to join the Council and the guest speakers for dinner at 6.30pm on the evening of each lecture.

Members intending to dine should communicate in advance with the **Honorary Secretary,** Mr. Eamonn G. Hall, Solicitor, 'Donaghmoyne', 22 Belgrove Lawn, Chapelizod, Dublin 20 Tel. Office (01) 748888 ext. 561 or home (01) 264773.

The meetings will commence at 8.00pm. The meetings and the dinner will be held in the **Kildare Street and University Club,** 17 St. Stephens Green, Dublin 2, by kind permission.

Persons seeking to become members of the Society should communicate with the Honorary Secretary.

Eamonn G. Hall, Honorary Secretary.

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Also, as a result of this injury, the Plaintiff was prejudiced in her hobbies . . . □

Mayo/Galway Golfing Society

The Inaugural meeting of the above Society, which was the brain-child of Brendan Allen, was held at Connemara Golf Club over the week end of the 9th and 10th of July. The main event was a challenge between Mayo and Galway for the Allen/McEllin Perpetual Trophy, presented jointly by Brendan Allen and Paddy McEllin.

Following the tournament, dinner was held in the Abbey Glen Hotel, which was Headquarters for the week-end. Brendan Allen welcomed all present, Golfers and non Golfers, and hoped that every meeting would be as successful and happy as this one. Paddy McEllin then presented the prizes. □

SOCIETY OF YOUNG SOLICITORS AUTUMN CONFERENCE

22-23 October Newpark Hotel, Kilkenny

Programme and Registration Forms are Circulated with this issue.

SOCIETY OF YOUNG SOLICITORS TRANSCRIPTION SERVICE

Norman Spendlove, who was a founder member of the Society in May 1965 and who since then in his capacity as Transcript Secretary has published transcripts from 35 Seminars has decided to retire from the position at the end of December 1983.

It is essential that a new Transcript Secretary take over the post, if continuity is to be maintained. Anyone interested in taking over the duties of the Transcript Secretary should contact Norman Spendlove at 94 Grafton Street, Dublin, 2.

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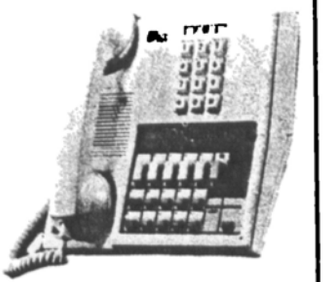

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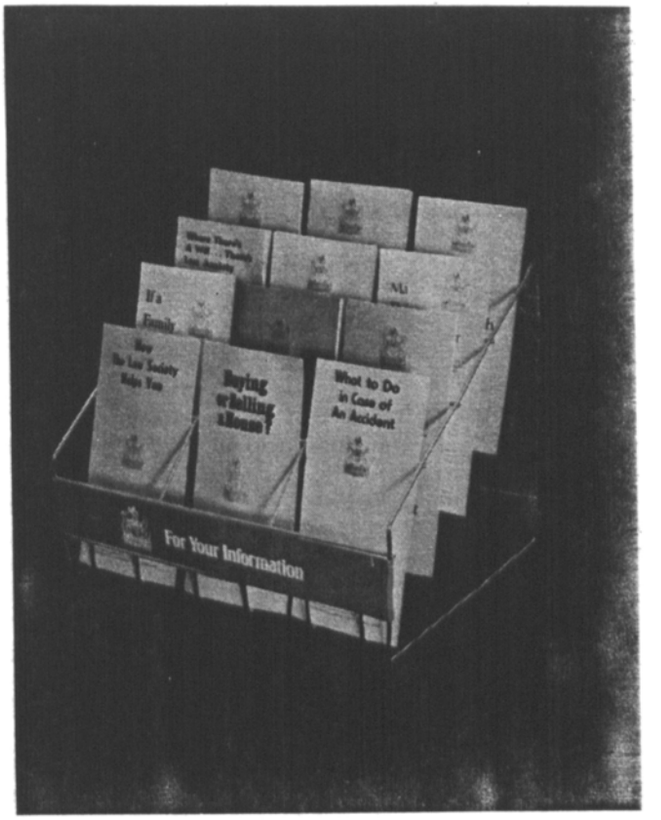

These display racks for public information leaflets published by the Law Society are now available to members from the Society's headquarters at £10 each. The dimensions of the racks are 12¾" long, 9¾" deep and 9¾" high.

Display cards (11¾" x 8") featuring the advertisements used during Wills Week, with updated legends, are now available free of charge to solicitors from the Society's headquarters. They are mounted and strutted for display in waiting rooms and other suitable locations. Two types are available, one carrying a family farm setting illustration, the other a family shooping in an urban situation. Supplies are limited.

Section 45 Consents and the Treaty of Rome

by
J. A. O'Farrell and N. T. Cawley [1]

In December 1982, the Commission of the European Communities took the decision to bring Ireland before the European Court of Justice to seek a declaration that "by maintaining S.45(2)(a) of the 1965 Land Act in force in respect of Nationals of other member States, the Republic of Ireland has failed to fulfill an obligation incumbent upon it under Treaty," on the grounds that "no provision of National Law may impose on a Community National wishing to exercise the right of establishment conferred by Art.52 the additional requirement of the consent of the State in which that establishment is to take place, even where such requirements, which do not also apply to the Member States' own Nationals, are imposed only for reasons of an administrative nature. A mere administrative practice not to apply the provision in question would not remove the infringement."[2]

On the 30th of May 1983, the Minister for Agriculture, in exercise of the power conferred on him by S.45(1)(x) of the Land Act, 1965 approved the Land Act, 1965 (Additional Category of Qualified Person) Regulations, 1983. (S.I.No. 144 of 1983.)

Paragraph 2 of this instrument reads as follows:-
"For the purposes of the definition of a "qualified person" in S.45 of the Land Act 1965(No.2 of 1965), the following category is hereby declared to be an additional category, namely, a person who is a citizen of a Member State of the European Communities and who-
(a) Is exercising in the State the right of establishment as a self-employed person under Art. 52 of the EEC treaty (within the meaning of the European Communities Act, 1972 (No.27 of 1972), by way of an economic activity the nature of which is specified in the relevant certificate given by that person under subsection (3) of the said S.45 and
(b) Is acquiring an interest in land to which the said S.45 applies for the purpose of or in connection with such exercise of that right."

What is the right of establishment to which the Instrument refers? What is the significance of the Land Act 1965 and in what way does it affect out Treaty obligations? Does S.I. 144 adequately discharge those obligations?

What is the background to the introduction of this Instrument? Prior to the 1st of June 1983, the need to obtain the consent of the Land Commission when an EEC national [3] was contemplating the purchase of land in the State was an accepted and largely unquestioned requirement of Irish conveyancing law and practice. The consequences of failure to obtain this consent were serious. Consider the following hypothetical example:

Helmut, a citizen of the Federal Republic of Germany, came to Ireland in 1980 and succeeded in buying 10 acres of agricultural land in fee simple from Eamonn, an Irish National. In January 1983 Helmut decided to sell the land to Benjy, also an Irish National. Both parties used the Standard Form Contract approved by the Incorporated Law Society of Ireland. Following General Condition 8 thereof, Helmut's solicitor sent copies of the title documents to Benjy's solicitor. At this stage, Benjy's solicitor queried the absence of a certificate on the Conveyance from Eamonn to Helmut stating that the consent of the Land Commission had been obtained to the vesting of the land in Helmut, as required by S.45 of the Land Act. However, Helmut's solicitor, a staunch believer in European integration, made no apology for failing to obtain the consent and refused to seek a "retrospective consent" from the Land Commission when requested to do so. What were the consequences for his client?

S.45 (2)(a) of the Land Act 1965 provides that no interest in land shall vest in a person who is not a "qualified person" unless he obtains the written consent of the Land Commission.

In summary, a "qualified person" is a person who is either-

i. An Irish Citizen, or
ii. A natural Person resident in the State for more than seven years prior to the transaction, or
iii. A person who receives the Certificate of the Minister for Industry and Commerce stating that it has been shown to the Minister's satisfaction that the land is being acquired for the purpose of an industry other than agriculture, or
iv. A local authority, or
v. A body corporate which does not have the words "Limited" or "Teoranta" appended to its name, or
vi. A body corporate established by Statute, or
vii. A body corporate established under the direction or authorisation of a statute, or
viii. A Bank named in the third schedule to the Central Bank Act, 1942, or
ix. A person who satisfies the Land Commission that he is acquiring less than five acres of land for private residential purposes, or
x. Any category declared by the Minister via regulations to be an additional category. [4]

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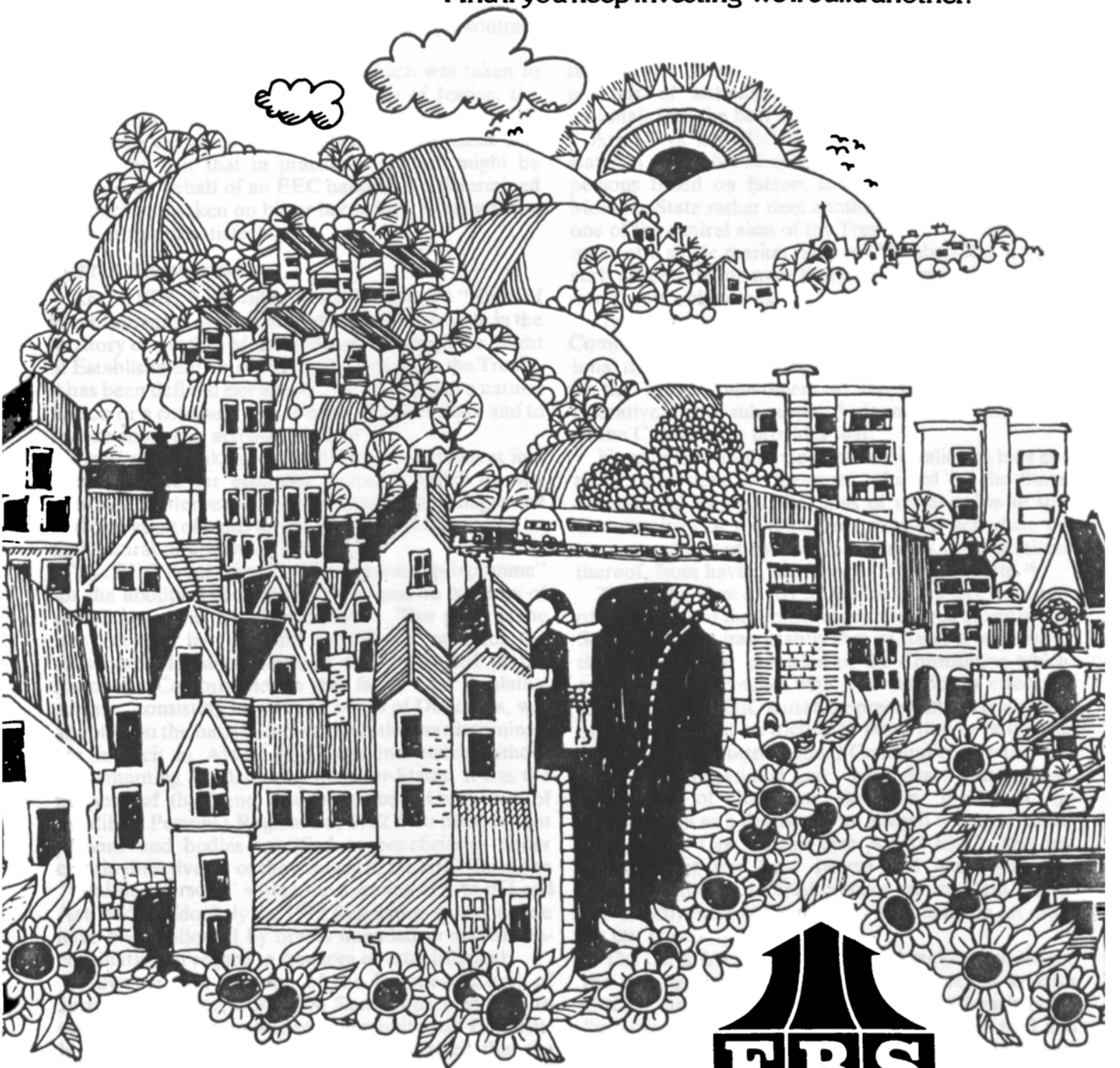

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If we assume that Helmut was not a "qualified person" the generally accepted view would have been that Helmut did not acquire a valid title to the land. The logic is simple on the face of it; Helmut must either fit into one of the approved categories or obtain the consent of the Land Commission. Helmut has not satisfied either of these conditions. Therefore the land is incapable of vesting in him. Logically too, therefore, Helmut would not have succeeded in an action for specific performance against Benjy because Irish Courts will not generally force a bad title on a purchaser by granting a decree for specific performance to the vendor. [5] Moreover, it is probable that Benjy would have been entitled to be discharged from his contract altogether.

By virtue of the fact that the decision was taken to refer the State to the European Court of Justice, the Commission was presumably dissatisfied with the continuing existence of S.45(2)(a) of the Land Act despite the fact that in practice a consent might be obtained on behalf of an EEC national if a determined approach was taken on his or her behalf. What was the cause of this dissatisfaction?

Right of Establishment

Art.52 EEC [6] provides for what is called a "Right of Establishment" of Nationals of one member-State in the territory of another Member-State. Although the "right of Establishment" is not explicitly defined in the Treaty, it has been defined elsewhere [7] as 'the right of a natural person or a company to settle in a Member-State and to pursue economic activities therein".

Generally speaking, this will involve settlement in a Member-State for economic purposes which on any reasonable interpetation must include the management and operation of lands for the purposes of carrying on an agricultural or any other business.

The EEC Treaty provided for a "general programme" for the abolition of existing restrictions on freedom of establishment in the Community. [8] This programme was adopted in 1961 and provided a basis for the subsequent legislative actions of the Council of the European Communities in this field. This legislative scheme, consisting largely of a series of Directives, was adopted on the basis that the prohibition on discrimination implicit in Art.52 EEC was ineffective without implementing legislation by Member-States. It was the purpose of the Land Act (Additional Categories of Qualified Persons) Regulation, 1972 [9] to provide that persons and bodies specified as beneficiaries under certain directives [10] of the Council of the EEC should be "qualified persons" within the meaning of S.45 of Land Act 1965. Undoubtly the 1972 Regulation would in time have been followed by others intended to abolish discrimination in regard to freedom of establishment.

However, the decision of the European Court of Justice in *Reyners v. Belgium State* [11] operated so as to stem the burgeoning tide of Community and Domestic legislation. In that case, the Court declared that the prohibition on discrimination implicit in Art.52 EEC was "directly applicable" as of the end of the transitional period, [12] and this despite the wording of the text of Art.52 which puported to make the aim of freedom of establishment dependent upon the Council's legislative programme and ultimately upon implementing legislation by EEC Member-States. This decision means that Art.52 *itself* can be relied on by a Plaintiff in a National Court who is alleging restrictions on his right to freedom of establishment. Even more significantly, Art. 52, like Arts.48 and 59, will be construed as prohibiting discrimination by private parties as well as by public parties. [13]

It should be noted that Art.56 EEC which permits derogation from the right of establishment in certain specified circumstances only does so in respect of conditions of entry and residence and not in respect of the terms and conditions under which occupational activities are carried on or are intended to be carried on; this means that a State cannot impose restrictions on EEC nationals on "public policy" grounds where the real motive is to restrict solely or substantially on grounds of nationality the integration of foreign nationals into the host State's economy. [14]

Art.7 [15] of the EEC Treaty is also relevant since it states in effect that all arbitrary differentiation between persons based on factors connecting them with one Member-State rather than another is incompatible with one of the central aims of the Treaty, viz. the establishment of a single market between Member-States. Any such differentiation must therefore be inconsistent with our Treaty obligations.

The obligations of membership of the European Communities gave rise to special problems of a constitutional nature. A solution was found through the medium of the Third Amendment to the Constitution. The operative part of sub-section 3 of section 4 of Article 29 of the Constitution provides that:

No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the Communities or prevents laws enacted, acts done or measures adopted by the Communities or institutions thereof, from having the force of law in the State. [16]

The better view of Art.52 EEC is that it has, by virtue of Art.29.4.3 of the Constitution, the force of law in the State and more importantly that its status is superior to that of any other provision of the Constitution which might possible conflict with it or restrict its effect. *A fortiori*, Art.52 EEC must take precedence over any Act of the Oireachtas restricting or puporting to restrict its effect. It is well settled under Community Law (as well as under International Law) that a State cannot plead provisions of its own domestic legislation or Constitution as a defence to an alleged infringement of Community Law (in this case Art.52 EEC); and any provision of our legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community Law must be set aside by our courts. [17]

The Land Act, 1965 (as amended) puported to render the vesting of Land in a person who was not an Irish Citizen but who was an EEC national (though not a "qualifed person") void without the consent of the Land Commission. *Prima Facie*, this was a discriminatory interference of an invidious nature with the right of an EEC national to pursue an economic activity in this country. In the case of our hypothetical example the "economic activity" which was interfered with was the right to enter into a contract for the purchase of land to carry on an agricultural or any other business or to resell

the land at a later date. It is clear that the restriction contained in S.45 in so far as it affects natural persons, is based solely on grounds of Nationality. Although the purpose of the Section was to prevent agricultural land being acquired by non-nationals, the effect of the Section is to subject the guaranteed economic freedom of EEC nationals to a degree of scrutiny and control which is inconsistent with our Treaty obligations".

The invidious nature of this discrimination was impliedly recognised by the State in 1972 when it passed the Regulation of that year referred to above which created new categories of "qualified persons" within the meaning of S.45. But the decision in the *Reyners Case* and subsequent cases truncated the Council's legislative programme and removed the necessity for implementing legislation by Member-States.

Prior to the introduction of S.I. 144 of 1983 the logical conclusion was that an EEC national "who was acquiring land in pursuance of the exercise of his right of establishment" did not require Land Commission consent to obtain a valid title to the land and S.45(2)(a) of the Land Act was void and of no effect in so far as it puported to render the vesting of land in such a person a nullity without the consent of the Land Commission in writing. [18]

S.I. 144 of 1983

The question must now be asked: Does S.I. 144 adequately discharge our Treaty obligations? Arguably, it goes some of the way towards remedying what was, on the face of it, a discriminatory interference with the guaranteed rights of EEC nationals to exercise their right of establishment. But does it go far enough? We submit that it does not.

In the first place, the second paragraph of Art.52 EEC states that "freedom of establishment *shall include* the right to take up and pursue activities as self-employed persons". A literal interpretation of this section would seem to suggest that the right of establishment is not the exclusive right of the self-employed; the difficulty with paragraph 2(a) of S.I. 144 is that it appears to state that it is only a person who is a citizen of a Member-State and who is exercising in the State the right of establishment *as a self-employed person* under Art.52 EEC who is entitled to be a "qualified person" for the purposes of S.45 of the Land Act. Thus it may be unduly restrictive in its effect.

In the second place, a citizen of a Member-State of the European Communities is obliged to specify the economic activity in which he intends to engage pursuant to the exercise of his right of establishment. There is no such comparable obligation on an Irish citizen imposed by S.45, yet the second paragraph of Art.52 EEC states that "freedom of establishment shall include the right to take up and pursue activities as self-employed persons....*under the conditions laid down for its nationals* by the laws of the country where such establishment is effected". Since there is no condition in S.45 or elsewhere requiring an Irish citizen to state anything other than the fact that he is an Irish citizen, there would appear to be a clear discrimination between the obligations imposed on an Irish citizen and those imposed on his European counterpart. Having regard to the second paragraph of Art.52 EEC and in view of what we have said above, we do not feel that this discrimination can be justified. If it cannot, then the State is still in breach of its obligations.[19] Finally, the Instrument limits (erroneously in our view) the right of establishment in general to persons who are citizens of Member-States of the European Communities and who fulfill the criteria set out in the body of the Instrument. There is no reference whatever to, nor any provision for, the right contained in paragraph two of Art.52 EEC, to "set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Art.58, [20] under the conditions laid down for it's own nationals by the law of the country where such establishment is effected...". The present position in respect of the purchase of land by ordinary limited liability companies, whether Irish or foreign and whether public or private is that the consent of the Land Commission in writing to the transaction is required. The essence of the machinery of S.45 is that it confers on the Land Commission the power to refuse such consent for whatever reason it thinks fit. While there can be no apparent question of discrimination in these circumstances since a refusal could in theory apply equally to an Irish company as to a company registered in another Member-State, Art.52 in our view does not permit the State to go so far as to exercise a *veto* in relation to the express right of a company registered in a Member-State of the EEC to purchase land in the State in pursuance of its right of establishment. The fact that Irish registered companies are equally obliged to obtain Land Commission consent and are subject to the same power of veto, does not relieve the State of its obligations; the proper view of Art.52 is that it only con-

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templates the imposition of *conditions* on the right of establishment, and not a situation where the exercise of the right itself can arbitrarily be denied. By confining itself to the interests of persons who are citizens of the Member-States of the European Communities SI 144 fails to remedy what must amount to a breach of our Treaty obligations.

Professor J. C. W. Wylie, writing in 1978 was of the opinion that in the light of our Treaty obligations S.45 would, ultimately, have to be wholly repealed. [21] In view of the probable deficiences of the approach taken via S.I. 144 of 1983, it might have been advisable to have considered the opinion of Professor Wylie and to have taken a comprehensive, rather than a piecemeal, approach to the problem.

In conclusion, it might be added that at the time of writing the European Commission has not proceeded to strike out its action against the State referred to above. □

Footnotes

1. The Authors are Solicitor's Apprentices.
2. Cf. O. J. No. C26/11; (23rd of December 1982) Case 339/82.
   For earlier commentaries on S. 45 see:-
   MacMahon, "The effect on Irish Law of recent developments in EEC law of right of establishment". S.Y.S. Lecture 92 at P. 12 (1975); O'Caoimh, "The individual European Member States obligations: Faithful implementation or realisation of unilateral political goals, with particular reference to Ireland". Journal of the I.S.E.L., Vol. 5,P.3 at 16. (1981)
3. Needless to say, the consent of the Land Commission may still be required when a foreign national who is not a citizen of a Member State of the European Communities is contemplating the purchase of land in the State.
4. S.I. 332 of 1972. The specified beneficiaries under certain Directives of the EEC are, by virtue of this Instrument, deemed to be "qualified persons" within the meaning of S.45 of the Land Act. For details see *Wylie, Irish Conveyancing Law*, para. 8.25 et seq. Note also that the provisions of S.45 do not apply to land in a County Borough, Borough, Urban District or Town.
5. Wylie op. cit. par. 12.36 et seq. See also *Snell, Principles of Equity*, 28th edition., PP. 598-599.
6. Article 52 states *inter alia*, that "freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings..."
7. Cf. Brita Sundberg-Weitman, "Discrimination on grounds of Nationality" quoted in *Wyatt and Dashwood, The substantive Law of the EEC* (1982).
8. Article 54 EEC.
9. See footnote 3 above.
10. Directives 63/261, 63/262, 67/530, 67/531, 67/654. "see footnote four above. For example, by virtue of the 1972 Regulation, Nationals of one member state who have worked as paid agricultural workers in Ireland for an unbroken period of at least two years have the right to acquire farming lands in the State Directive 63/261.
11. Case 2/74; (1974) 2 C.M.L.R. 305.
12. 1st of January 1973.
13. Wyatt and Dashwood. op. cit. at PP. 188-189.
14. Ibid. P. 192.
15. Article 7 EEC states, *inter alia;* "Within the scope of application of this Treaty and without prejudice to any special provisions contained therein; any discrimination on grounds of Nationality shall be prohibited".
16. See further J. M. Kelly, The Irish Constitution (1980) PP. 152-154.
17. Second Simmenthal Case (1978) ECR 629. The status of Art.52 EEC was puportedly consolidated by S.2 of the European Communities Act 1972, but this Act was passed as a declaratory measure, largely to allay the fears of those members of the legal profession who had allowed themselves to be steeped too long in the chilling waters of the Common Law.
18. It could be argued that a vendor who was a national of another Member-State whose title did not have incorporated in it a certificate stating that Land Commission consent had been obtained, might have been in certain circumstances able to obtain an order for specific performance against a purchaser who was reluctant to complete due to the absence of the Certificate. Irish Courts might have been persuaded to decide-that the vendor's title was, to all intents and purposes, complete and was not suffering from any defect which would render a decree inequitable as against the purchaser. See also, "Right of Establishment before the French Courts" (1977) Ir. Jur. (N.S.) 280-281. (Cooney), which perhaps hints at the possibility of enforcing the Community right of establishment in a Municipal Court.
19. The definition of economic activity which is not contained in the text of Art.52 EEC, is capable of both a wide and a narrow interpetation in the context of the right of establishment. We favour a wide interpetation that would include the simple buying and selling of land for purposes other than for the making of a profit. If however, a narrow interpretation of this term were to be used based on an interpretation of Articles 2 and 3 EEC and other articles of the Treaty, e.g. Article 58 then the right of establishment ought properly to be restricted to economic activities being activities comprising the carrying out of trade or the provision of services with a view to profit. This might mean that an EEC national who wished to acquire land for the purposes of establishing a charity would not be a "qualified person" within the meaning of S.45 as amended. Since there is no such restriction on Irish Citizens, a narrow interpretation of this kind would, in our view not be consonant with our Treaty obligations.
20. Cf. Wyatt and Dashwood. 195-198.
21. Cf. Wylie. op. cit. Para 8.27.

F.L.A.C.

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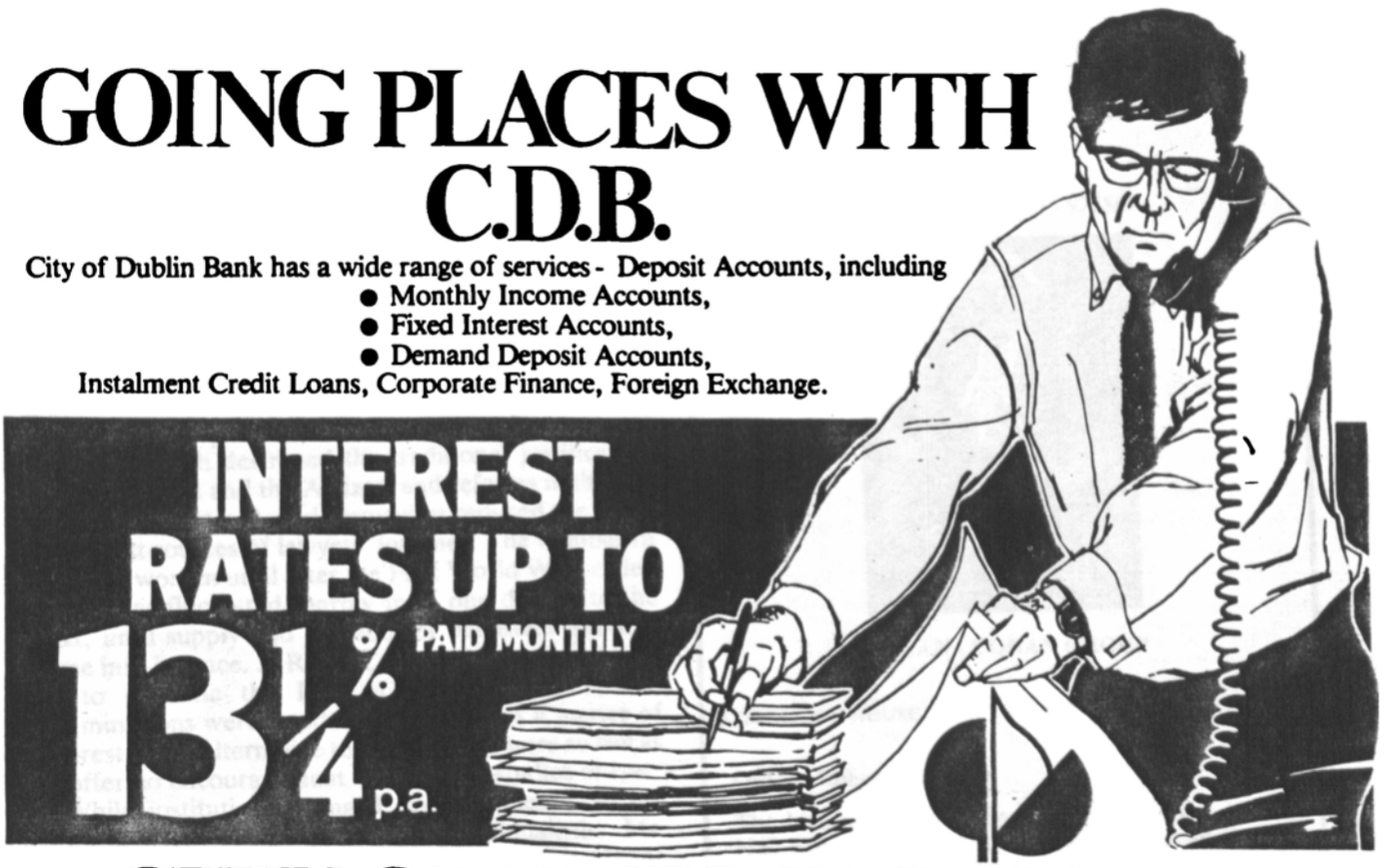

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BOOK REVIEW

Raymond Cock "Foundations of the Modern Bar", Sweet & Maxwell, London 1983. 233 Pages, £9.50 sterling.

In recent years the study of the history of the English Legal profession has been something of a growth industry. Mr. Cock, a barrister who lectures at the University of Sussex, is one of the leading explorers in this new field of history and his book is a study of the Bar in the nineteenth century and of its professional ideas and ethos. He is prepared to wonder, after the fashion of Abel-Smith and Stevens's classic study "Lawyers and the Courts 1750-1965", published in 1967, whether one man's immemorial custom might not be another man's restrictive practice.

He remarks that "professional history is more complex and a great deal less well known than most people had thought", and although it may seem strange that a work on such a subject can properly be called original Mr. Cock's approach, amply vindicated, was to study the great volume of contemporary papers and legal journals and to ascertain what the members of the Bar and interested outsiders said and wrote at the time, rather than what they or their friends and relatives thought when in the fullness of time they came to write biographies and memoirs and collections of anecdotes from Circuit, as often as not casting a patina of good cheer over sometimes quite bitter arguments. These latter sources have their historical value, of course, but Mr. Cock has generally used them "to render explicit the assumptions of the past" (in words he uses in another context) rather than at their face value.

The comfortable but unhistorical impression of where the Bar and its institutions had come from derived largely from the powerful hold that late-Victorian concepts of the Bar came to exercise on the minds of lawyers. In the last decades of the nineteenth century many issues of professional concern that had been debated earlier in its century had died down. In the middle of the century, by contrast, the Inns of Courts and the Circuits had been shaken by economic and industrial influences and by an active (and largely hostile) public opinion. The railways brought an ease of transport which destroyed the traditional justification for the Circuits and the Assizes, and reforms in the law and in the court system destroyed or reduced the value of ancient sources of lawyers' incomes. The number of men (no women until after the First World War) called to the Bar fluctuated sharply from one decade to the next, until supply and demand for barristers' services came into balance. A Royal Commission was established to examine the Inns of Court in the 1850's. Examinations were intoduced (initially, as a matter of interest, as an alternative to lectures) but were so run as to offer no encouragement to academic studies of law.

While institutions changed, the membeship of the working Bar remained strongly individualistic. Mr. Cock remarks that the ethos of the Bar made it a home for persons "who were either great by themselves or remarkable for their capacity to embody some aspect of worthy or strange conduct". Any Irish influence on the English Bar in the course of the century derived from the individuals who made their careers in England, such as Lord Cairns, Sir Charles Russell or Sir Edward Carson. Members of the Irish Bar, however, would have been generally aware of and influenced by developments in England since students in King's Inns were obliged to keep terms at one of the Inns of Court in London until 1885, when the Irish Parliamentary Party succeeded in having an Act of Parliament passed to abolish this requirement.

Mr. Cock's book, while it of course deals with the changes in the profession resulting from events such as the establishment of the County Courts and the passing of the Judicature Acts, focuses more upon what barristers thought was happening or ought to happen to the profession and the way that they did their work. The author writes in a clear and easy style, and wears very lightly the great research and scholarship which underlies his work.

"Foundations of the Modern Bar" is the first in a commendable new series which is to be issued by the publishers in co-operation with the Society of Public Teachers of Law at well below a normal commercial price. The circumstances of publication might stay Mr. Cock's hand in making what could surely otherwise be a claim for exemplary damages against the publishers for having mis-spelled his name in the book. Any other misprints pall in comparison with that. □

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The Editor,
Law Society Gazette,
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21st July, 1983.

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Yours Sincerely,
Mary E. Mulcahy.
4 Clyde Rd.,
Dublin 4.

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

11th August 1983

Dear Sir,

The article "Gifts and Distributions to U.K. Residents" in the May 1983 Gazette will, I fear, cause misunderstanding in regard to the situation where a U.K. resident beneficiary receives assets from trustees not resident in the U.K. The author concludes that as a result of Section 90 of the U.K. Finance Act 1981 such a beneficiary "receives the asset distributed at a *nil* value for U.K. C.G.T. and on a subsequent disposal of that asset will be chargeable to U.K. C.G.T. on the total value realised from the disposal".

That *was* the original view taken by the U.K. Revenue as to the effect of Section 90. Indeed, I was involved in the case where they gave that initial ruling - although they did, even at that stage, admit that arguments could be made for the opposite view.

The U.K. Revenue has now *altered* their view. In a Press Release dated 15th March 1983 they say "Following recent further legal advice, however, the Inland Revenue now consider that the better view is that Section 54 *does* apply. Consequently, such a beneficiary will be deemed to have acquired assets to which he becomes absolutely entitled *at their market value*".

It might be worth mentioning that because of the General Election, legislative proposals in the Finance Bill 1983 dealing with this area did not become law, but they are expected to be re-introduced in the Finance Bill 1984.

Yours sincerely,
John F. Condon.
Solicitor,
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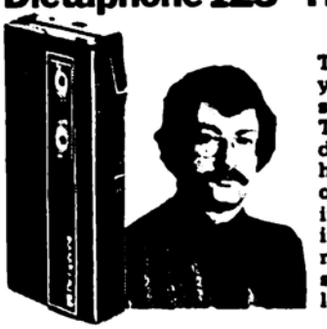

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Dated 23rd day of September 1983.

B. Fitzgerald (Registrar of Titles)

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

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3. **REGISTERED OWNER:** Denis Dunne: Folio No.: 20r.: Lands: Derrycloney: Area: 0a. 3r. 25p.: County: **LAOIS.**
4. **REGISTERED OWNER:** Michael Ryan: Folio No.: 2364 (now closed to 2414F).: Lands: Ballypierce: Area: 1a. 2r. 3p.: County: **CARLOW.**
5. **REGISTERED OWNER:** Hugh O'Donnell and David Kileen: Folio No.: 355R: Lands: Cools: Area: 149a. 1r. 36p.: County: **WEXFORD.**
6. **REGISTERED OWNER:** John Murphy: Folio No.: 19741: Lands: (1) Corrybracken, (2) Drumgossat, (3) Losset: Area: (1) 12a. 2r. 21p: (2) 5a. 3r. 5p: (3) 4a. 3r. 15p.: County: **MONAGHAN.**
7. **REGISTERED OWNER:** Joseph Gleeson, 7 Exchange Street, Limerick: Folio No.: 28347 and 29599: Lands: Blackwater Blackwater: Area: 0a. 0r. 25p: 0a. 1r. 18p.: County: **CLARE.**
8. **REGISTERED OWNER:** Christina Monaghan: Folio No.: 1971: Lands: situate in the Townland of Malahide, Part and Barony of Coolock, County of **DUBLIN** containing 0.121 Hectares.
9. **REGISTERED OWNER:** Joseph Farrell: Folio No.: 3703F: Lands: Ballygortagh: Area: 0a.3r. 0p.: County: **MEATH.**
10. **REGISTERED OWNER:** Brigid King (deceased): Folio No.: 2775L: Lands: known as 167 Collins Avenue situate on the South side of the side Avenue in the Parish of Artane and District of Clonturk. **CITY OF DUBLIN.**
11. **REGISTERED OWNER:** James O'Donovan: Folio No.: 23060 & 57390: Lands: Glanduff: Area: 58a. 1r. 34p. (F.23060). (1) 19a. 3r. 12p.: (2) 47a. 2r. 1p.: (F.57390): County: **CORK.**
12. **REGISTERED OWNER:** Stephen Burke, Rusheenamanagh, Carna, Co. Galway. Folio No.: 5432: Lands: Rusheenamanagh. Area: 8a. 1r. 22p: County: **GALWAY.**
13. **REGISTERED OWNER:** Gerard and Winifred Fleming, Ballinturley, Oranmore, Co. Galway.: Folio No.: 16562F: Lands: Ballinfoile (Part): Area: - County: **GALWAY.**
14. **REGISTERED OWNER:** Helena Hannon, 1 Sycamore Drive, Highfield Park, Galway.: Folio No.: 14661F.: Lands: Ballinfoile (Part): Area:- County: **GALWAY.**
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17. **REGISTERED OWNER:** Rose Emily Rossi, 184 Lower Kilmacud Road, in the County of Dublin.: Folio No.: 60537L: Lands: 184 Lower Kilmacud West: Area: 0a. 1r. 30p.: County: **DUBLIN.**
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19. **REGISTERED OWNER:** Edward and Helen Fitzgerald, 392 Tirellan Heights, Headford Road, Galway.: Folio No.: 16513F: Lands: Area: County: **KERRY.**
20. **REGISTERED OWNER:** John Augustine Healy: Folio No.: 14460F: Lands: (1) Listrim (2) Listrim: Area: (1) 88.775 acres, (2) 0.325 acres: County: **KERRY.**
21. **REGISTERED OWNER:** Patrick Joseph Dillon: Folio No.: 26044: Lands: Cushinstown: Area: 0a. 1r. 38p.: County: **MEATH.**
22. **REGISTERED OWNER:** Frank Carolan & Grace Carolan: Folio No.: 2106L.: Lands: Seasonpark: County: **WICKLOW.**

Lost Wills

CARROLL, Margaret, deceased, late of Oldcourt, Manor Kilbride, County Wicklow. Will any person, aware of the whereabouts of orginal will of Margaret Carroll dated the 25th of October 1946 please contact Arthur E. MacMahon, Solicitor, Naas, telephone number 045/97936/97937/76570.

BYRNE, Laurence, deceased, late of 9 York Road, Rathmines, Dublin 6. Will any person having knowledge of a Will of the above named Deceased, who died on the 3rd of July 1983, please contact Messrs. Walker & Company, **Solicitors,** 26 Westmoreland Street, Dublin 2.

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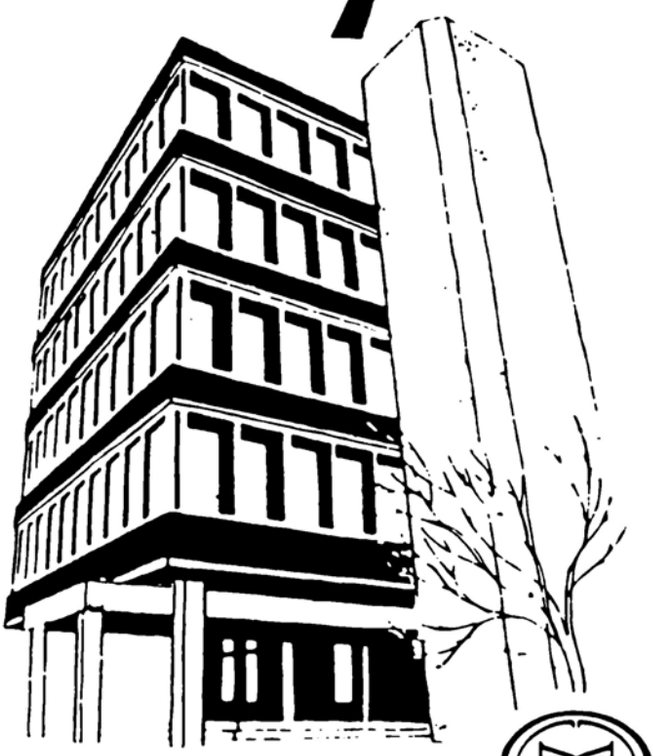

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77 No. 8 October 1983

President Elect of the American Bar Association visits Dublin, 12 October, 1983.

Mr. John C. Shepherd, (left) President Elect of the American Bar Association, pictured on the occasion of his recent visit to the Law Society, with the Hon. T. F. O'Higgins, Chief Justice, Mr. Michael P. Houlihan, President of the Law Society of Ireland and Mr. Alan Logan, President of the Law Society of Northern Ireland.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77 No. 8. October 1983

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Published at Blackhall Place, Dublin 7.

Comment . . .

. . . A Foolish Tax

AS the date of implementation of the Residential Property Tax grew nearer so the concentration of minds on the detailed provisions revealed extraordinary examples of misplaced logic in the legislation.

One thing must first be made clear; objection is not being taken to an additional tax on those whose annual incomes exceed £20,000. While many in this income bracket may have been hard pressed by the recession and by existing levels of taxation they are still in a group which may have to be pressed even more heavily in the short term in the pursuit of fiscal rectitude. There may even be a case for the introduction of a property tax but the mix of the concepts of income level and property value upon which the Residential Property Tax is based has been applied with a kafka-esque logic which must lead to ludicrous consequences.

The two aspects of the tax which have drawn most criticism are firstly the aggregation of all household incomes, requiring the tax payer to pay tax based on the incomes of third parties over whom he may have no control and secondly, the "market value" concept which with its presumption of ownership of an un-encumbered fee simple is so artificial as to raise serious doubts as to its constitutionality.

The tax as introduced is a nonsense. It pays lip service to the doctrine of simplicity of taxation by the introduction of a so called "self assessment" method. Yet if it is to be monitored at all it may well end up with the highest cost/yield factor of all our taxes. This at a time when the report of the Commission on Taxation has so recently recommended the simplification of our tax system.

As the "Economist" has recently said of the UK system, which we have not merely inherited, but have continued largely to follow, "taxation is an illogical mess and every tax payer knows it": Official figures in the UK show that sophisticated property taxes and capital taxes have high cost/yield factors. Our profession is only too familiar with the delays which, perhaps necessarily, are involved in the processing of capital tax cases, with consequent inconvenience or even hardship for members of the community.

There is a strong argument that taxes should not only be simple, but also efficient, meaning in part that they should not result in tax payers taking a course of action which they would not take in the absence of the tax. This applies not merely to the taxes themselves but also to concessions which are given. The "Economist" example of the half page of UK legislation providing for tax relief on life assurance being accompanied by 28 pages of anti-avoidance legislation is not a unique one, nor one unknown in this jurisdiction. Indeed some of the curious provisions of the Residential Property Tax itself are evidence of the difficulties of implementing efficiently what appears to be a simple concept.

There is unfortunately evidence that our Revenue authorities have been less than effective in collecting taxes from the Corporate sector in recent years. Their resources should not have been thinned further by the need to provide experienced officials to monitor the collection of this new tax. It should never have been introduced and should be repealed immediately. □

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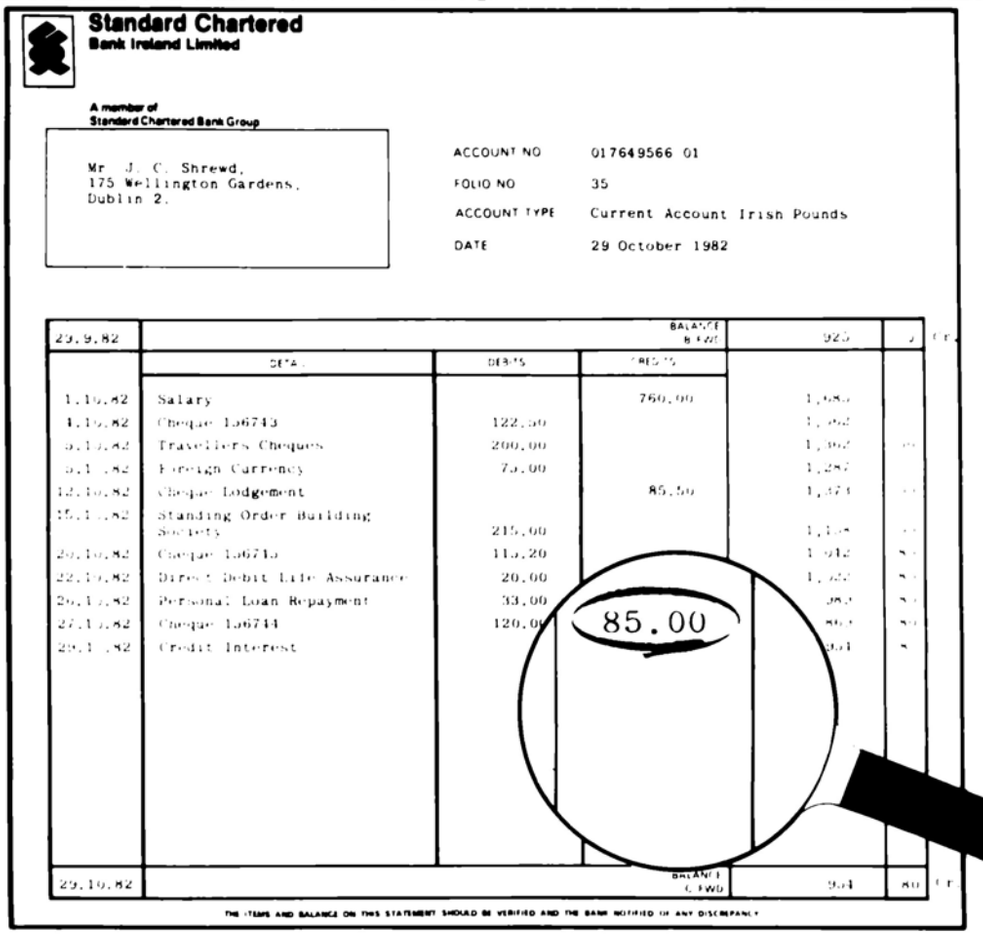

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The Right to Jury Trial in Cases of Contempt

Part 2

by

Gerard McCormack, B.C.L.

McEnroe v Leonard

While the U.S. authorities were not the subject of Irish judicial deliberation until the case of *The People (D.P.P.)* v *Walsh and Connelly* [41] in 1981, the early 1970's saw increased solicitude for the protection of procedural guarantees. This concern found expression in *In Re Haughey* [42] where the constitutional propriety of section 3 (4) of the Committee of Public Accounts of Dail Eireann (Privilege and Procedure) Act 1970 was at issue. This provided that where a witness refused to answer a question lawfully put by the Dail committee he was guilty of a statutory offence punishable in like manner as if he had been guilty of contempt of the High Court. Thus a person convicted under the section was liable to fine and imprisonment at discretion i.e. without statutory limit. Because of the severity of the possible penalty the crime committed was outside the minor offence category and was not constitutionally triable summarily. *In Re Haughey* appears to have been misinterpreted by Parke J. in *McEnroe* v *Leonard,* [43] a case in which the defendant had disobeyed a court order in civil proceedings. It was taken as supportive of the proposition that a jury trial was a constitutional prerequisite in cases of contempt, whereas in *In Re Haughey* the court was concerned with a statutory offence, the punishment for which had been assimilated to contempt. This mistaken reliance was pointed out by Finlay P. in *The State (Commins)* v *McRann* [44] who also indicated further flaws in Parke J's reasoning. The learned judge had referred to *Comet Products (U.K.) Ltd* v *Hawkex Plastics Ltd* [45] where it was held that a party charged with civil contempt could not be compelled to answer interogatories, or to give evidence against his will so as to incriminate himself but no direct question arose in that case as to the right of a person against whom civil contempt was alleged to trial by jury. The English court of Appeal merely applied the inveterate common law principle stated by Bowen L. J. in *Redfern* v *Redfern* [46] that a party cannot be compelled to discover that which if answered would tend to subject him to any punishment, penalty or forfiture. In light of the foregoing facts Finlay P. in *McRann* refused to follow *McEnroe* v *Leonard* and also because relevent earlier authorities had not received the consideration of Parke J.

The State (Commins) v McRann.

In this case Finlay P. after reviewing the earlier authorities, opined that it would be wrong to construe Article 38 of the Constitution of 1937 as depriving the courts of a long-established jurisdiction to punish in a summary manner contempt of court whether the contempt was committed in the face of the court or outside it, and whether it be classified as civil or criminal contempt. The case involved disobedience to a Circuit Court order in a civil action but the learned judge's observations are certainly susceptible of application to the criminal contempt sphere. The terms of Article 34 of the Constitution stipulating that justice shall be administered in courts established by law and by judges appointed in accordance with the Constitution constituted a qualification upon the apparently imperative provisions of Article 38. His lordship defended himself by means of an example. If the contention that an alleged contemnor was entitled to trial by jury was correct then in the event of a court's order having been disobeyed or in the event of a court suffering contempt in its face, the A.G. or now the D.P.P. would have to be relied on to present an indictment and to try the person alleged to have been guilty of such contempt before a jury. That construction, the President said seemed to construe Article 38 as depriving the courts of the right to enforce their own orders - a denial of the fundamental tripartite division of powers which underlies the entire Constitution. The President envisaged that a situation could arise in which the court was obliged to restrain directly the commission of an act by the Executive or by an agent of the Executive so as to preserve the right of an individual. Furthermore by non-activity, the Director, a servant of the Executive, could paralyse the capacity of the court to enforce its will against him. This would be a vital infringement of the independence of the judiciary.

Protestations to the contrary notwithstanding, the ultimate effect of this argument is to ride roughshod over the rights of citizens. In *McMahon* v *A.G.* [47] McLoughlin J. pertinently stated that it was no part of the function of the courts to forge from the iron of the constitution, shackles designed to prevent a happening which in the light of experience and reason can never happen. Further it was authoritatively asserted in *Byrne* v *Ireland* [48] that in the event of an award of damages being made against the State, there was no reason to believe in a State governed according to the rule of law that the necessary moneys to meet the decree would not be voted. Budd J. opined that the possibility of the State failing to honour its legal obligation was so remote that no real difficulty of the kind envisaged had been shown to exist. Thus Finlay P. is seen to have impaled himself on the horns of a dilemma that was purely of his own creation. However the reasoning in *The State (Commins)* v *McRann* was unhesitatingly accepted by the Supreme Court in *The State (H)* v *O'Daly* [49] and it was confirmed that the determination of an issue as to whether or not a person was guilty of a civil contempt of court did not require a trial by jury.

(continued on p. 212)

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Solution

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Monkstown	Packenham The Slopes, off main Blackrock/ Dun Laoghaire Rd.	Setlef Builders Ltd.	Superb 1 and 2 bedroomed apartments on timbered site in prime location.		One bed from £35,000 2 bed from £52,750	Over 25 sold. 9 now on offer. Completion from Oct '83 to March '84.	Showflat on view Sat & Sun 2.30-4 p.m.	Hooke & MacDonald 601500.
Blackrock	The Elms Mount Merrion Avenue	Mount Elm Constr. Co.	Magnificent one, two & 3 bed. apartments on mature sylvan site beside all amenities.		One bed from £43,000-£48,000 2 bed from £58,500	Over 20 sold. 2nd phase now for sale. Some ready for occupation	2 Showflats on view Sat & Sun 3-4.30 p.m.	O'Brien Driscoll 684475 & Hooke & MacDonald 601500
Blackrock	STRADBROOK HILL adj. Stradbrook Rd. Abbey Rd. Roundabout	Elmland Builders Ltd.	Very attractive one & 2 bedroom apartments. Ideal for first time buyers. Seeking £4,000 Government Grants & subsidies		One bed from £32,500-£36,900 2 bed from £45,800	Block 1 (33 units) sold out. 2nd block now for sale. Nearing completion.	Showflats on view Sat & Sun 2.30-4 p.m.	Hooke & MacDonald 601500 Tony Walsh & Co. 686750.
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Ballsbridge	41 Park Avenue off Sydney Parade Avenue	Chevas Securities Ltd.	Fine block of 12 two bedroomed apartments each of c.800 sq.ft.		From £59.000-£62.000	9 sold 3 for sale. Ready for occupation	Showflat on view Sunday 4-5 p.m.	Hooke & MacDonald 601500.
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Ranelagh	Cullenswood Northbrook Ave., off Northbrook Rd./ Leeson Park.	Holland Constr. Co.	Elegant one & two bed apartments within walking distance of Grafton St. & the many amenities of Ballsbridge.		One bed from £37,500 2 bed from £47,500.	Completion from Nov '83	4 Showflats on view Sat & Sun 2.30-4 p.m.	Hooke & MacDonald 601500 & Anderson Hall 686644
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Rathfarnham	RATHFARNHAM CASTLE adj. The Village.	Rath-farnham Castle Devs. Limited	Selection of one & two bed apartments alongside 100 acres of the Castle Golf Club. Highly original design and layout.		One bed units from £37,500. 2 beds from £45,500.	Over 35 sold. 9 units presently for sale	Showflat on view Sat. 2.30-4.30 & Sun 2.30-3.30	Nolan Estates Tel. 906151 & Hooke & MacDonald 601500
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(continued from p. 209)

The State (D.P.P.) v Walsh & Conneelly.

Here the Supreme Court approved the constitutionality of a summary trial in a particular case of criminal contempt. However Henchy J. with whom Griffin and Kenny J.J. agreed, delivering the majority judgement of the court entered the *caveat* that, as presently advised, he believed a jury trial to be the correct mode of trying factual issues in all major contempt charges in which they arise. [50] This line of reasoning would appear to be applicable also to cases of civil contempt for it was specifically stated that a judicial policy that in only some cases should such issues be determined by a jury would seem to be so arbitrary and discriminatory as not to be consistent with the equality before the law guaranteed by Art. 40 of the Constitution. O'Higgins C.J. with whom Parke J. concurred, did not doubt the existence of cases where the High Court in its discretion might prefer and the D.P.P. might be willing to have particular charges of contempt tried by a jury. [51] This might occur where issues of fact arise or where a conflict of evidence appears. However this was a matter for discernament according to the particular circumstances and jury trial was not necessitated by the Constitution.

In *The State (D.P.P.)* v *Walsh and Connelly* the alleged contemnors were leading officials in an organisation known as the Association for Legal Justice which was reported in a newspaper article to have condemned the imposition of the death penalty in a particular criminal case as this ran counter to the notion that violence begot violence. The *gravamen* of the alleged offence consisted of the following sentence:-

> "It was particularly reprehensible because it was passed by the Special Criminal Court, a Court composed of Government appointed judges with no judicial independence, which sat without a jury, and which so abused the rules of evidence as to make the court akin to a sentencing tribunal".

This outburst might be viewed as constituting the form of contempt which falls within the description of scandalising the court. Such contempt occurs where wild, unfounded allegations of corruption or malpractice are made against a court or judge to bring the administration of justice into disrepute.

The appellants contended that having been proceeded against on attachment they were persons charged with a serious criminal offence and that being so charged their right to trial by jury was guaranteed by Article 38.5 of the Constitution. They were prepared to accept that in respect of criminal contempts committed in *facie curiae* a summary jurisdiction existed and made a similar concession in relation to such constructive contempts as impede, threaten or endanger a fair trial of pending proceedings. In such instances the courts are bound to act expeditiously in the interests of justice and this requirement of urgent action was the source of a summary jurisdiction in respect of such contempts. However in the present case the trial alluded to, had already concluded and thus there could exist no requirement of urgency to warrant the exercise of a summary jurisdiction by the High Court in deprivation of their constitutional right to trial by jury.

The Chief Justice did not find this "urgency-as-the-basis-of -jurisdiction" argument attractive. He said:-

> "To my mind the power to act summarily in cases of criminal contempt, if it exists, must extend to all forms of such contempt: if it exists, whether it should be exercised in a particular case may well be a matter of judicial discretion to be decided on the facts and circumstances applicable. The question to be determined, however, is whether in the light of the general directory provisions of Article 38.5 of the Constitution, the courts have any jurisdiction to try charges of criminal contempt in the absence of a jury" [52]

O'Higgins C.J. went on to state that a particular provision of the Constitution must not be construed in isolation; to do so would be to regard the Constitution not as one fundamental law but as a series of such laws. Article 38.5 had to be viewed against the background of the general scheme of things postulated by the Constitution. The legal landscape on which the Constitution had been superimposed was also a matter for the cognisance of the courts. The possession of a power of summary punishment in relation to contempt of court was authoritatively declared in *A.G.* v *O'Kelly* to be the birthright of every court. Article 34.1 of the Constitution provided that Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and save in such special and limited cases as may be prescribed by law, shall be administered in public. It was the solemn duty of judges under the Constitution to see that justice was administered in the courts. The Chief Justice observed that the imposition of this duty carried with it, both the power, and the corresponding duty to act in protection of justice if its fair and effective administration be endangered or threatened. The judicial power of government was sufficiently ex-

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tensive to authorise the courts to take any action necessary for the due administration of justice, including the power to try summarily those accused of interfering in any manner with the administration of justice.

Article 35.2 stipulating that judges shall be independent in the exercise of their functions was also relevant to a consideration of the issues raised in the case. This declaration of judicial independence represented more than a pious platitude. It was a solemn recognition by the People in enacting the Constitution that the Judiciary as the custodians of the rights of the citizen would be free from all other organs of State in discharging judicial functions. The constitutional charter would be a mere form of words, devoid of substance and meaning, if when court proceedings were obstructed, witnesses suborned or threatened by criminal conduct, judges endeavouring to administer justice in the proceedings attacked or threatened had to seek assistance from another authority. The Chief Justice continued: [53]

> "Such conditions, if they obtained, would constitute the very antithesis of independence and would in fact amount to judicial dependence of a most demeaning kind".

This undoubtedly amounts to a powerful piece of judicial rhetoric. Indeed it smacks somewhat of the statement of Kennedy C. J. in *Lynham* v *Butler* wherein [54] he said that the judicial power of the state is deposited with us and the other constitutional courts will be the subject of our special watchfulness even to the point of jealousy. With respect, it might plausibly be contended, that in the judgment of O'Higgins C. J. judicial jealousy for the preservation of powers traditionally associated with the courts has reached the furthest limit. Certainly the judgment portrays a marked lack of confidence in the willingness of co-ordinate brances of government to enforce the judicial will. In *Buckley* v *A.G.* [55] the Supreme Court spoke of the respect which one great organ of state owes to another. This respect is very much at variance with the erection of a rule that is intended to be of universal application and which has as its supposed justification the possibility that the administrative and executive arms of the state would abdicate their constitutional duties. The Chief Justice was evidently of the opinion that a summary jurisdiction in cases of contempt was necessary to ensure the effective administration of justice. Stark necessity is an impressive and often compelling thing, but, unfortunately it has all too often been affirmed loosely and without reason, in the law, as elsewhere to justify that which is in truth unjustifiable. Experience and sagacity are shown in the following statement by a proponent of the abolition of summary trial of criminal contempt.

> "Not one of the oppressive prerogatives of which the Crown has been successively stripped in England, but was in its days, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation". [56]

The majority judgment of Henchy J. in *The State (D.P.P.)* v *Walsh and Connelly*, took a diffenent line than that of the Chief Justice in attempting to harmonise the essence of the apparently conflicting constitutional provisions in a unified scheme that preserved the substance of each of the relevant guarantees. The earlier Irish authorities were examined and analysed by the learned judge but in none of them could he find a sure or

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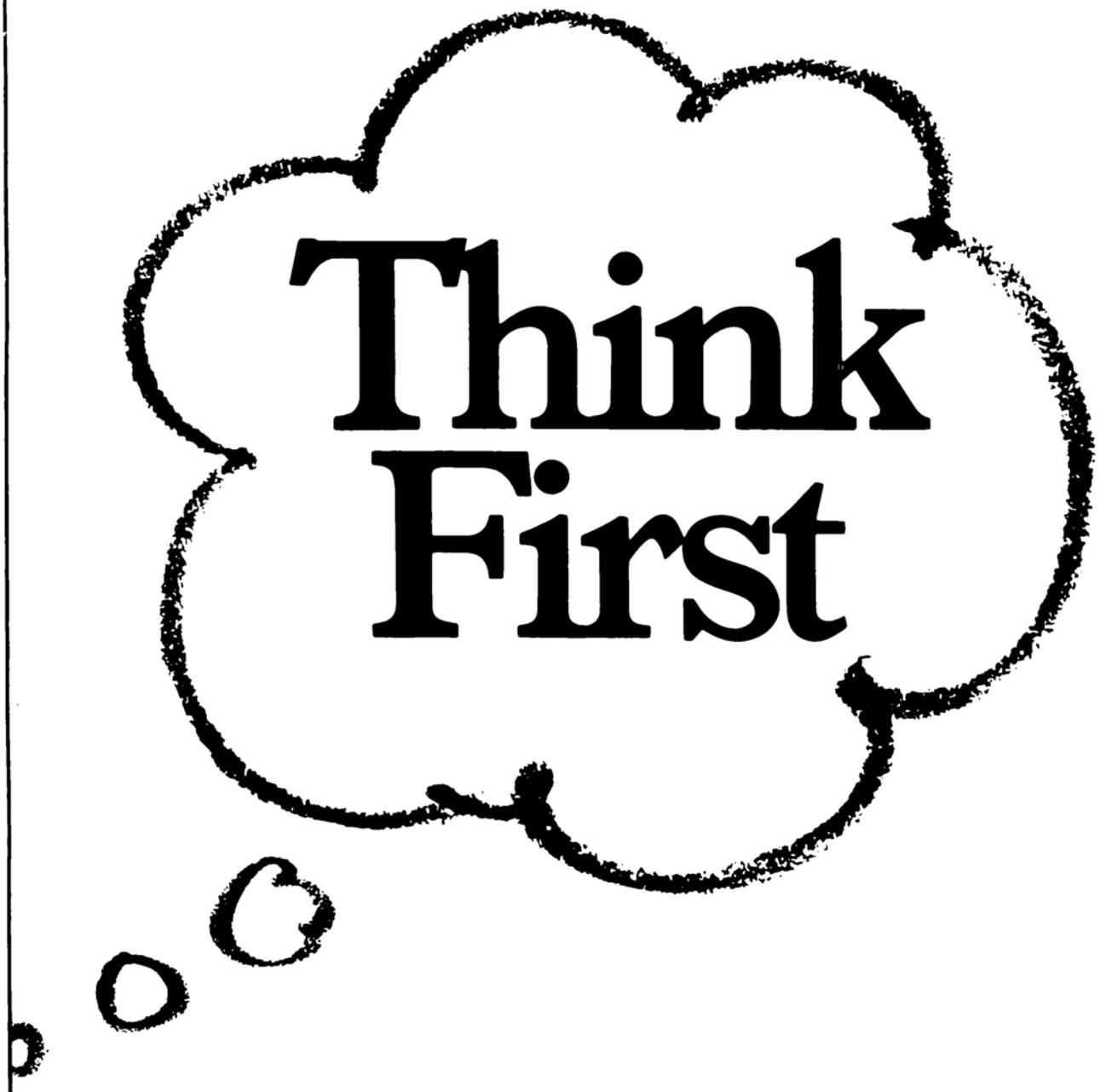

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satisfactory guide to the case before the court. The American cases on contempt were likewise regarded as not being very helpful. They did not constitute adequate authority for the appellants' contention that they were constitutionally entitled to a jury trial. Henchy J. pointed out that contempt of court is in certain respects *sui generis*. The offence of criminal contempt attracted a maximum fine of penalty which was theoretically at large. To this it might be said that the penalty which can be imposed for other common law crimes like conspiracy is also without theoretical limit and jury trial is required in these instances. No adequate answer is made to the argument that in terms of those considerations which have led to the constitutional necessity of trial by jury, criminal contempt of court does not differ in essential respects from other serious crimes. His lordship also stated that because criminal contempt was an offence that strikes at the heart of justice by substantially impeding it or prejudicing its operation, the necessity to come to grips with it expeditiously had for centuries been recognised by the summary manner in which courts of record had thought it necessary to deal with it. Other agruments were adduced to distinguish the position obtaining in the United States from that in this jurisdiction. None of them were altogether convincing or cogent. The U.S. Constitution prescribed trial by jury for all criminal prosecutions (the exclusion of "petty" offences being a judicially created exception):[57]The American criminal contempt concept included conduct which in our law would be merely civil contempt or perhaps not amount to contempt at all. It was also noted that judges in state courts, by reason of the manner of their appointment and of their terms of tenure, did not fully correspond to our judges.

Notwithstanding this rejection of American authorities, the approach ultimately adopted by Henchy J. mirrors somewhat the opinions expressed by Blackman J. (dissenting) in *Codispotti* v *Pennsylvania*[58] wherein it was said that the determination of whether basically undisputed facts constitute a direct criminal contempt is a particularly inappropriate task for the jury. Henchy J. built on this foundational framework by asserting that what is guaranteed by Art. 38.5 is trial with a jury. He went on:- [59]

> "The true and essential purpose of such a mode of trial, it may be presumed, is to ensure that, in cases of controverted facts, there will be entrusted to a body of impartial, competent and representative laymen, empanelled as a jury and duly instructed as to the relevant law by "the" presiding judge, the task of determining the facts in issue, and of deciding whether on their interpretation of the contested facts, the verdict should be one of guilty or not guilty".

The learned judge further stated that when there are live and real issues of fact (such as whether the accused committed the act alleged against him or whether it was done with his approval etc.) the accused had a *prima facie* right under Art. 38.5 to a trial with a jury, entitling him to have those issues of fact committed to a jury for their determination. There did not appear to be any other provision of the Constitution which would rebut that presumption. It would not seem to be consistent with the constitutional requirement of fundamental fairness of procedures, or with the equality before the law guaranteed by Art. 40.1 if contempt of court were the only major offence exempt from the requirement of a determination by a jury of the controverted facts.

However the ultimate responsibility for the setting and application of the standards necessary for the due administration of justice rested with the judges. They could not abdicate that responsibility by allowing juries of laymen to say whether conduct proved or admitted amounted to criminal contempt. It was said:- [60]

> "The committal to the arbitrament of laymen of the question whether the conduct complained of amounted to a criminal contempt is singularly unsuitable for a jury, because of the varying standards and values that juries would be apt to apply; because such a question (being a question of the minimum standard of behaviour necessary for the due administration of justice in the courts) calls for an answer which cannot be given in the laconic and uninformative verdict of untrained and inexperienced laymen, because the jury by their verdict may put a wrongful acquittal beyond correction; because such an incorrigible acquittal may leave a contemned judge in a state of odium and rejection in the minds of the public, to the detriment of his independence and finally, because such verdicts may have to be allowed to stand although they condone breaches of the requirement of fundamental fairness of procedure".

In the present case the appellants, who it will be remembered were responsible for a publication, [61] which alleged *inter alia* that the Special Criminal Court had so abused the rules of evidence as to make it akin to a sentencing tribunal, lacked even a *prima facie*

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right to trial by jury. This was so, Henchy J. said, because the question whether the rules of evidence had been abused was always a question of law to be determined by the presiding judge or judges before whom such a question validly arose.

This latter line of reasoning is open to attack. Criminal contempt of court by scandalising the courts is not committed merely by making erroneous statements. While it is not possible to chart with accuracy the limits of invective, it has often been emphasised that the bounds of propriety are passed only when what is said amounts to scurrilous, outrageous abuse.

> "The path of criticism is a public way; the wrong-headed are permitted to err therein; provided that members of the public are genuinely exercising a right of criticism and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".[62]

These observations of Lord Atkin in *Ambard* v *A.G. for Trinidad and Tobago*[63] were cited with approval by the Supreme Court in *In Re Hibernia.*[64] They are illustrative of the proposition that factual accuracy is not required for comment to escape condemnaton as criminal contempt by scandalising the courts. *Reg.* v *Metropolitan Police Commissioner, Ex Parte Blackburn (No. 2)*[65] may also be referred to. There "Punch's" criticism of the Court of Appeal was erroneous as to fact and rumbustious in its tone, while its fairness and good taste were open to doubt. But it was not contempt of court. In *The State (D.P.P.)* v *Walsh and Connelly* Henchy J. remarked that it would be utterly inappropriate to leave laymen with the task of deciding if the abuse at issue amounted to criminal contempt because of the varying standards and values that juries would be apt to apply. However judicial reaction is also not easily predictable. It may be said:-[66]

> "Since the judiciary does not have a common threshold of tolerance it is to be expected that judges' reactions to criticism will not be uniform and the resilience of the judicial epidermis will vary from court to court. Other areas of our law may be codified by statute or rationalised by a zealous Supreme Court or House of Lords, but in this field the subjective judgment seems destined to remain unchallenged, it is unlikely that we shall ever find a judge on the Clapham Omnibus".

Conclusion.

In the final analysis it is submitted that the court in *The State (D.P.P.)* v *Walsh and Connelly* were unduly swayed by the allegedly awful consequences which they foresaw if they decided otherwise than they did. Due respect for the courts and their mandates would be much more likely if they faithfully observed the spirit and letter of the constitutional requirement of fundamental fairness of procedure. Also in practice the Irish Courts have not always lived up to the theoretical entitlement of persons to indulge in robust but fair criticism. The contempt cases involve the Constitution being read in its historical contest. Invocation of this canon of construction is, it is submitted, indicative of a result-oriented approach towards questions of constitutional adjudication. Professor Kelly, in a perceptive comment which is borne out by a study of the decided cases had said: "the principle of interpretation which admits as a consideration...the state of law and public opinion at the time of the enactment of the constitution is peculiarly liable to subjective application".[67] The importance of procedural safeguards in securing a citizen's inestimable liberty also appears to have been ignored in the contempt context. One might echo the view of Frankfurter J. in *McNabb* v *U.S*[68] that the history of liberty has largely been the history of observance of procedural safeguards. Experience has counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The lawful instruments of the criminal law cannot be entrusted to a single functionary. Also it might be said in the words of Lord Devlin that:-[69]

> "Trial by jury is more than an instrument of justice and more than one wheel of the constitution, it is the lamp that shows that freedom lives".

The author would like to thank Mr. T. A. Cooney for his very helpful encouragement in the writing of this article. □

(Footnotes)

41. Supreme Court, unreported 6 February 1981.
42. [1971] I.R. 217.
43. High Court, unreported 9 December 1975.
44. [1977] I.R. 78.
45. [1971] 2Q.B. 67.
46. (1891) p. 139.
47. [1972] I.R. 114.
48. [1972] I.R. 241.
49. [1977] I.R. 90.
50. At page 30 of his unreported judgment Henchy J. went on to state that to the extent that such mode of trial may require the co-operation of the D.P.P. if such co-operation were not forthcoming, the inherent powers of the courts would comprehend the capacity to compel such co-operation. However earlier at pages 21 and 22 the learned judge appears to imply that civil contempt proceedings do not constitute the trial of a criminal offence and thus an alleged contemnor in such a case would not be entitled to trial by jury. He said: "While important procedural differences have always existed between trial by jury for other criminal offences and the summary trial of contempt at court, such differences do not detract from the fact that a criminal contempt is a criminal offence and that it is not be equated with a civil contempt".
51. See page 3 of the judgment of O'Higgins C. J.
52. At page 11 of his unreported judgment.
53. At page 19 of his unreported judgment.
54. [1933] I.R. 74, 97.
55. [1950] I.R. 67, 80.
56. Statement of American lawyer quoted by Black J. in *U.S.* v *Green* 356 U.S. 165, 214.
57. This exception is well-established. See *District of Columbia* v *Clawans* 300 U.S. 617 (1937).
58. (1974) 418 U.S. 506, 522.
59. At page 23 of his unreported judgment.
60. Ibid at p. 28.
61. The responsibility of the appellants for the dissemination of the offensive material was confirmed by the Supreme Court (Henchy, Griffin and Kenny J. J.) in *The State (D.P.P.)* v *Walsh and Connelly* (No. 2) Supreme Court, unreported 18 March 1981. The view was expressed that no issue of fact as to the appellants' guilt remained to be decided.
62. [1936] A.C. 322 at p. 335.
63. [1936] A.C. 322.
64. [1976] I.R. 388. It should be noted that in this case the defendants did not get any trial never mind a trial by jury. The D.P.P. applied *ex parte* to the High Court for conditional orders of attachment and sequestration. When this application was refused he appealed to the Supreme Court without notice to the prospective defendants. The Supreme Court held the orders should issue without hearing the other side. The permissibility of this practice may have to be reconsidered in the light of *Re Zwann* [1981] I.L.R.M. 333.
65. [1968] 2 Q.B. 150.
66. M. Russell "Contempt of Court" (1968) 3 Irish Jurist 1 at page 3.
67. Kelly op. cit. p. 241.
68. 318 U.S. 332, 347.
69. *Trial by Jury* (1966 ed.) p. 164.

Practice Notes

Valuations of Immovable Properties

The Society has been in discussion with the Revenue Commissioners concerning delays in agreeing valuations. The Chairman of the Revenue Commissioners has been asked to ensure that cases are not sent to the Valuation Office as a matter of course, but only when there is doubt as to the veracity of the valuation. The Chairman of the Revenue Commissioners has suggested that it might be of advantage and help to expedite matters if, when submitting cases involving valuations of properties, a realistic valuation was submitted in the first instance, with a view either to acceptance or immediate negotiation, and thereby avoid the Revenue having to submit the valuation to the Valuation Office. It would be helpful in submitting the valuation for the property under review, if the auctioneer/valuer were asked to furnish values for comparable local properties for forwarding to the Revenue. Such an approach would bring about speedier settlements.

The Chairman of the Revenue Commissioners encourages solicitors to make every attempt to agree valuations by negotiation at as early a stage as possible.

It has already been suggested in previous notifications that if the members of local Bar Associations get together, a number of cases could be taken together, and a representative from the Valuation Office would attend at an agreed office in the area with a view to negotiation of all such cases.

The Chairman of the Revenue Commissioners is conscious of the Society's representations to expedite all matters requiring adjudication and Valuation Office agreement and is taking steps to improve on the existing situation within the staff constraints imposed on him. □

Stamp Duty on Assents

An Assent must be in writing (Section 52, subsection 5 of the Succession Act 1965). It is not necessary that the Assent be sealed. Accordingly, there is no need for the Personal Representative to sign and seal an Assent. It is sufficient that he signs the Assent. If the Assent is under Seal then Stamp Duty of £5 is payable. If it is not under Seal there is no need to stamp the Assent at all. (S.52 (8) Succession Act 1965).

Where the title is registered in the Land Registry the Assent must be lodged in the Registry for registration. If the title is unregistered it is recommended that the Assent should be registered in the Registry of Deeds. □

An Unmarried Company?

Recent correspondence to the Conveyancing Committee has shown that there is reluctance to answer any question on the Family Home Protection Act where the Vendor is a company. This is presumably based on the view that, since a company cannot have a spouse, no requisition under the Family Home Protection Act is therefore appropriate.

However, the recent case of *Walpoles (Ireland) Limited -v- Jay* and *obiter dicta* in other cases have highlighted the fact that in certain cases it is necessary to make enquiries where it is believed a person, other than the Vendor or his predecessors in title, has been in occupation of any part of the property as a "family home". In *Walpoles (Ireland) Limited* -v- *Jay*, the Vendor was a company but the Purchaser was on notice that the residence situate on the property had been occupied by a Director of the Vendor company for a number of years. It was held that while there was nothing which could make void the conveyance of the property by the Vendor Company nevertheless the Purchaser was entitled to make enquiries as to the nature of the interest (if any) held by the Director in the property and as to the termination of that interest.

The problem arises from the wide definition of both "interest" and "conveyance" in the Act. "Interest" means "any estate right title or other interest legal or equitable". "Conveyance" includes "a mortgage, lease, assent, transfer, disclaimer, release and any other disposition of property . . .".

It is therefore the view of the Conveyancing Committee that where a Purchaser is aware that any person, other than the Vendor or his predecessors in title has been or is in occupation of the property as a "family home", then additional requisitions should be raised. This could arise in circumstances similar to that in *Walpoles (Ireland) Limited* -v- *Jay* where a Director or other employee of a Vendor company is in occupation, where another married member of the Vendor's family is in occupation or where the property has been occupied by tenants.

In the light of the foregoing the standard form of requisitions under the Family Home Protection Act have been revised and are circulated with this issue of the *Gazette.*

When considering the reply to be given to the standard requisition 51 (a), the attention of practitioners is drawn to the definition of "family home" in Section 2 of the Act. It "means, primarily, a dwelling in which a married couple ordinarily reside". The requisition is not confined to whether the property is the *Vendor's* "family home".

Note:

These Requisitions require a civil marriage certificate (i.e. a Certified copy of Entry in the Marriage Register Book) to be exhibited in the statutory declaration. Such a certificate is clearly the best supporting evidence of the marriage which can be produced and should be furnished. This does not mean that a Purchaser or Lender should not be prepared to accept the next best supporting evidence such as a Church Marriage Certificate in circumstances where there are valid reasons why a Civil Marriage Certificate is not available on closing. □

Building Contracts –

Properties on Housing Estates

While many of the solicitors acting for the leading building firms are known to be using the agreed Law Society/Construction Industry Federation Contract there are still a small number who are using other forms. The Conveyancing Committee while recognising the right of individual solicitors, or their clients, to use their own contracts points out that the working party which drafted the standard contract when examining a number of the contracts then in use on building estates found that many of them had serious defects. A most common one was that in the event of a dispute the decision of the builder's architect would be final. Provisions of this sort have been deemed unenforceable by the Courts. Accordingly the Committee would urge members acting for the developments of building estates to give serious consideration to using the standard Law Society/Construction Industry Federation form. □

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ACCESS TO CLIENTS FILES

The Compensation Fund Committee of the Society has recently made a ruling on the question of the auditors' access to clients files.

It will not be satisfactory, in future, to deprive an auditor from the examination of clients files purely on the grounds of privilege. The auditor has specific duties under the Solicitors' Accounts Regulations and it is the Society's view that these duties can only be carried out by vouching the transactions in the books of account with the supporting files. It should not be necessary, however, to disclose the entire file to the auditor but the correspondence covering payments/receipts should be made available to the auditor.

A policy decision has been made by the Society to investigate any solicitor's practice who refuses that auditor access to clients files. Where the Society appoints an accountant pursuant to Section 20 of the Solicitors' Accounts Regulations 1967 as amended, the said accountant has the statutory right to inspect all of the relevant files, vouchers, etc.

Legal Offices Mixed Football

The Legal Offices Mixed Football Competition Final took place on Thursday, September 1st, between the holders, Four Courts XI and Dynamo O'Connor at the Law Society, Blackhall Place.

The two finalists were evenly matched and it was not until well into the final quarter that Four Courts asserted their superiority with a well taken goal followed by another in the closing minutes of play, to win 2-0.

Teams in the competition, consist of six male and five female players. The competition rules state that only women players can score directly with men scoring only with their leads or through deflections off opposing players.

This year's competition, sponsored by the Irish Civil Service Building Society, attracted 18 teams which included individual law offices combining under one banner.

The President of The Law Society, Mr. Michael Houlihan, presented the perpetual trophy to the winning Captain, Joe Russell and thanked the Irish Civil Service Building Society for its sponsorship which was greatly appreciated by all the participants and members of the Law Society. □

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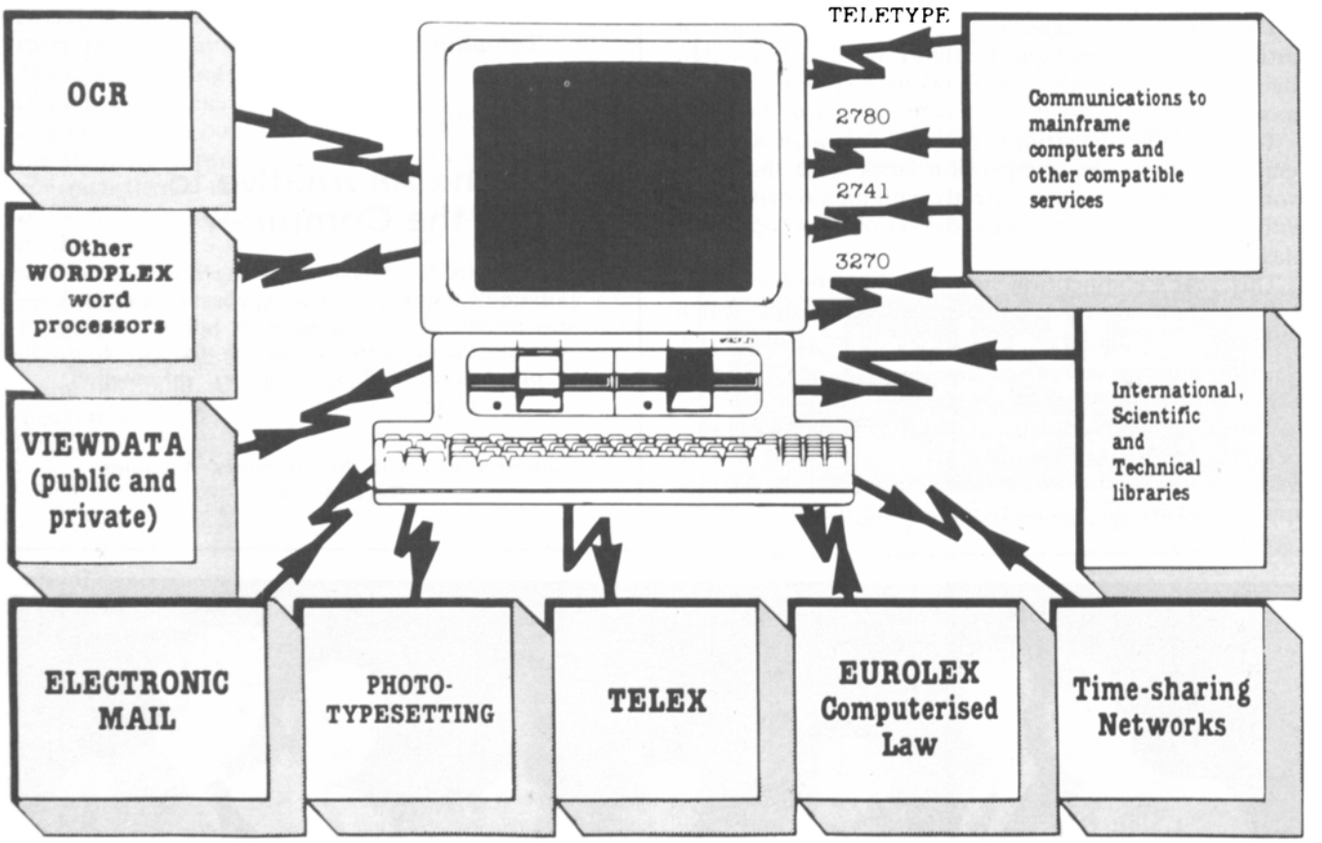

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Masters and Apprentices

Members who are contemplating taking apprentices are reminded that copies of the Society's publication "How to Become a Solicitor" (1983 Edition) together with the standard forms of Apprenticeship Deed and Application Forms are available from the Society's Education Department.

Only solicitors who are principals or partners may take apprentices. A solicitor who has been in practice for less than 7 years requires the consent of the Society to take an apprentice; such consent is also required by a solicitor who wishes to take a second apprentice. No solicitor may have more than 2 apprentices. The current practice of the Society's Education Committee is to grant consent to the taking of apprentices to solicitors who have been less than 7 years in practice and also to grant consent to practitioners taking second apprentices where the first apprentice has already served the full year of apprenticeship.

Applications for leave to take a second apprentice, or by those who are less than 7 years in practice, should be made at the earliest possible opportunity before the apprenticehsip deed has been executed.

Another part of the monitoring process is the review meeting, which is held for apprentices approximately half way through their 18 month in-office training.

Practitioners who already have apprentices are reminded that visits are paid to the offices by members of the staff of the Society's Education Department. The purpose of these visits is to monitor the progress of the apprenticeship, to obtain the views of both master and apprentice on the efficacy of the Society's professional Course at a time when the apprentice who has been trained in that course is in the field, to identify what areas the master and the apprentice believe could usefully be covered in the Society's Advanced Course and generally to give advice which will help master and apprentice to maximise the benefit of their association. Unhappily, time will not allow a visit to every office.

Masters and those proposing to become masters are reminded of the Society's recommendation that a wage of not less than £60.00 be paid to apprentices who have completed their Professional Course and who are working full-time in the office of their master during the eighteen month training period which elapses between the end of their Profesisonal Course and the beginning of the Advanced Course.

Apprentices who have completed their Advance Course and have passed the Final Examination — Third Part but whose Indentures have not expired have — in the Committee's view — completed their formal training and should be able to take on the range of duties normally discharged by a qualified solicitor apart from appearing in Court. Their salaries should reflect the new status as circumstances permit. These apprentices should be advised whether or not they will be offered a position in their master's firm when they qualify. If such a position is not available, the Committee recommends that masters should place no impediment in the way of the apprentices' seeking other employment. □

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The Rights of Children and the Discretion of the Courts under Section 117 of the Succession Act, 1965

by
Anne E. Bacon, Solicitor.

(John B. Jermyn prize-winning essay, 1983)

THE Succession Act of 1965 was finally passed in December of that year during Brian Lenihan's term of office as Minister for Justice. A previous Succession Bill had been swept aside with a dissolution of the Oireachtas, but contributions to the drafting of the new Bill had come from all sides, with that of Mr. John A. Costello, in particular, being acknowledged by the Minister. The Bill was entitled "An Act to reform the law relating to succession to the property of deceased persons in particular the devolution, administration, testamentary disposition and distribution on intestacy of such property and related matters." Until this enactment the Acts governing this area of law were to be found scattered through the Statute Books dating back as far as 1285 to the Administration of Estates Act; a comprehensive overhaul was long overdue.

As the laws of succession affect fundamental property rights quite a number of areas affected by the new act were controversial. The main areas of contention were in Parts IX and X entitled "Legal Right of Testator's Spouse and Provision for Children" and "Unworthiness to Succeed and Disinheritance" respectively. They introduced novel concepts into the Irish law of succession which severely curtailed testamentary freedom. The Minister pointed out during the debates on the second stage of the Bill (Dail Debates Vol. 215 25/5/65) that the right to disinherit a spouse and children was not a fundamental right inherent in property. "In a country such as ours which recognises the very special position of the family "as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law", so-called freedom of testation is a paradox which cannot be defended on any ground". It was thought that the enactment of legislation which only went as far as providing for maintenance of a spouse and not a legal right to a specific share irrespective of need or dependency would fail to discharge the obligations imposed on the state under Article 41 of the Constitution.

The intention of Part IX of the Act in giving a legal right to a testator's spouse was to place the spouse beyond the control from the grave by a capricious testator. Under Section III of the Act a spouse has a legal right to one-half of the testator's estate where there are no children and a right to one-third of the estate where there are children. The spouse does not have to have recourse to the Courts to establish his or her rights to a share in the testator's estate. The Act imposes a duty on the Personal Representative to notify the spouse in writing of the right of election between the legal right and the rights under the Will (Section 115). The right must be exercised within a year from the first taking out of representation of the deceased's estate or six months from the receipt by the spouse of notification of the right of election, whichever is the later. Likewise where a person dies intestate the surviving spouse becomes entitled to a fixed portion of the estate.

By contrast with this type of provision for spouses, the rights of children of testators to a share in the estate is dependant on judicial discretion. It should be noted that the system of entitlement to a fixed portion applies to children only when there is an intestacy.

Section 117

The provisions of Section 117 are as follows:

" 117. (1) Where, on application by or on behalf of a child of a testator, the Court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.

(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other children.

(3) An order under this section shall not affect the legal right of a surviving spouse or, if the surviving spouse is the mother or father of the child, any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy.

(4) Rules of court shall provide for the conduct of proceedings under this section in a summary manner.

(5) The costs in the proceedings shall be at the discretion of the court.

(6) An order under this section shall not be

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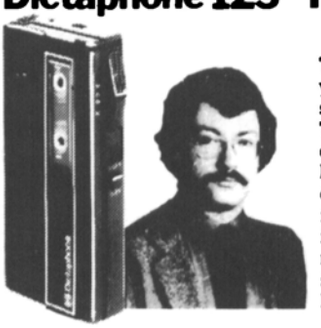

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made except on an application made within twelve months from the first taking out of representation of the deceased's estate."

The first provision to note is the time limit contained in sub-section (6). The application by or on behalf of the child of the testator must be made within twelve months from the first taking out of representation. However, the personal representative is under no obligation to notify any child of his right to apply to the Court. In fact there would be a conflict of interest as pointed out by William J. Maguire in his commentary on the Succession Act (Page 107 para. 5) "an executor's first duty is to administer the estate in accordance with the directions contained in his testator's will, and he would be imprudent (particularly if he was a professional executor), to do anything by way of notifying the child or otherwise which would encourage, or instigate proceedings under Section 117." It seems very short-sighted not to have provided at least for the notification by a personal representative in the case of infant children with a stipulation that the children be separately advised, as the personal representative is very often the parent or step-parent of the children. Carroll J. dealt in some detail with this aspect of Section 117 applications in the case of *In the Matter of the Estate of E.J.D. Deceased* (1979 No. 596Sp, Judgment delivered 19/2/1981). In this case the application under Section 117 was made more than one year after the Grant of Probate issued. The wording of sub-section (6) specifically limits the power of the Court "an Order under this Section *shall not be made except* on an application made within 12 months . . . .". This is unusual in that the Court cannot judge an application on its merits even where the defence of effluxion of time has not been raised.

Section 127

The Succession Act contains a provision in Section 127 for the extension of limitation period in the case of disability. Carroll J. considered whether this section applied to applications under Section 117 so that in case of disability (e.g. infancy) the period of limitation fixed by Section 117 could be extended to three years after the disability ends. She gave some examples of situations showing that there are compelling reasons why a time limit of 12 months should be mitigated. But "equally there are reasons why the administration of estates should not be delayed beyond a reasonable time". This was adverted to by the Supreme Court in *Moynihan -v- Greensmith* [1977] IR 55, 72. Applying the Section 127 limitation period to Section 117 would have the effect of leaving the estate of a deceased testator open to claims on behalf of his children until three years after they had attained their majority. Section 127 applies Section 49 of the Statute of Limitations 1957 (extending periods of limitation for persons under disability) to actions "in respect of a claim to the estate of a deceased person or to any share in such estate, whether under a will, on intestacy or as a legal right" but Carroll J. points out that an application under Section 117 is not a claim "under a will" nor a claim "on intestacy". Nor can it be regarded as a claim as "a legal right" because that phrase has a special meaning as defined in Section 3 of the Succession Act as "the right of a spouse under Section III to a share in the estate of a deceased person". Therefore no application brought under this Section more than 12 months after the taking out of a Grant of Representation can succeed.

Any child who has been guilty of the murder, attempted murder or manslaughter of a testator shall not be entitled to make an application under Section 117 (Section 120 sub-section 1). A person who has been found guilty of an offence against the deceased or his spouse or any other children, punishable by imprisonment for a maximum period of at least two years or by a more severe penalty is precluded from making an application under Section 117.

An application under Section 117 cannot be brought in the case of a person dying intestate since the distribution of his estate is governed by Part VI "Distribution on Intestacy", Section 67. However a testator's will may be rendered inoperative, for example by reason of the prior death of the universal legatee and if there is no surviving spouse the estate devolves as on intestacy. This situation arose in a case before Carroll J., *R.G. -v- P.S.G. and J.R.G.* (Judgment delivered 20/11/1980). It was held that as the deceased died testate, although his will was inoperative and his estate fell for distribution as on intestacy, a Section 117 application could be made. Testacy did not depend on the effectiveness of, but upon the execution of, the will and the testator remains testate until and unless he revokes it in accordance with Section 85.

The Courts approach to these applications was briefly stated by Costello J. in *L. -v- L.* [1978] IR 288. He stated that there are basically two issues which may require to be determined in Section 117 applications. The first is the question "Has there been a failure by the testator in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise?" The second issue, which arises when the first question is answered in the affirmative, is "what provision should the Court make?" The Courts have held that an objective test must be applied to ascertain whether the testator failed in his moral duty. In the case of *R.E. -v-*

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A.J., I.E. and R.D. (Unreported Judgment 11/1/1980) Barrington J. was asked to consider whether a testatrix had failed in her moral duty to the applicant, one of her eleven children, to make proper provision by will or otherwise. Her nett estate amounted to £2,093.00 and was left equally between two children. He applied objective standards in the light of the situation at the time of the testatrix's death. Since the Plaintiff had already been provided for during the testatrix's lifetime the Court was not prepared to hold that she had failed in her moral duty by neglecting to make further provision for him in her will.

The application of the objective test did not always produce what one might consider desirable results. Keane J. in the case of *In the Matter of the Estate of J.R.* (Judgment delivered 13/11/79), followed the dicta of Kelly J. in the cases *F.M. -v- T.A.M. & Ors.* [106] ILTR 82 and *In Re N.S.M.* [107] ILTR 1, and in applying objective considerations he held that the testator had failed in his moral duty to provide for the plaintiff. The testator owned a small farm which could only support one couple. The Plaintiff, the testator's only son, was 43 years of age, a motor mechanic, married with four children and living in a Local Authority house and in no way dependent upon his father's farm. The Defendant in the application was the Testator's spouse and was Step-mother to the Plaintiff. The Testator in his will had left all his property to his wife subject to a right of residence for his brother.

Step-parent's rights

It should be noted that the Step-parent of an Applicant under Section 117 is less secure in his succession rights than a natural parent. Under sub-section 3 of Section 117 no order given under that section can affect the legal right or any devise or bequest made to an Applicant's natural parent. However only the legal right share of a Step-parent is immune from an Order under the section and any devise or bequest in excess of that share may be appropriated by the court to satisfy a claim under Section 117. In this case, if the spouse had been the Plaintiff's mother the Plaintiff could not have brought any application under Section 117 no matter how little provision the testator had made during his lifetime for the Plaintiff because under sub-section 3 an Order made under Section 117 may not affect any devise or bequest to the spouse or any share to which the spouse is entitled on intestacy. But as the spouse was the stepmother of the Plaintiff his potential maximum entitlement under Section 117 was two-thirds of the estate. Keane J. ordered that the Plaintiff receive two-fifths of the estate and noted that unfortunately implementing the Order meant selling the farm but stated that it could not be avoided once the conclusion was reached that the testator failed in his moral duty to provide for the Plaintiff.

It would seem that Keane J.'s objective test of the testator's moral duty had a rather narrow basis and does not take into account his duties to persons other than the applicant. As Kenny J. states in *G.E.M.* [1972] 106 ILTR 82 *Deceased* "the relationship of parent and child does not of itself and without regard to other circumstances create a moral duty to leave anything by will to the child". Keane J.'s approach may be contrasted with the approach of Costello J. in the case of *L. -v- L.* "a just parent in considering what provision he should make for each of his children during his lifetime and by his will, must take into

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account not just his moral obligations to his children and his wife but all his moral obligations". Obligations which could not be enforced under the Succession Act would nonetheless have to be taken into account e.g. a duty towards aged parents. Likewise if the testator had an illegitimate child the Court should have regard in Section 117 applications by his legitimate child to the fact that the Testator has a moral duty to his illegitimate child. The decision does not in any way improve the legal status of the illegitimate child in relation to the Law of Succession but it may be the thin end of the wedge. At the moment it would seem that the only instance in which it would be relevant to consider the duty of a Testator to an illegitimate child would be where the illegitimate child is a beneficiary under the Testator's will and an Order under Section 117 would affect his interests.

The decision in *L. -v- L.* is important in view of the increasing number of cases of second marriages which may or may not be valid. Costello J. stated that the nature and extent of the testator's moral duty to the children of his second marriage could not be affected by a decision of the Court at a given point in time, that the second marriage should not be recognised. Even if the Court could not properly recognise the second marriage it must accept as a fact that moral duties were created by the parties to it (he refers to the Judgment of Kenny J. *In Re M.* [1971] 107 ILTR. However, the facts in *L. -v- L.* did not make it necessary for Costello J. to decide on the validity of the second marriage nor on the extent of the rights of the children of the second marriage. It is inevitable that other such cases will arise but despite Costello J.'s broad view it is difficult to see how, under the Succession Act as it stands, an illegitimate child can acquire rights over the estate of a testator other than as a beneficiary under his will.

The test of the existence of a moral duty to make proper provision by will for a child was laid down by Kenny J. in the case of *In Re N.S.M. Deceased* and has been applied in many subsequent cases: "It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death and must depend upon (a) the amount left to the surviving spouse or the value of the legal right, if the survivor elects to take this; (b) the number of the testator's children, their ages and position in life at the time of the testator's death; (c) the means of the testator; (d) the age of the child whose case is being considered and his/her financial position and prospects in life; and (e) whether the testator has already in his lifetime made proper provisions for the child. The existence of the duty must be decided by objective considerations." In this case the provision the testator had made for one of his children in particular failed because of the large amount of Estate Duty and legal costs payable out of the estate. In deciding whether or not the testator had made proper provision for the child Kenny J. felt that Section 117 must be interpreted so as to attribute to the testator a remarkable capacity to anticipate the costs of the litigation following his death and the extent of Estate Duty payable out of his estate.

Testator's Moral Duty

The following cases illustrate circumstances which have been found relevant by the Court in considering the

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testator's moral duty. In *McGarry -v- Byrne* Costello J. thought that heavy family responsibilities of two of the testatrix's children placed a moral obligation on her to help them discharge these responsibilities. In respect of a third child the Court took into account contributions made to the upkeep of the testatrix and the family home and to the fact that if the home was to be sold under the terms of her will he would have nowhere to reside. Circumstances such as the illness of one of a testator's children or an exceptional talent which should be developed are relevant. In the case of *H.L. -v- Governor and Company of the Bank of Ireland* (Judgment delivered 27/7/78) Costello J. found the testator had failed in his duty towards the surviving four children of his marriage. They had received no proper education and each had been forced to leave home in their mid-teens unfit for any trade or profession and unprovided for. He had refused to have his eldest son treated for paranoid schizophrenia or to have a daughter treated for a fall from a horse when she was fifteen with the result that at the time of the proceedings she was confined to a wheelchair. It was noted that each of the children had attempted to be reconciled with their father. The testator had a gross estate of £476,000. Having found that there was failure in the moral duty the Court had to approach the issue of making provision for the children from the point of view of a just and prudent parent giving special consideration to the two children needing medical treatment in order to make a just provision for them. In the case of the child needing psychiatric care it was thought that a just and prudent parent would establish a Discretionary Trust with the schizophrenic son as the main beneficiary but having the other children also as beneficiaries enabling trustees to apply any income, surplus to the requirements of the main beneficiary, to the needs of the others. The remaining children were paid capital sums out of the estate, in addition to their legacies under the will.

The case law under Section 117 is indicative of a more or less liberal approach by the Courts to its interpretation. The Section has not been construed narrowly to confine its application to dependant children or children who have received inadequate provision in accordance with the Testator's means. Gradually a pattern is emerging from the cases and it may be noticed that few of the applications to the court have failed to secure better provision for the applicant out of the estate. In most cases every effort was made by the court to avoid disturbing the provisions of the Will of the Testator in satisfying an applicant's claim by having recourse to the residuary estate where possible. It has been borne in mind by the Court that when the Act was debated by the members of the Oireachtas there were strong arguments made that the section should be confined either to infant children of the Testator or to dependant children of a Testator. These limitations were not accepted by the majority of the Members and even when a subsequent attempt was made in the Senate to limit the scope of the section with the introduction of a Succession Bill in 1970 it was rejected.

This is a newly developing area of Succession Law with the earliest major cases no more than a dozen years old. In

John B. Jermyn, Solicitor, presenting Ms. Anne Bacon with the winning prize in the John B. Jermyn Essay Competition 1983.

that short space of time a relatively large number of the Judges of the High Court have had to consider the application of Section 117, usually the younger and most recently appointed members of the Bench. The variety of Judges has produced a certain lack of consistency in the extent of the Court's interpretation of the section with the apparently liberal approach of earlier judgments being curtailed in subsequent cases. Nonetheless the importance of Section 117 has not diminished and much more use will be made of it in the future as awareness grows of its applications and as the reality of family relationships deviates increasingly from the legal norms.

There has been no Supreme Court decision to date on Section 117. It is inevitable that there will be one in the next couple of years and that it will set the parameters to the interpretation of the Section. As it stands the Section has only limited use in providing justly for a Testator's children, but this can only be cured by the Legislators. Law Reformers seeking to reform the area of Divorce and Illegitimacy and the succession rights of illegitimate children could achieve much by having Section 117 amended. □

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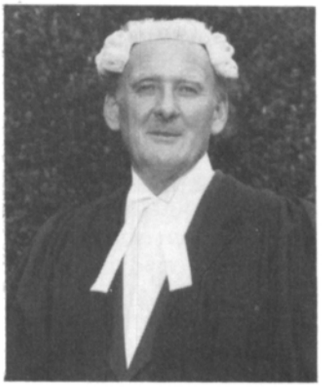

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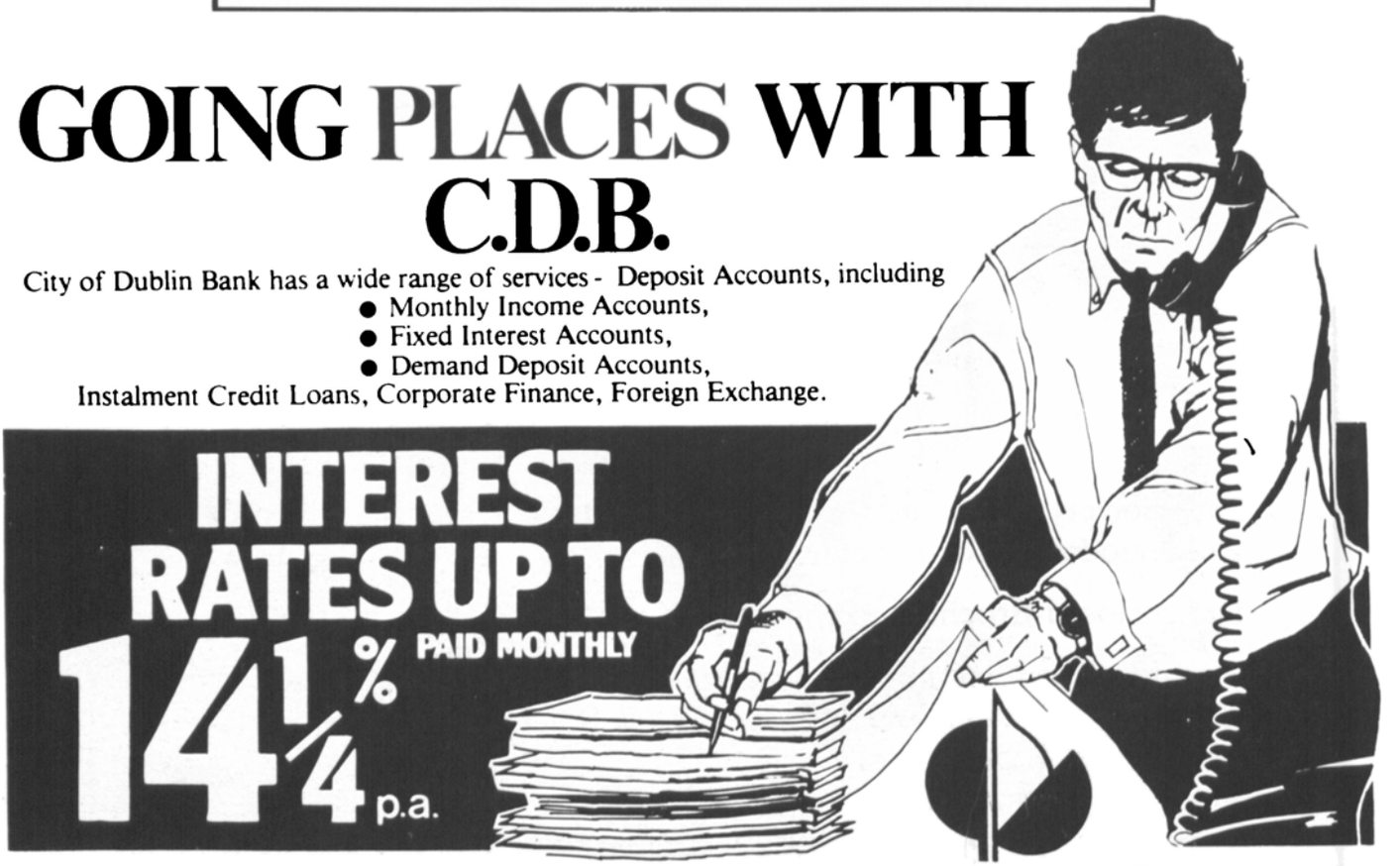

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Society Staff

Retirements

Two long-serving members of the Law Society's staff—Basil Doyle and Anne Kane — retired in recent months.

Basil Doyle took up duty with the Society in 1974 and in the following years was concerned with the problems of complaints of alleged delays and over-charging. By his careful handling of the ever-increasing correspondence and patient telephone conversations with frustrated clients, he managed to solve many problems. His painstaking work first achieved recognition from the media when the 'Ask the Experts' column in the *Evening Press* began to refer inquiries to the Society. By his efforts over almost a decade, Basil Doyle enabled the Society and its administration to organise its relations with the media and members of the public complaining of any inadequacy of service.

Before joining the Society, Basil Doyle had a distinguished career in the Office of Public Works, culminating in his appointment as Finance Solicitor. On his retirement, the then Attorney General, Colm Condon, paid tribute to his work in the Public Service.

At the Law Society's Council meeting in June, Basil attended to receive the recognition of the President and members. He was introduced by Peter Prentice and the formal presentation to him was made by the President of the Society, Michael Houlihan. In making the presentation, he paid tribute to Basil Doyle's service to the Society at a critical period and wished him well in his retirement. He then presented Basil with a Waterford Glass ship's decanter, as a token of the Council's appreciation of his services.

After the Council meeting in September the President, on behalf of the Council members, made a presentation to Anne Kane, to mark her retirement from the Society. He remarked that Anne's name would always be associated with the development of the social activities in Blackhall Place and that she would be particularly missed by the members, both of the Council and of the Society generally, to whom she was always of the greatest possible assistance.

Miss Kane joined the Society in 1971 and was involved in a variety of activities. Initially, she was concerned with the establishment and development of the Society's Company Formation Service, now much appreciated by members. At a later stage, she served as personal secretary to the Director General. It was on the transfer of the Society's Headquarters to Blackhall Place, coupled with her appointment as Premises Manager, that Anne Kane found her ultimate fulfilment. In co-operation with Peter Prentice, Moya Quinlan and the wives of succeeding Presidents, she played a large part in the furnishing of the premises. Her sense of values and appreciation of quality was invaluable. No one who visited Blackhall Place can fail to have been impressed by the beautiful flower arrangements which Anne prepared and maintained in all the public areas. On the social side, Anne took a strong personal interest in all the activities and many will remember how she was there to receive them on their wedding day. She will be greatly missed. □

Mrs. Joan Houlihan (left), wife of the President, presenting a bouquet to Ms. Anne Kane on the occasion of her retirement, with Mr. Michael P. Houlihan, President of the Society (2nd left) and Mr. James J. Ivers, Director General.

For Your Diary . . .

12 November, 1983. Incorporated Law Society of Ireland Symposium. **Alcoholism and Drug Addiction.** Blackhall Place, Dublin 7.

17 November, 1983. Chartered Institute of Arbitrators. Luncheon Meeting. Incorporated Law Society of Ireland, Blackhall Place, Dublin 7. 12.30 p.m. for 1.00 p.m. Speaker: Mr. Richard Soper, M.Eng., C.Eng., M.I.C.E., S.I. Struct., S.I. Struct. E., S.I. MUNE., S.R.T.P.I., M.I.H.E., S.C.I. Arb., Past President, who will speak on his worldwide experience of Arbitration. Fee : £14.50.
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18 November, 1983 Irish Society for Labour Law. A public lecture will be delivered by Professor B. A. Hepple of the Faculty of Laws, University College, London, at 8.15 p.m. in the Ussher Theatre (Room 2037), Arts Building, Trinity College, Dublin. Membership of the Society is open to all those with a professional interest in the study or practice of Labour Law. Membership forms will be available at the lecture, or can be obtained by writing to The Secretary, Irish Society for Labour Law, School of Business and Administrative Studies, Trinity College, Dublin 2.

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Correspondence

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

5th September, 1983

Dear Sir,

We should like to provide your members with some information about our Society.

The Protestant Adoption Society was founded in 1952, when legal adoption was first introduced in the Republic of Ireland. Since that time we have endeavoured to provide a comprehensive adoption service and have remained the only Society placing children for adoption with Protestant couples in the twenty-six counties. As a result of the development of a more open approach to adoption, a large proportion of our work now also involves counselling past adopters, adoptees and natural mothers who are either seeking background information or require help to deal with the various problems associated with adoption.

In 1978 we decided to extend the scope of our work and set up a Single Parent Counselling Service, as it was recognised that there was a need for a specialised service within the Protestant community for the unmarried mother. Over the last four years the demand for this service has continued to grow. While offering support to natural mothers placing their children for adoption, much of the work is now with mothers who are planning to keep their babies.

If any of your members have lists of charities drawn up to which they might refer should a client discuss with them to whom they might make bequests in their Wills, or if a client may have left money to unspecified charities of the Solicitor's choice, we should be most grateful if our name could be added to these lists.

Yours sincerely,
(Mrs.) Hazel McDowell,
Adoption Officer,
Protestant Adoption Society and
Single Parent Counselling Service,
71 Brighton Road,
Rathgar,
Dublin 6.

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

18 Lunasa, 1983

Cash Bail in Custody Cases
Law Society — Litigation Committee

A Chara,

I am directed by the Minister for Justice to refer to previous correspondence concerning the above matter and to say that arrangements have been made whereby cash in the sum of £500 or over, lodged in District Courts in connection with bails may be placed on interest-earning deposit where persons lodging the money so request.

Mise, le meas,
Lena Keegan,
Department of Justice,
72-76 St. Stephen's Green,
Dublin 2.

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

23rd August, 1983

Dear Sir,

re: Use of Blackhall Place

Arising out of the constraints the Premises Committee feel obliged to exercise regarding members' use of the Society's premises for legal meetings, our Council considered the matter at its Long Vacation meeting.

It is appreciated that there has been certain abuse in the use of the premises, not always by Society members, and that it is sought to eliminate such. Members of our Council have in fact directed attention to such abuse on several occasions.

Knowing the many demands on the generous services of the Society's Council, our Council has prevailed on our Chairman, Mr. T. C. G. O'Mahony, to volunteer his services to the Premises Committee, which he has done.

In the meantime our Council would welcome constructive suggestions from members of the Society as to the use of the premises which would benefit the Society, its Members, the Profession and the common good of the Community.

Yours truly,
Anna O'Sullivan,
Joint Hon. Secretary,
Legal Consultative Council,
C.C. Centre,
22 Merrion Square,
Dublin 2.

James J. Ivers,
Director General,
Law Society
Blackhall Place,
Dublin 7.

19th August, 1983

Dear Mr. Ivers,

I would be grateful if you would give publicity in your Gazette or otherwise to the fact that the Estate Duty division of Capital Taxes Branch (assessments of Estate Duty on Inland Revenue Affidavits and Accounts, also applications for Certificates of Discharge from Estate Duty) is no longer situate within the precincts of Dublin Castle. It has moved to Osmond House (third floor), Ship Street, which is beside the Castle. The telephone number is 01-711777 (extensions 510 or 538). The collection side of Estate Duty (i.e. from assessment to payment) is still situate in the Castle under the general collection division of Capital Taxes.

Correspondence in all Estate Duty matters should continue to be addressed to Dublin Castle. It might be useful to note that the Estate Duty files are, in general, still filed in the Castle area. If a personal call is envisaged in an Estate Duty matter, a prior 'phone call is suggested. This is with a view to avoiding inconvenience and reducing delay for solicitors.

Yours sincerely,
Liam Walsh,
Office of the Revenue Commissioners,
Capital Taxes Branch,
Dublin Castle,
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 is stated to have been lost or inadvertently destroyed. A new Certificate will be issued unless notification is received in the Registry within twenty-eight days from the date of publication of this notice that the original Certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the Certificate is being held.

Dated 25th day of October, 1983.

B. Fitzgerald (Registrar of Titles)

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

1. **REGISTERED OWNER:** Ethna P. Keogh, 279 North Circular Road, Dublin 7: Folio No.: 56208: Lands: Kilroe West: Area: Oa. 1r. 13p.: County: **GALWAY.**
2. **REGISTERED OWNER:** Thomas Fee; Folio No.: 10105; Lands: Kilroe West; Area: 0a. 1r. 19p.; County: **LOUTH.**
3. **REGISTERED OWNER:** Martin McKenna; Folio No.: 9741; Lands: Drumrooghill (part); Area: 13a. 0r. 16p.; County: **MONAGHAN.**
4. **REGISTERED OWNER:** John Joseph Carroll; Folio No.: 355 now closed to Folio 4735F; Lands: (1) Ballygriffin, (2) Killanahan; Area: (1) 26a. 1r. 4p.; (2) 3a. 2r. 0p.; County: **LIMERICK.**
5. **REGISTERED OWNER:** Eva Lydon, Kilkelly, Co. Mayo; Folio No.: 23592; Lands: Kilkelly; Area: 16p.; County: **MAYO.**
6. **REGISTERED OWNER:** Gerald Felle, Kylemore Abbey, Loughrea, Co. Galway; Folio No.: 25603; Lands: Kylemore, Moannakeeba West, Moannakeeba East, Moannakeeba East; Area: 8a. 3r. 24p., 0a. 3r. 22p., 0a. 2r. 15p., 1a. 1r. 5p.; County:**GALWAY.**
7. **REGISTERED OWNER:** James Daly (deceased); Folio No.: 4454; Lands: Forgney; Area: 17a. 3r. 10p.; County: **LONGFORD.**
8. **REGISTERED OWNER:** Kevin Conlon; Folio No.: 12112; Lands: Drumlane (part); Area: 7a. 1r. 0p.; County: **MONAGHAN.**
9. **REGISTERED OWNER:** The Munster & Leinster Bank Limited; Folio No.: 56945; Lands: Parish of St. Ann's, Shandon, Co. Cork; Area: 0a. 2r. 4p.; County: **CORK.**
10. **REGISTERED OWNER:** Eugene Prunty; Folio No.: 11598; Lands: Croaghan (part); Area: 22.969 acres; County: **MONAGHAN.**
11. **REGISTERED OWNER:** Michael J. Nolan; Folio No.: 13104; Lands: Goulmore; Area: 66a. 0r. 30p.; County: **TIPPERARY.**
12. **REGISTERED OWNER:** William Healy; Folio No.: 12545; Lands: Kilcolman West; Area: 55a. 2r. 15p.; County: **CORK.**
13. **REGISTERED OWNER:** John J. Hickey, Inchileigh, Millstreet, Co. Cork; Folio No.: 8624; Lands: Inchileigh; Area: 35a. 2r. 7p.; County: **CORK.**
14. **REGISTERED OWNER:** James Kelly; Folio No.: 17589; Lands: (1) Annahean, (2) Annahean; Area: (1) 3a. 0r. 0p.; (2) 12a. 1r. 30p.; County: **MONAGHAN.**
15. **REGISTERED OWNER:** Philomena Innes; Folio No.: 23576F; Lands: A plot of ground situate to the West side of Raheen Road in the Urban District of Youghal; Area: — ; County: **CORK.**
16. **REGISTERED OWNER:** Thomas Murphy (deceased); Folio No.: 880; Lands: Clondaw; Area: 98a. 0r. 0p.; County: **WEXFORD.**
17. **REGISTERED OWNER:** Elizabeth Bollard; Folio No.: 133L. S.D.; Lands: No. 51 "Smythsville" Richmond Road, Drumcondra, in the Parish Clonturk, and Borough of Dublin; Area: — ; County: **CITY OF DUBLIN.**
18. **REGISTERED OWNER:** Mary Kelly and Eamonn Markey; Folio No.: 2225; Lands: Drumever (Part); Area: 20a. 0r. 0p.; County: **MONAGHAN.**
19. **REGISTERED OWNER:** Peter Moore; Folio No.: 11465; Lands: Knockbrack, Barony of Balrothery West and County of Dublin; Area: 23a. 3r. 5p.; County: **DUBLIN.**

Lost Wills

HOLOHAN, Patrick Joseph, late of 40 St. Michael's Terrace, Arklow in the County of Wicklow and formerly of Rathduff, Rathnure, Enniscorthy, County Wexford and 43, Chalvey Road East, Slough, Bucks, England, Batchelor. Will any person having knowledge of a Will of the deceased dated later than 3rd day of August, 1967 and who died at Sir Patrick Dun's Hospital, Dublin on 2nd day of August, 1983 please communicate with Henry J. Frizelle, Solicitor, Slaney Place, Enniscorthy, Co. Wexford.

HAMPSON, Richard, deceased, late of Tobinstown, Tullow, Co. Carlow. Date of death: 5th September, 1983. Would any person holding a Will on behalf of the above named please contact the undermentioned Solicitors. Clarke Jeffers & Co., Solicitors, 15, Dublin Street, Carlow.

LYNCH, Miss Helen, (otherwise Eily), deceased, late of Fenit, Tralee, County Kerry and formerly of Templeogue College, Templeogue, Dublin 6. Will any person having knowledge of the whereabouts of any Will of the above named deceased who died on 15th of September, 1983, please communicate with Messrs. Gerald Baily & Co., Solicitors, Ashe Street, Tralee, County Kerry.

O'MAHONY, Mary, deceased, late of 15 Marguerite Road, Drumcondra, Dublin 9, formerly of 31 Old Cabra Road, Dublin 7 and 24 St. Joseph's Road, Aughrim Street, Dublin 7. Would any person having knowledge of the existence or whereabouts of a Will of the above named deceased who died on the 14th August, 1983, please contact Michael Reynolds, Solicitor, 197B North Circular Road, Dublin 7.

Miscellaneous

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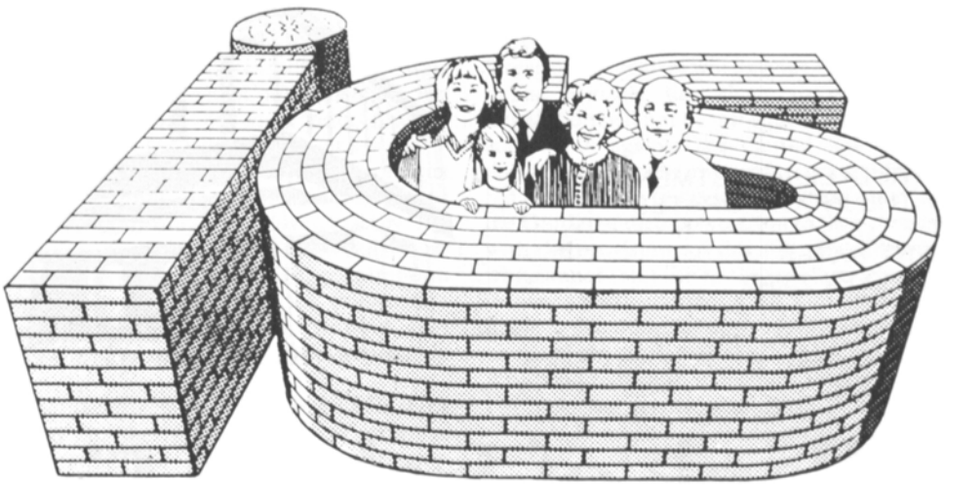

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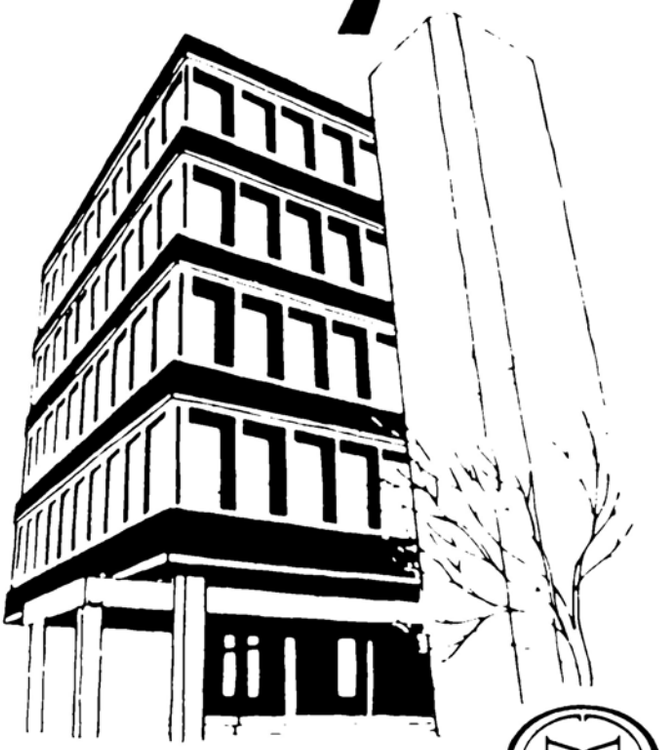

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77 No. 9 November 1983

More Law — Less Justice?

ONE of the most worrying aspects of the Criminal Justice Bill is not to be found in its pages. It is the manner in which it is being presented to the public as a solution to the problems of rising crime. It is nothing of the sort. It has been said previously in these pages that there will be no diminution of the level of crime until there is greater public support for the Gardai, a greater sense of civic responsibility, the lessening of ill-concealed approval for illegal activity and, most important of all, the devotion of greater resources, both financial and technical, to the Gardai. In addition, improvement in the training of the Gardai and in their methods of operation are badly needed.

Recent statistics show extremely low levels of detection of urban crime in Ireland. There is ample anecdotal evidence that much petty crime is investigated in a perfunctory manner. There is similar evidence that a substantial amount of such crime is never even reported to the Gardai, which makes the detection rate even less acceptable.

Our Police Force has in the main served the community well, but unfortunately it does not seem to have adapted itself sufficiently speedily to the changing environment. The failure to provide, except on the "security" side, increased financial resources is a factor, but not the only one. Training at induction level is inadequate and further training has not been mandatory for promotion to higher levels. Experience is invaluable in the development of a police officer, but it must be matched by continuing in-service training of a high order.

Even if higher levels of detection are achieved, more convictions obtained and the longer sentences prescribed in the Bill for certain offences imposed, what benefit can this bring so long as our jails are so over-crowded that some prisoners have to be released in order to permit other newly sentenced prisoners to be admitted? There is an element of hypocrisy in the situation, not confined to this jurisdiction, in which public demand for increased incarceration is matched by equal reluctance to provide the necessary resources for a proper prison system.

The Bill itself gives grave cause for disquiet. While it contains a number of changes which should improve the criminal justice process, their merits are unfortunately outweighed by the principal provisions, many of which are unacceptable in a legal system based on the Anglo-American model. The presumption of innocence and the obligation placed on the Prosecution to establish its case against a Defendant without that Defendant's assistance will be greatly eroded by the proposals in the Bill.

It is difficult to avoid the conclusion that detection is to be replaced by detention as the prime means of criminal investigation. The obtaining of incriminating statements, instead of the discovery of incriminating evidence, is apparently to be the order of the day. Two recent cases have given particular cause for concern in this area. In the *D.P.P. -v- Lynch*, the accused, having undergone questioning for a period of some twenty-two hours, confessed to having committed a murder. Subsequently, evidence was given by unimpeachable independent witnesses to the effect that a number of significant elements in the confession could not be true. In a recent prosecution of a Miss McShane, her solicitor, having been informed that Miss McShane had been taken into custody, visited a Garda Station where she thought her client might be likely to be detained. The client was not there, being still en route to that Station from another Garda Station, but her solicitor found in that Garda Station, and at a time before the questioning of her client had ended, a type-written document in the form of a statement purporting to have been made by her client.

The *Lynch* case is a clear example of the danger that a person, totally unfamiliar with the atmosphere of the Garda Station, cut off from family and lawyer may, after many hours of detention, be so affected by the intimidatory process as to be willing to make an incriminating statement solely to end the intimidatory process. The *McShane* case is even more disturbing, raising fears that the temptations provided by the new proposals would prove too great for the increasing number of Gardai, anxious to produce results.

The provisions in the Bill relating to the right of a detained person to the notification of a lawyer are a complete sham, primarily because they do not provide for the lawyer to have a right of access to his client during detention, but also because the only obligation on the Gardai, and then only on request, is to cause the Solicitor "to be notified as soon as possible". It is not difficult to see this provision being construed, in the case of an arrest on a Friday evening, as notification on the following Monday morning. There is nothing in the Bill to limit the "station switching" of suspects, which the Courts have criticised. If the detention powers of the Bill are to be introduced, the introduction of a "Duty Solicitor" system in larger urban centres will become essential.

The Minister has given an undertaking that the new Legislation will not be introduced until a satisfactory system for complaints against the Gardai has been introduced. It is difficult to describe this undertaking as anything more than a red herring. The faults in this Bill are not related to the abuse by the Gardai of their powers, but to their proper use in accordance with the provisions of this Bill. The Bill would leave a person who cannot establish to the satisfaction of the Gardai that he is driving a particular motor car with the permission of the owner liable to detention for up to twenty hours and it is not difficult to envisage circumstances in which an innocent citizen might find it difficult to furnish immediate evidence of his right to drive the particular car to the satisfaction of the Gardai.

Even in respect of those provisions of the Bill which are welcome such as majority verdicts, notification of alibis, the creation of the offence of failing to surrender to bail and others, there are serious drafting defects. There should be no question of this Legislation being guillotined at the Committee Stage. Every section must be carefully considered, as the citizen's right to liberty is dependent on a coherent and well drafted criminal code. □

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

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Comment . . .

. . . Quis Custodiet?

RECENT events involving the appointment of an administrator to the Private Motorist Protection Association have raised questions about the efficacy of the monitoring functions of our Public Service. There have been other areas in which the monitoring functions vested in Central or Local Government bodies have been seen to be carried out inadequately or belatedly — notably in relation to environmental or public safety matters.

We are fortunate in having a Public Service that is free from the sort of corruption which appears to be endemic in many countries. Unfortunately the efficacy or efficiency of that service is increasingly being called into question. The public perception is that promotion in the Public Service depends largely on seniority, coupled with the absence of "black marks" on the candidate's record. Such a system may well have considerable advantages, but it is unlikely to encourage members of the Service at any other than the highest level to be sufficiently emboldened to take the sort of courageous steps which are from time to time required of officials who are invested with monitoring functions.

The fact that the political support of the Minister for the time being will also be required for any firm action by the monitoring authority raises further doubts as to whether the Public Service is always the appropriate vehicle in which control of various activities affecting the public interest should be vested.

Firm action is less easily taken against a populist movement with laudable aims, such as the P.M.P.A., even when evidence begins to emerge that it is running off the rails, than against some fly-by-night financial opportunist.

In many areas of professional activity, the principle of collective responsibility may be appropriate and the arguments in favour of the principle are strong; however, in order for such a system to operate fairly and efficiently, the overall monitoring of those activities must be seen to be not only fair but effective.

There may well be a case for the establishment of an independent monitoring body which would supervise the activities of various bodies and organisations which are permitted to deal with the public, but whose operations are controlled by statute.

While there have been significant improvements in the supervision of persons or organisations soliciting investments or deposits from the public, it is anomalous that control is not vested in one single monitoring authority.

The Central Bank is an example of a monitoring agency not forming part of the Civil Service which is seen to perform its regulatory functions over the banking community with increasing firmness.

A body whose sole function, in contra-distinction to that of a Government Department, is to ensure that the activities of organisations or persons subject to statutory control are in fact adequately monitored, would provide a more satisfactory alternative to our present inadequate arrangements.

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Companies (Amendment) Act, 1983

Part 1

by
William Earley, Solicitor

THE Companies (Amendment) Act, 1983 ("the Act") enacts into Irish law the provisions of the EEC Second Directive on Company Law (77/91/EEC 1977. O.J. 126/1). The Directive regulates the formation of public companies and establishes minimum safeguards as to the subscription, maintenance and alteration of their capital. The Irish Legislature has, however, considered it worthwhile, in the interest of the development of company law generally, to apply many of the provisions of the Act to private companies as well as to the new class of public limited companies.

The Act was brought into force on 13th October 1983 by the Companies (Amendment) Act, 1983 (Commencement) Order, 1983 (S.I. No. 288 of 1983). This date is "the appointed day" for the purposes of the Act. On the same day the Companies (Forms) Order, 1983 (S.I. No. 289 of 1983) laid down the new Companies Office forms necessitated by the Act.

It is intended to devote two articles in the *Gazette* to the Act. This Article will deal with parts I and II of the Act, concerning preliminary matters and more importantly the name of a public limited company, and the registration and re-registration of companies. The second article will deal with the balance of the Act dealing with the raising and maintenance of capital of a company, the new restrictions on distribution of profits and assets and with other miscellaneous matters.

Part I — Preliminary

Section 1 deals with the short title, collective citation and commencement of the Act.

Section 2 is the interpretation section. It is here that we come across the first important difference between the Act and the corresponding legislation in the United Kingdom, the U.K. Companies Act, 1980; a difference which makes all U.K. textbooks and commentaries on the U.K. Act misleading in relation to the Irish Act. The U.K. Act introduced a general re-classification of companies whereby the private company was made the residuary class and included all companies that had not been registered or re-registered as public companies.

The Irish Act retains the existing basic classification structure and defines a public company as one which is not a private company. No new definition of private company is given and the definition contained in the Companies Act, 1963 applies.

These Articles will refer back to other definitions contained in Section 2 as and when they arise in the Act.

The provisions of the Act require some consequential amendments to the 1963 Act and these are effected by Section 3 and the First Schedule. Again, these changes will be referred to as and when they arise.

Part II — Name of Public Limited Company, Registration and Re-Registration of Companies

"Public Limited Company" is defined in Section 2 of the Act as a public company limited by shares or a public company limited by guarantee and having a share capital, being a company —

(a) the memorandum of which states that the company is to be a public limited company; and

(b) in relation to which the provisions of the Companies Acts as to the registration or re-registration of a company as a public limited company have been complied with on or after the appointed day.

Section 4 (1) of the Act provides that the name of a public limited company must end with the words "public limited company" or "cuideachta phoibli teoranta" which may be abbreviated to "p.l.c." or "c.p.t." respectively. Such words may not be preceded by "limited", "teoranta", "ltd." or "teo.".

Section 4 (2), however, provides that a resolution for the re-registration of a company in accordance with Section 12 of the Act (see below) may change the name of the Company by deleting "company", "and company", "cuideachta", "agus cuideachta" or any abbreviation thereof and no change of name fee is payable in respect of such change of name. It should be noted that the change of name of a public limited company on re-registration likewise attracts no fee, whether or not the company is either an old public company or a private company.

Appropriate amendments have been made to Section 6 (1) of the 1983 Act dealing with the requirements to be stated in the memorandum of a company regarding its name.

The registration or re-registration of companies as public limited companies occurs in three main circumstances:

(1) the registration on its original incorporation of a company as a public limited company;

(2) the re-registration of a private company as a public limited company;

(3) the re-registration of an old public limited company as a public limited company.

The Act also provides for the re-registration of unlimited companies (Section 11) and joint stock companies (Section 18) as public limited companies.

(1) Registration on original incorporation

If a company is registered as a public limited company on its original incorporation, section 6 of the Act requires

that it shall not do business or exercise any borrowing powers unless the Registrar has issued it with a certificate that the Company's allotted share capital is not less than "the authorised minimum". Section 19 of the Act defines "the authorised minimum" as £30,000 or such greater sum as may be specified by order made by the Minister of Trade, Commerce and Tourism.

Section 6(3) of the Act prescribes matters which must be stated in a statutory declaration by a director or secretary of a company in support of an application for such a certificate.

It should be noted that a share allotted in pursuance of an employees' share scheme (as defined in Section 2) may not be taken into account in calculating the authorised minimum unless the share is paid up at least to one-quarter of the nominal value of the share and the whole of any premium of the share.

A certificate under Section 6 shall be conclusive evidence that the company is entitled to do business and exercise any borrowing powers.

There are provisions in the Act making the doing of business or the exercising of borrowing powers without a certificate an offence for the company and any officer of the company in default. Further, although the provisions of Section 6 are without prejudice to the validity of any act of a public limited company, if a public limited company enters into a transaction in contravention of the Section but fails to comply with its obligations thereunder within 21 days of being called upon to do so, the directors of the company shall be jointly and severally liable to indemnify the other party to the transaction in respect of any loss or damage suffered by him by reason of such failure.

The Registrar may take steps to strike a public limited company off the Register if it has not been issued with a certificate under Section 6 within one year of its registration.

(2) Re-registration of private companies

Section 9 of the Act sets out the requirements for the re-registration of a private company as a public limited company. This will from now on represent "going public" and, as we shall see, no "old public limited companies" may be created after the appointed day.

The requirements are —

(a) a special resolution that the company be so re-registered be passed which resolution must also

(i) alter the company's memorandum so that it states that the company is to be a public limited company;

(ii) make such other alterations in the memorandum as are necessary to bring it in substance and in form into conformity with the requirements of the Act, and

(iii) make such alterations in the company's articles as are requisite. (This will invariably involve adopting a new long form set of articles appropriate to a public company);

(b) An application for re-registration in the prescribed form must be delivered signed by a director or secretary together with the following documents:

(i) a printed copy of the memorandum and articles as altered. (As previously "printed" will be interpreted as including all modern electrical forms of typing and also photo-copying);

(ii) a copy of a written statement by the auditors of the company that in their opinion the relevant balance sheet (see below) shows that at the balance sheet date the amount of the company's net assets was not less than the aggregate of its called-up share capital and "undistributable reserves" (see below);

(iii) a copy of the relevant balance sheet together with a copy of an unqualified report (as defined) by the auditors in relation thereto;

(iv) where shares have been allotted between the balance sheet date and the date of the special resolution as fully or partly paid up otherwise than in cash, an expert's report as required by Section 30 of the Act as to the value of such non-cash consideration; and

(v) a statutory declaration in prescribed form (Form F2) by a director or secretary that the special resolution referred to at (a) above has been passed and that the conditions referred to at (c) below have been satisfied and that between the balance sheet date and the date of the application there has been no change in the financial position of the company that has resulted in the amount of the company's net assets becoming less than the aggregate of its called up share capital and undistributable reserves;

(c) the conditions specified in Section 19(5)(a) and (b) (where applicable — dealing with non-cash consideration for shares) and in Section 10(1)(a) to (d) (see below) are satisfied in relation to the company.

"undistributable reserves" is defined by Section 46(2) of the Act.

"relevant balance sheet" means a balance sheet prepared as at a date not more than seven months before the application for re-registration.

Section 10 of the Act sets out the requirements as to share capital of a private company applying to re-register as a public limited company. Principally, the nominal value of the allotted share capital must not be less than the authorised minimum and each allotted share must be paid up at least as to one quarter of its nominal value and the whole of any premium. There are also provisions dealing with the valuation of non-cash consideration for shares.

If the Registrar is satisfied with the application made under Section 9, he shall issue the company with a certificate of incorporation on re-registration as a public limited company and upon the issue of such certificate the company by virtue of such issue becomes a public limited company and any alterations to its memorandum and articles take effect accordingly.

A certificate of incorporation on re-registration is conclusive evidence that the requirements of the Act in respect of re-registration and of matters precedent and incidental thereto have been complied with and that the company is a public limited company.

Section 35 of the 1963 Act has been amended to dispense with the need for private limited companies

availing of re-registration under Section 9 to file a statement in lieu of prospectus.

(3) Re-registration of old public limited companies

The procedure for the re-registration of old public limited companies as public limited companies is simpler than in the case of private companies.

The Act defines an "old public limited company" as a public company limited by shares or by guarantee and having a share capital which

(a) either existed on the appointed day or was incorporated thereafter pursuant to an application made before that day; and

(b) has not since the appointed day, or the day of its incorporation, as the case may be, either been re-registered as a public limited company or become another form of company.

As we saw earlier, therefore, no old public company can be formed (save where an application is in train on the appointed day) after the appointed day. Private companies "going public" must become public limited companies under the Act.

There are two important time periods, each dating from the appointed day, in connection with old public limited companies (and which will arise elsewhere in our consideration of the Act).

Firstly, the "general transitional period" is the period of 18 months commencing on the appointed day, e.g. until 13th March, 1985.

Secondly, the "re-registration period" is the period of 15 months commencing on the appointed day, e.g., until 13th December, 1984.

An old public company may, pursuant to Section 12(3) (either before or after the end of the general transitional period) be re-registered as a public limited company if:

(a) the *directors* pass a resolution that it should be so re-registered which alters the company's memorandum so as to state that it is to be a public limited company and making any other necessary alterations;

(b) an application in the prescribed form is delivered signed by a director or secretary together with the following documents:

(i) a printed copy of the memorandum as altered in pursuance of the resolution, and

(ii) a statutory declaration in the prescribed form by a director or secretary that the above resolution has been passed and that the conditions specified in Section 12(9) of the Act were satisfied at the time of the resolutions.

(c) conditions in relation to its share capital as set out in 12(9) are satisfied. These conditions are similar to those in Section 10 referred to above in connection with the re-registration of private companies.

If an old public limited company cannot at the time of its application for re-registration satisfy the conditions as to its capital set out in Section 12(9) and a statutory declaration to that effect is filed by a director or secretary, then the Registrar shall re-register the company as a

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public limited company but shall notify it that if, within 3 years from the appointed day (called in the Act the "transitional period for share capital") it has not satisfied these conditions it must either re-register as another form of company or wind up voluntarily under Section 251 of the 1963 Act. Failure to take either of these steps now constitutes grounds for a winding up by the Court under Section 213(i) of the 1963 Act.

All rights or obligations of an old public company and all legal proceedings by or against it are preserved on re-registration.

Failure by an old public company to re-register as a public limited company by the end of the re-registration period is an offence both for the company and any officer in default unless at that time the Company

(a) has applied to be re-registered as a p.l.c. and the application has not been refused or withdrawn;

or

(b) has applied to be re-registered as another form of company.

Further, if an old public company has applied under (b) above and failed to fulfil the requirements for such re-registration, there are similar offence provisions unless within a period of 12 months from the end of the re-registration period —

(a) the requirements have been fulfilled and re-registration has taken place; or

(b) the company has re-registered in another form than for which application was made; or

(c) the company has been wound up voluntarily under Section 251 of the Act.

The Act also provides in Section 14 for the re-registration of a public limited company as a private company. Section 15, however, gives the right to a minority of dissenting shareholders to apply to the Court for the cancellation of the special resolution providing for such re-registration. The Court may make an order cancelling or confirming the resolution and may also adjourn the proceedings so that arrangements may be made to purchase the dissenting members' shares.

An application as above may be made

(a) by the holders of not less in the aggregate . . . . . five per cent in nominal value of the company's issued share capital or any class thereof;

(b) if not limited by shares by not less than five per cent of its members; or

(c) by not less than 50 members.

Section 17 provides that, save as provided, a public limited company may not reduce its capital below the authorised minimum. Section 72 of the 1903 Act, dealing with reduction of capital, is to be construed accordingly. □

(Continued).

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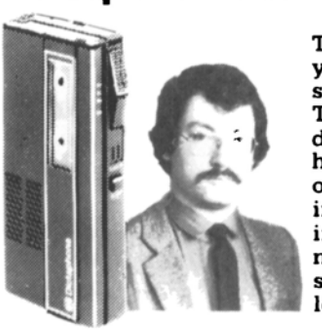

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Sittings of Rent Tribunal

The Law Society has been notified by Miss Mary Laffoy, B.L., Chairperson of the Rent Tribunal, of the following arrangements for bringing cases before the Tribunal.

The cases listed before the Rent Tribunal in Dublin on the 9th and 10th November are the first cases to have been dealt with by the Tribunal in Dublin and the approach to listing cases is experimental at this juncture.

Under Section 17 of the Housing (Private Rented Dwellings) Amendment Act, 1983, under which the Tribunal was established, the Tribunal is given the right to inspect a dwelling in respect of which an application is made to it to fix rent. It is the intention of the Tribunal to carry out an inspection in all cases.

Three cases are being listed before the Tribunal on each day it sits. In the case of the cases listed for 9th and 10th November, the Tribunal will have carried out its inspection in each case in the morning and the hearings will have taken place in the afternoon.

For the convenience of the public and practitioners, cases are being listed at a specific time, rather than being all listed together at 2 p.m. or 2.15 p.m. The last case listed on each day is listed for 4.00 p.m. It is envisaged that the Tribunal's business would conclude about 5.00 p.m., unless the last case on any day is of unusual complexity.

Every effort will be made to list cases at times which are convenient for both the public in general and members of the legal profession and the society's views will, of course, be taken into account. □

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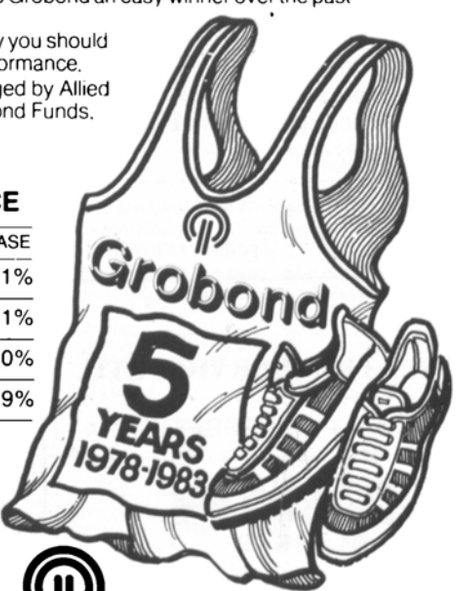

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Salzburg Seminar Seeks Irish Fellows

The Salzburg Seminar in American Studies, which in its 1984 programme has two sessions of interest to lawyers, is seeking to attract more Irish Fellows. The number of Irish participants in the earlier years of the Seminar's operation was quite significant, but has dwindled to two in the 1983 Seminars.

The Salzburg Seminar is a private, independent, non-profit education organisation, which was established in 1947 by students at Harvard University; it was sponsored initially by the Harvard Student Council. It now has its own Board of Directors, with both a European Advisory Council, composed mostly of alumni of the Seminar, as well as a Business Advisory Council. All of its sessions are held at Schloss Leopoldskron, Salzburg.

The purpose of the Salzburg Seminar is the study, at the highest level, of contemporary issues of worldwide scope, as well as of significant aspects of American society. It provides a unique forum for the frank exchange of ideas and informed opinion. It offers to non-Americans practical, as well as theoretical insights into developments in the United States at the same time as it familiarises American participants with the ideas and attitudes of those from other countries.

In 1984, the Seminar offers ten sessions, lasting nine days, each on a different subject and each with a different faculty and group of Fellows. The Fellows the Seminar brings together are people of prominence or promise in their fields. They come primarily from western Europe, eastern Europe, North America and from developing countries, with special emphasis on the Middle East. Usually, forty to fifty men and women are selected for each session. They are chosen to reflect a diversity of professional viewpoints and experiences. Most Fellows are in their 30s, though some are younger, some older. They work with a distinguished international faculty, all of whom serve without monetary compensation.

The sessions usually include a series of lectures, presented by each of the faculty members and attended by all Fellows. These lectures are followed by questions and discussion. In addition, each Fellow participates in a more specialized small group seminar, in which about a dozen Fellows meet at least twice a week with an individual faculty member for intensive work on a particular aspect of the topic. All Fellows are expected to make oral or written contributions to these seminar groups. Since all Fellows and faculty members work, live, and dine together at Schloss Leopoldskron, the opportunity for continuous informal exchange of ideas and information and for the building of professional contacts and long-lasting personal friendships is unlimited.

There are now over 11,000 former Fellows of the Salzburg Seminar, including current prime ministers, members of cabinets and parliaments, ambassadors, mayors of major cities, and leaders in the arts, business, education and the legal and medical professions. Many former Fellows return to Salzburg from time to time for reunions and conferences, or to serve as faculty members or guest lecturers.

For the session on "American Law and Legal Institutions" to be held between July 1st and 20th, 1984, the faculty will include the Chief Justice of the United States, Warren E. Burger, Professors Geoffrey C. Hazard of Yale Law School, Robert H. Mundheim of University of Pennsylvania Law School and Terrance Sandalow of the University of Mitchan Law School. The session "Legal Aspects of New Technologies" held between August 26th to September 8th will have in the Faculty Nicholas Kazenbach, former U.S. Attorney General, and Professor Harold Scott of the Harvard Law School. The fees for participation, which include all accommodation, are 40,000 Austrian schillings for a three-week session and 30,000 Austrian schillings for a two-week session. Scholarship assistance may be available to participants from funds available to the Seminar. Further information is available from Salzburg Seminar, Schloss Leopoldskron, Box 129 A5010, Salzburg, Austria. □

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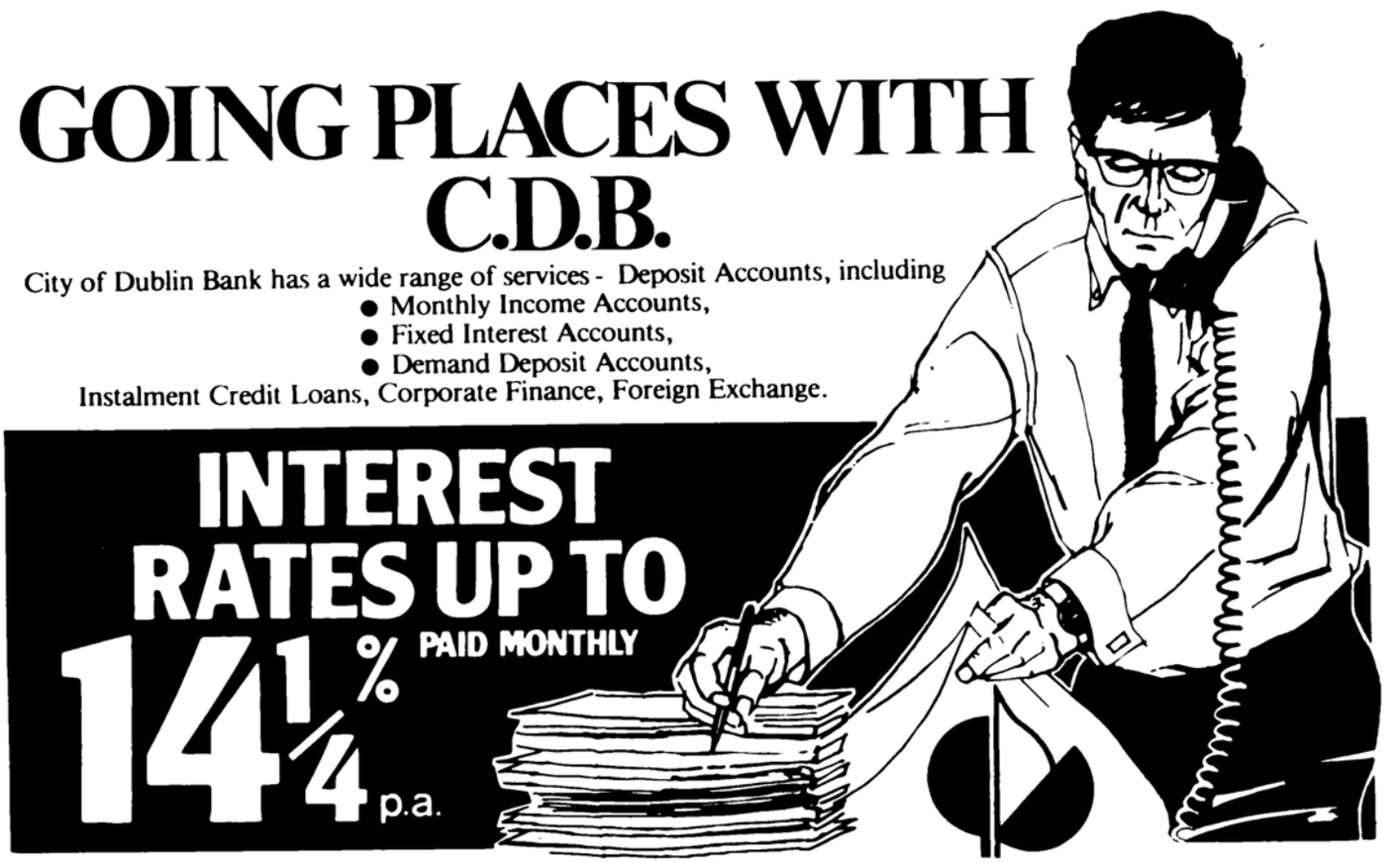

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Probability Theory and Rules of Proof

by

John O'Connor M.Sc.(Mngt.), C.Eng., F.I.Struct.E., F.IEI., M.Cons.E.I.*

TO the uninformed the concepts of a case being proved "beyond a reasonable doubt" or "on the balance of probabilities" is not at all specific. True, both statements indicate a standard of proof less than certainty itself, and we shall begin by adopting the commonsense definitions of Denning L.J. in *Miller -v- Minister of Pensions*[1]. In a criminal case the evidence "need not reach certainty, but it must carry a high degree of probability .... (it) does not mean proof beyond the shadow of a doubt". The balance of probabilities was defined as when the Court can say "we think it more probable than not .... but if the probabilities are equal the burden is not discharged".[2]

It follows from these definitions that certainty is not required and it is important to note the use of the word "probabilities" in both definitions. In essence, therefore, the burden of proof is discharged by a standard of probability which depends on whether the case is criminal or civil. Certainty, being the ultimate level of probability is of course acceptable, but not necessary to establish guilt or liability.

The word 'probability' is subjective and its meaning will vary with the circumstances of its use. In *Walker -v- Dept. of Trade and Industry*[3] the Court had to decide on the meaning of "the *probable* amount of the cash balance". These words appear in Section 89(2) of the English Bankruptcy Act 1914. It was held that the words "probable amounts" referred to small amounts only and not to large amounts. It follows that there is no intrinsic legal meaning of the word 'probable' and all definitions rest on a subjective assessment of the circumstances of its use.

It is obvious that this use of the word "probable" is part of the language of law and not of science. In science, one may find two further meanings of "probability" contained within the disciplines of pure mathematics and statistics. A. J. Ayer[4] has given the following meanings to "probability" as outlined above.

(a) 'A priori' probability or the mathematical calculation of chances per abstract games of chance.

(b) Statistical probability which introduces the notion of "limiting frequency". In essence it is simply the experiment being carried out so often that further experiment will not affect the result by more than a small amount.

(c) Finally, the legal use of the word "probability", which Mr. Ayer is pleased to call "a statement of credibility".

The larger question is whether the scientific definitions of probability are useful in directly establishing burden of proof, i.e., is it possible by using a pure mathematical formula for chance events, or by the use of statistical evidence to prove guilt or liability? The answer is no. Although technical evidence on the chances of events occurring as deduced by pure maths have a place in the courtroom, that place is limited. The reasons lie in the origin of scientific and legal terminology. They are not compatible and the same word can have a different meaning in legal affairs and affairs of science.

For instance, the word 'law' to the lawyer represents an intangible idea of an authority demonstrated by Bracton in the thirteenth century. He said "That the King should not be under man, but under God and the Law".[5]

Lord Denning in fact claimed that Bracton "was the first to make the law into a science"[6], but he was mistaken. Science is precise, rigorous and impersonal while the law is impossible to measure or predict.

Again, a scientific 'law' is inferior in ranking to a scientific 'theory'. The essential element in science is certainty and argument and opinion bows to scientific measurement. It is possible to trace the development of a theory which illustrates the absence of subjective judgement and demonstrates that the certainty required by science is not possible to satisfy in a courtroom. except in the limited case of expert scientific evidence.

The development of a scientific theory is indicated later diagramatically. This begins with a collection of facts, which is a very low form of scientific research. Scientifically, these facts are then used to develop Concepts, e.g., the fact that man exists leading to the concept of man as a father, worker or law student, etc. These concepts give rise to the Hypothesis which is where the legal system and the scientific system separate.

At this level, the law has already run its course. The collection of facts and the analysis of the concept of the litigants as plaintiff/defendant complete the legal exercise. In science the analysis of concepts is just a further step leading to a hypothesis to be postulated and tested in the manner "if A is done then B will probably occur".

For instance, if a load is attached to a strand of wire, then the wire will extend. Is this always true? The answer is yes and we arrive at the scientific definition of a law which is that whenever a phenomenon occurs consistently in any part of the globe with similar experimental results then that hypothesis has achieved the status of a law. In our case, the extension of the strand of wire is related to applied load up to certain limits and gives rise to Hookes law or the law that stress is proportional to strain. Since stress is load per unit area and strain is defined as extension of strand under load divided by original length we can write:

$$\frac{\text{Stress}}{\text{Strain}} = \text{a constant (called the modulus of Elasticity E).}$$

Therefore, $\text{Stress} = \text{'E' x Strain}$

Therefore, $\frac{\text{Load}}{\text{Area}} = \frac{\text{'E' x extension in length}}{\text{original length.}}$

Therefore, $\text{Extension} = \frac{\text{Load x Original length}}{\text{Area x 'E'.}}$

Therefore, We have calculated with certainty what the extension in length of the wire will be, and this equation will be constant anywhere the experiment is carried out in the same way, even with different loads and wire lengths.

This law (taking Hooke's law for instance) may then become part of the highest level of scientific statement we can make. This is that it may become part of a "Theory". A scientific theory is quite precise. It consists initially of a scientific law in terms already explained. This immutable law is taken as an axiom and provides the basis for further experiments. If further laws, which we chooe to call theorems, can be extracted from the basic axiom, then the axiom itself, together with the theorems and their proofs will collectively become a 'theory', e.g., Einstein's "Theory of Relativity". Note that a 'theory' has a more important place in the canons of scientific thought than the mere 'law' from which it is derived.

It appears, therefore, that any concept of probability less than certainty would be difficult for an expert giving technical evidence. Since the languages of science and law are not compatible we must proceed with caution. The lawyer's familiarity with the concept of 'probability' may blind him to the totally different scientific concept. The scientist likewise is unlikely to grasp the subtlety of the word 'probability' having two different meanings when put in the context of civil or criminal cases and both these different to his own. Since justice itself rests on the objective treatment of the facts it follows that the facts as presented should be capable of being clearly understood by the lawyers and the judge/jury.

The logical conclusion to be reached is that expert evidence based on probability theories may have their place in court but should not be treated as sacrosanct. A full explanation of their basis in non-technical language should be demanded.

Application of Probability Theory

Probability theory applied to any case may be considered in two ways. The first is when scientific probability is applied during expert evidence. This means that probability theory is restricted to a narrow band of evidence confined to the expert witness. Since this probability theory rests on pure or abstract mathematics its application to real life situations is always open to challenge. Here one should differentiate between scientific facts collected by the expert witness and not open to question and the application of that fact to activate a mathematical probability theory. For example, the expert witness may say that a hair found on the defendant's clothingwas similar to that of the victim and not be contradicted. When the expert witness then proceeds to show that the probability of this happening is 1 million to 1, he has overstepped from the abstract and rigid world of science into the teeming, complex world of reality. In short, his probability theory depends on complete predictability and the events of the real world contaminate this.

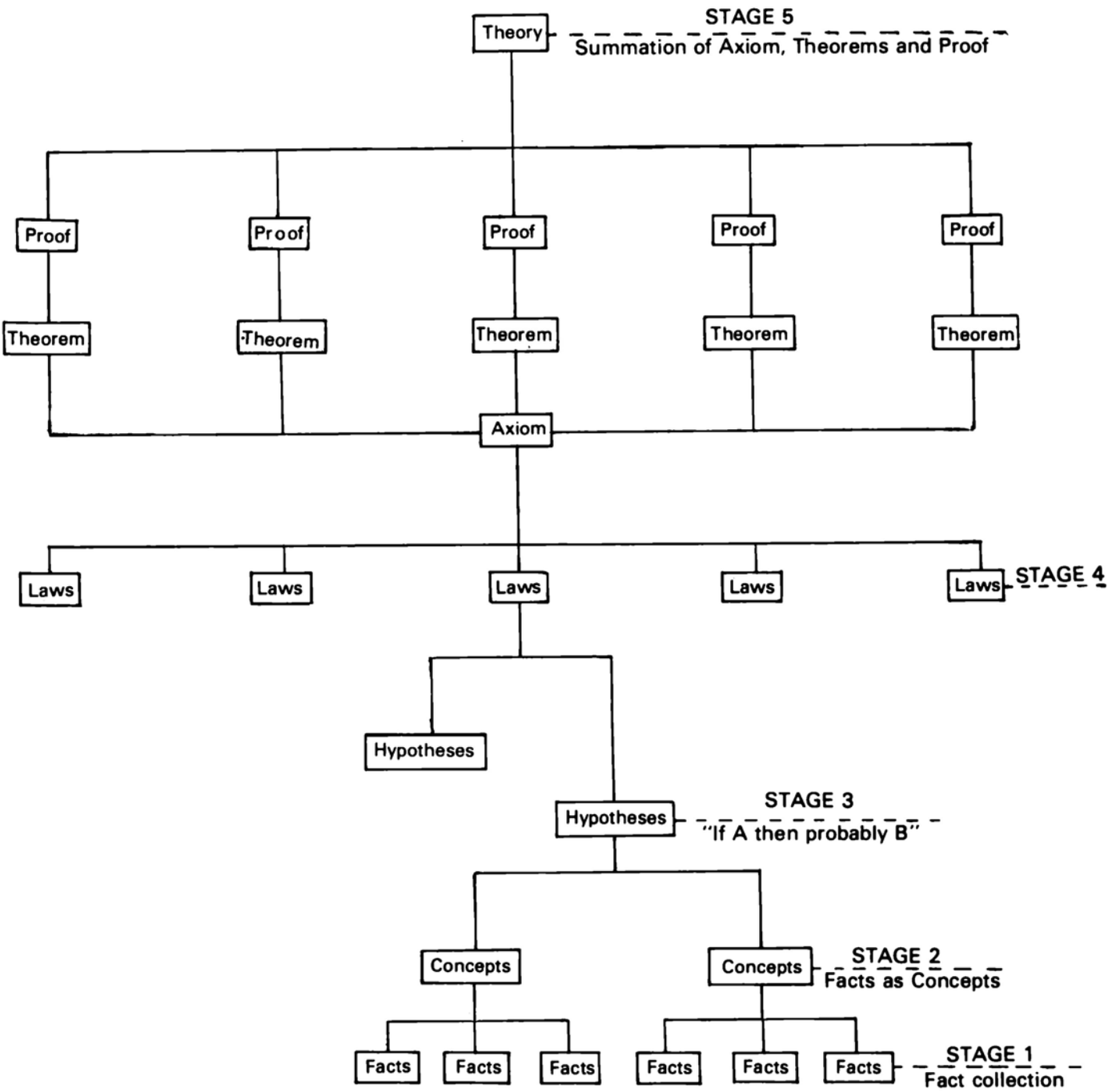
In expert evidence, the witness would be better advised to confine his remarks to fact collection, and leave these facts to the jury. In the given case, where the odds against a hair of the same type as the deceased being found on the defendant are stated as (say) 1 million to 1, then it is an invitation to the defence to debunk the figures. It invites argument following the contrast between probability theories and real life situations. For instance, we know that more people die of lung disease in Arizona because those afflicted with this disease retire there to enjoy the dry weather. We know the blood group of the majority of Aran Islanders is shared more with those areas of England from which Cromwell's invading force were recruited rather than any Irish region. The application of probability theory, even in the narrow context of expert evidence can be too easily upset by a defence determined to show the facts in the light of the statistician's shortcomings, i.e., with one foot in a fire and one foot in a fridge then you are comfortable on average.

This could be seen in *People -v- Collins*[7] and *DPP -v- Kinlan*[8]. In both cases the errors in establishing the probability of certain events together with attempts to combine these probabilities was fatal to the cause. The laboratory conditions of the pure probability theory will never be available in real life.

The second case arises when probability theory is applied on an even wider scale. *A fortiori,* the same remarks apply to the idea promoted by Dr. Lindley[9] that *all* evidence presented in court should be expressed in terms of probabilities and combined by means of a "probability calculus". This silly idea rests on being able to place a numerical value on the strength of each piece of evidence and to combine these values mathematically to give an overall verdict. The effect of this would be to play Russian roulette with the defendant. It would reduce the court hearing to the game of chance on which probability theory is based. In addition, it would lead to defendants without merit being discharged on appeal under the weight of a rigorous attack on the mathematical analysis of the prosecution. It is hard to agree with M. Stuart[10] who advocates "the wider use of probabilities and statistical evidence in legal processes". It is significant that there is no unanimity on the question of proof based on probability. In 1977, A. Cohen[11] devoted his book almost completely to the flaws in a theory of probability related to court fact finding. A year later, Sir R. Eggleston[12] wrote to claim that the reverse approach was fundamental to fact finding. Perhaps they are both wrong in looking at pure probability theory and could compromise by adopting the scientific "hypothesis" based on probability as shown in the diagram.

The first activity in the diagram is fact collection itself, unaided by any theory of probability. These bare facts are then scrutinised conceptually to give a hypothesis for testing in terms of "If A occurs then B will probably result". This is the basis of scientific analysis and readily absorbs the concept of probability.

We can use the fact of *People -v- Collins*[7] to illustrate this. Here, a robbery was committed by an inter-racial couple in a yellow car. He had a moustache and she was a blond. On a statistical probability basis the prosecutor



The Development of a Scientific Theory.

attempted to show odds of 12 million to 1 against any couple other than the accused having committed the robbery. He failed dismally. Using the formal analytical approach of science he might have simply gathered the available facts as a first step. These facts would then be analysed conceptually for the purpose of setting up a number of hypotheses for testing. An example would be "if witnesses were present then they would probably identify directly" or "if the accused carried out the robbery then they would probably be in possession of the loot". In this way, via a series of hypotheses the prosecution/defence could scientifically analyse the probabilities of the case before the hearing and form conclusions based on the facts. The case would then rest on the facts being presented as concepts in a tested hypothesis. There would be no need for explanation as to the procedure being adopted, as the presentation of the case would be straightforward, sensible and logical since it rests on the relevant facts presented in a tightly knit manner.

It is apparent on this analysis that there is no future for probability theory being applied to all the evidence in any case as it would give too many opportunities for successful challenge.

The expert witness may attempt to bolster his evidence

of fact with odds against these facts occurring. Although the facts may not be open to challenge he may imperil his evidence by giving the probabilistic odds. One has only to consider the small size of our population to realise that odds of 2 million to 1 are meaningless in a male population of less than 2 million. It would be a poor advocate who could not attack the basis of a probabilistic statement and if the expert witness is thrown then the facts themselves may be put in question.

The law has never defined "probability". In *mens rea*, we can identify graduated levels of intent rising from the defendant knowing the result of his action would be "possible", or "probable" or "certain" which are all simply different levels of probability in legal terms. The methods of mathematics might better serve the law in providing a more accurate framework for analysis through the routine testing of hypotheses. In this way we could aspire to legal probability being assisted by the methods adopted by science to the greater understanding of all concerned. □

* *Mr. O'Connor is presently reading for the Bar in King's Inns.*

(Footnotes)

1. [1947] 2 All ER 372 at p.373.
2. Ibid. at p. 374.
3. [1972] 1 All ER 1096 (Ch.D.) and [1974] 1 All ER 551.
4. A. J. Ayer *Probability and Evidence.* Part 1. Chapters 2 and 3.
5. H. Bracton *Laws and Customs of England.*
6. Denning, M. R. *What next in the Law?* at p.5.
7. *People -v- Collins* [1968] 438p 2d. 33.
8. *D.P.P. -v- Kinlan* [1978] Central Criminal Court — unreported.
9. D. V. Lindley "Probability and law", *The Statistican* Volume 26 No. 3.
10. M. Stuart, "Statistics and Probabilities as legal evidence" *Dublin University Law Journal (1981) at p.54.*
11. A. J. Cohen. *The Probable and the Provable* (1977).
12. Sir R. Eggleston *Evidence, Proof and Probability* (1978); see also J. D. Jackson, "Probability and Mathematics in Court Fact-Finding" *Northern Ireland Legal Quarterly.* Vol. 31, No. 3 Autumn 1980, p.239.

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American Bar Association to Hold its Annual Meeting in London in July 1985

The American Bar Association's 107th Annual Meeting will take place in London, July 14-20, 1985. Solicitors, barristers and judges from the United Kingdom and Ireland are invited to participate in the meeting, which will offer extensive educational and social programmes to the registrants and their families. It is estimated that some 10,000 American lawyers and judges will be coming to London for this meeting.

The meeting will open with a formal opening ceremony on Monday, July 15. During the course of that week, over 20 plenary programmes will be sponsored by 23 ABA Sections and Divisions. The plenary programmes will cover such topics as "Practising and Maintaining Offices in Other Countries", "International Arbitration", "Strikes by Public Employees", "Extraterritorial Enforcement of Regulatory Laws", "Systems of Governmental Procurement", "Computer Technology and Privacy", "Foreign Investment in the United States", "Control of Land Development", and "Regulation of Energy Sources". American and British paper-writers will prepare materials for each plenary programme. The actual programmes will include presentations by the paper-writers with comments from a panel consisting of both British and Americans. Time will be set aside during each programme for questions and discussions with the programme audience.

In addition to the plenary programmes, the ABA Sections and Divisions will sponsor programmes of specific interest to their fields. Thus, there will be additional programmes in the areas of taxation, business and corporate law, litigation, energy law, general practice, family law, economics of law practice and antitrust law, to name a few.

A host of special events is being planned during the meeting for programme participants and their families. Garden parties, receptions, special opening and closing ceremonies, luncheons, golf and tennis events, theatre tickets, etc., will all be available for registrants at the meeting.

"Satellite" programmes are being arranged to take place in Edinburgh and Dublin following the London meeting.

The American Express has been selected by the American Bar Association to act as the official travel agent for all registrants attending this meeting.

For further information on the meeting please contact Mr. Keddy J. Soffair of American Express. His address is:

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> "That the Council of the Law Society recommends that solicitors in the first year of their employment, should now be paid a minimum salary of £6,500."

At the request of some members, the Council wishes to clarify that it was not the intention that the recommendation for a minimum salary would apply where newly qualified solicitos are retained on a temporary basis by their masters, following the expiry of their indentures while such solicitors are seeking employment elsewhere. □

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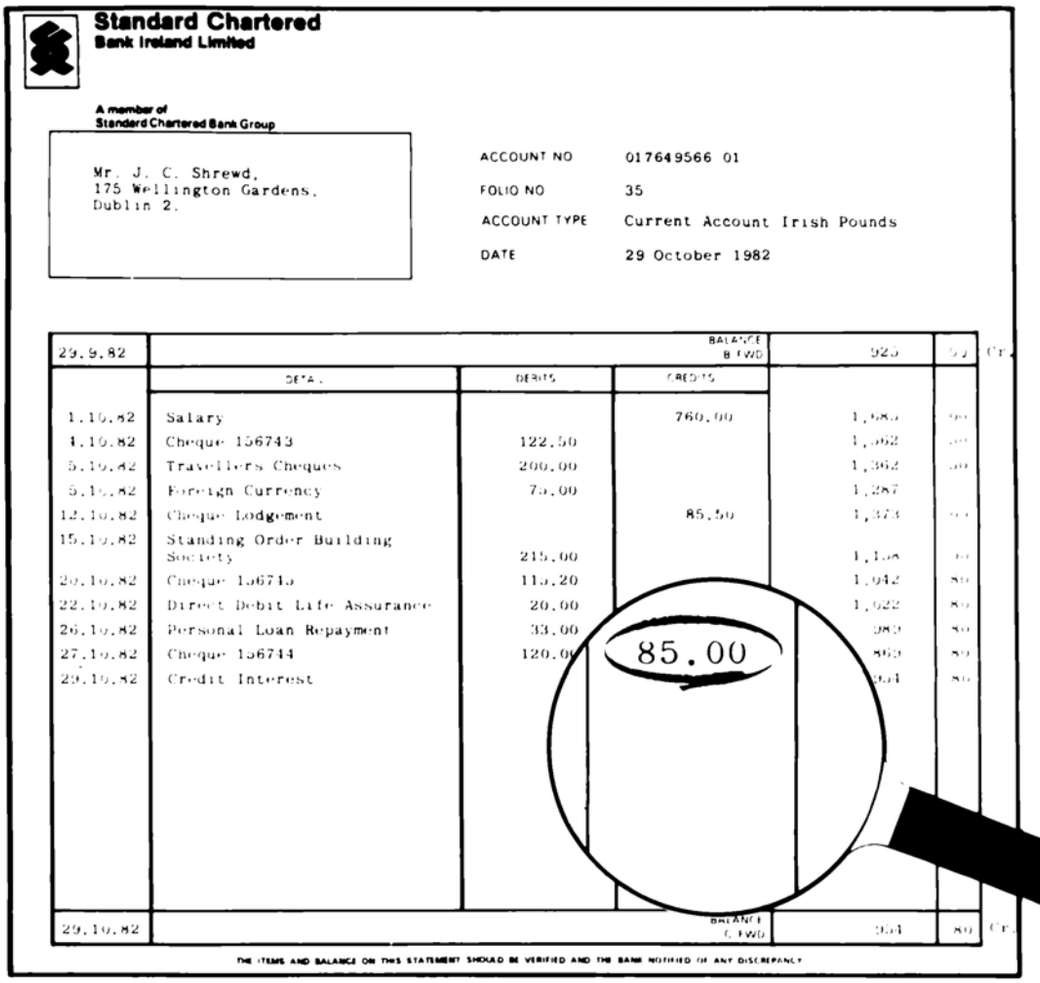

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Confessions in Criminal Cases — A Review

by
Vincent Crowley, Solicitor

IN our courts it occurs frequently that the Prosecution rests its case on confessions obtained from accused persons and this should not obscure the fact that, in addition, confessions are regularly features of cases where there is a plea of guilty entered on behalf of the accused. Generally, a solicitor is instructed in cases only after the accused has been charged and quite often his client will already have made a statement admitting the offence and the solicitor may have no alternative but to advise his client to plead guilty. Where they do not do so they will have to challenge the admissibility and veracity of the confession and hence the importance of the legal principles which apply to confessions generally.

The Legal Principles

The most important and acknowledged principle is that confessions must be voluntary and should be obtained in accordance with the Judges' Rules. The full version of the Judges' Rules as set forth in Appendix 'D' of the "Report of the Committee to recommend certain safeguards for persons in custody and for members of the Garda Siochana" (PRL. 7158, 13th April 1978) are set out as an appendix of this Article. (The "O'Brien Committee" Report.) Secondly, though voluntary, the confession must not have been obtained by a deliberate and conscious violation of constitutional rights save where there are extraordinary excusing circumstances warranting such violation. Where a voluntary confession is obtained contrary to the Judges' Rules or as a result of illegal action it may be admitted at the discretion of the trial judge, which discretion will be exercised having regard to public policy based on a balancing of public interest.

The following is a summary of the Judges' Rules, which are now accepted as part of our law:

1. A person may be questioned provided he has not been charged.
2. As soon as a police officer has reasonable grounds for suspecting that the person being interrogated has committed an offence he should administer a caution.
3. A further caution should be administered when the person is charged.
4. A statement made by a person in custody should be written down at the same time as it is being given, and an opportunity should be afforded to the person for correcting, amending or rejecting the statement.
5. Where there are two persons charged with the same offence and the police officer wishes to draw the attention of one of those charged to a statement by someone else charged with the same offence he should hand him a copy of the other person's statement without saying or doing anything to invite a reply, and a caution should be administered if the person so desires to make a reply.

   Persons other than police officers should comply with these Rules.

Leading Cases

Two major decisions among others which underline these principles are:—

The People (A.G.) -v- O'Brien [1965] IR 142
The People (D.P.P.) -v- Shaw [1982] IR 1

Walsh J. (Supreme Court), in *O'Brien's case* first analysed the second principle that evidence must not have been obtained by a deliberate and conscious violation of a person's constitutional rights unless there are "extraordinary excusing circumstances". This was agreed to by all members of the Court except that the majority preferred not to give examples of such circumstances whereas Walsh J. recited three examples, namely;

(a) the need to prevent an imminent destruction of vital evidence;
or (b) the need to rescue a victim in peril;
or (c) the seizure of evidence obtained in the course of and incidental to a lawful arrest even though the premises on which the arrest is made have been entered without a valid search warrant.

These examples did not purport to be exhaustive and were simply illustrative.

Walsh J. went on to say ([1965] IR at p. 170):—

> "In my view evidence obtained in deliberate conscious breach of the constitutional rights of an accused person should, save in excusable circumstances outlined above, be absolutely inadmissible. It follows therefore that evidence obtained without a deliberate and conscious violation of the accused's rights is not excusable by reason only of the violation of his constitutional right."

The only matter of clear dissent between the members of the Court in *O'Brien's case* was that four of the five-man Court decided that evidence obtained illegally could

be admissible at the discretion of the trial judge whereas the fifth member of the Court took the view that such evidence was always admissible provided it was relevant and probative. These principles were further reiterated by the Supreme Court in *Shaw's case.* However, there was no absolute harmony between the members of that Court with regard to every point that might happen to govern a confession in any given instance. The majority of the five-man Court disagreed with Walsh J. where he stated without qualification that no person may be arrested with or without a warrant for the purpose of interrogation or the securing of evidence from that person. Walsh J. had majority support in saying that a person's statement is to be ruled out as evidence obtained in deliberate and conscious violation of his constitutional rights even though the taker of the statement may not have known that what he was doing was either illegal or unconstitutional. It would require fine legal analysis to reconcile this part of his judgment with the part of his judgment in *O'Brien's case* quoted above. However, in all other respects the members of the Court concurred.

One can only conclude from reading the *O'Brien and Shaw* decisions that an accidental, unintentional infringement of the Constitution may not be sufficient to rule out a statement so that the maxim *'ignorantia juris non excusat'* may no longer apply to this aspect of admissibility. In *The People (D.P.P.) -v- Madden & Ors.* [1977] IR. 336 (S.C.) a factor such as inadvertance was recognised as capable of being one of the "extraordinary excusing circumstances" envisaged in *O'Brien's case.* In the opinion of Griffin J. in *Shaw's case* (with whom the majority agreed) it is a violation of the accused's constitutional rights and *not* the particular act complained of that has to be deliberate and conscious for the purpose of ruling out a statement.

In *Madden's case* Counsel for the accused objected to the admission of the statement of Madden on the ground that it was induced by oppression, prolonged questioning and the abuse of the power conferred on the Gardai by s.52 of the Offences Against the State Act 1939. It was further contended as a ground for excluding the statement that it was taken under circumstances in which the Defendant was unlawfully detained by the Gardai and that the completion of the statement was secured in breach of his constitutional right to liberty. Madden had been arrested at 7.15 a.m. on 19th June, 1975, under Section 30 of the 1939 Act under which Section the lawful period of detention is 48 hours. Accordingly, the time expired at 7.15 a.m. on 21st June, 1975.

A garda officer began taking down the statement at 6.40 a.m. on the 21st June and therefore it was wholly improbable to be completed by 7.15 a.m. and it was in fact not completed until some time afterwards and he was only released at 10 a.m. on the same day (21st June). The Special Criminal Court had ruled that Madden's statement was voluntary and should be admitted in evidence and further had ruled that there had been no deliberate and conscious violation of the accused's constitutional right, but the Court of Criminal Appeal held (per O'Higgins C.J.) that the incriminating written statement which he had made had been completed after the expiration of the period of his lawful detention and while he was being detained unlawfully and without regard to the right to liberty guaranteed to the Defendant by Article 40 of the Constitution and without regard to the state's obligation under that Article to defend and vindicate that right; and that the onus of proving that there had been no deliberate and conscious violation of his constitutional rights had not been discharged by the prosecution. The statement was therefore held inadmissible and the Defendant set free.

The primary requirement, however, is for the prosecution to show that the confession was voluntary and therefore not coerced or otherwise induced but made with the true and free will of its maker. To quote Griffin J in *Shaw's case* [1982] IR at p.60/61

> "It is sufficient to say that the decided cases show that a statement will be excluded as being involuntary if it was wrung from its maker by physical or psychological pressures, by threats or promises made by persons in authority, by the use of drugs, hypnosis, intoxicating drink, by prolonged interrogation or excessive questioning, or by any one of a diversity of methods which have in common the result or the risk that what is tendered as a voluntary statement is not the natural emanation of a rational intellect and free will".

In *The People (D.P.P.) -v- Lynch* [1982] IR 64 where the Defendant had been taken into custody on a Sunday evening and had made a statement at 2 p.m. on Monday afternoon and again at 6 p.m. admitting the murder, the subject of the proposed charge, the conviction by the Central Criminal Court was quashed on Appeal to the Supreme Court. The Supreme Court found that the Defendant had been subjected for almost 22 hours to sustained questioning, never had an opportunity of communicating with his family or friends and had never been permitted to rest or sleep until he made an admission of guilt. The Supreme Court (per O'Higgins C.J.) held that although the accused's admissions of guilt had been voluntary admissions, the trial judge should have excluded them in the exercise of his general discretion since the circumstances in which those admissions were procured had been oppressive and that all that had happened had amounted "to such circumstances of harrassment and oppression as to make it unjust and unfair to admit in evidence anything he said." The Supreme Court added that the jury by an appropriate question ought to have been asked as a question of fact material to the Defence whether the Defendant's evidence that he had been held against his wishes was or was not true.

Another case on confessions is *The People (D.P.P.) -v- McNally and Breathnach* Court of Criminal Appeal: 16th February, 1981). In the case of Bernard McNally, it was accepted that the only evidence against him consisted of verbal admissions which were made after an interview extending over 44 hours interrupted by one night's sleep only. No explanation other than a previous course of conduct was tendered to the Special Criminal Court for the failure of the two garda witnesses directly concerned to make a note of the alleged verbal admissions by the Defendant and to afford to him an opportunity for correcting or rejecting them. The Court of Criminal Appeal was not satisfied that there were any circumstances proved before the Court of trial which would justify the exercise of its discretion in favour of admitting in evidence these verbal statements notwithstanding the breach of the Judges' Rules. The conviction therefore was set aside.

In the case of Osgur Breathnach, the circumstances were that the Defendant had been arrested on 5th April, 1976, at about 1.30 p.m. and brought to the Bridewell Garda Station. There was no evidence that his request for services of a solicitor was in fact complied with and he was held in the Garda Station until 8 p.m. on the 6th April, 1976, and at 5.20 a.m. on the following morning, that is to say the 7th April, 1976, he was interviewed for twenty minutes in a corridor leading to an underground staircase under the Bridewell Courthouse. The Defendant during this period of time made a number of verbal admissions and subsequently a written statement in Irish was taken from him and signed by him purporting to be a confession of involvement in the robbery, the subject of the charge. The Court of Trial had amitted these statements in evidence and held that notwithstanding the request earlier made by the Defendant for the presence of a solicitor that there had not been a deliberate and conscious violation of his constitutional rights by failing to obtain for him the presence or advice of a solicitor, and the statements had been voluntary and made after due caution in each case and were admissible in evidence. The Court of Criminal Appeal held that it would not be open to the Court of Trial to conclude beyond reasonable doubt that the statements were voluntary in the legally accepted meaning of that word or even if they were as to the circumstantial context in which they were made passed the test for basic fairness and held therefore that the Statements should not have been admitted in evidence and set aside the conviction. In its judgment the Court of Criminal Appeal cited *Shaw's case* and approved of the majority judgment of the Supreme Court and quoted particularly the judgment of Griffin J., part of which has already been outlined *supra.*

Conclusion

The conclusion to be reached therefore is that whether or not a confession will be admissible will be judged by the criteria laid down in *O'Brien's* case and *Shaw's* case and that having regard to the constitutional considerations there is unlikely to be any radical change by legislation or otherwise in the foreseeable future.

APPENDIX

THE JUDGES' RULES

(as set forth in Appendix 'D' to the O'Briain Committee Report (13th April, 1978).)

1. When a police officer is endeavouring to discover the author of a crime there is no objection to his putting questions in respect thereof to any person or persons, whether suspected or not, from whom he thinks that useful information may be obtained.

2. Whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions as the case may be.

3. Persons in custody should not be questioned without the usual caution being first administered.

4. If the prisoner wishes to volunteer any statement, the usual caution should be administered. It is desirable that the last two words of such caution should be omitted, and that the caution should end with the words "be given in evidence".

5. The caution to be administered to a prisoner when he is formally charged should therefore be in the following words: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence". Care should be taken to avoid the suggestion that his answers can only be used in evidence against him, as this may prevent an innocent person making a statement which might assist to clear him of the charge.

6. A statement made by a prisoner before there is time to caution him is not rendered admissible in evidence merely because no caution has been given, but in such a case he should be cautioned as soon as possible.

7. A prisoner making a voluntary statement must not be cross-examined, and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said. For instance, if he has mentioned an hour without saying whether it was morning or evening, or has given a day of the week and day of the month which do not agree, or has not made it clear to what individual or what place he intended to refer in some part of his statement, he may be questioned sufficiently to clear up the point.

8. When two or more persons are charged with the same offence and their statements are taken separately, the police should not read these statements to the other persons charged, but each of such persons should be given by the police a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered.

9. Any statement made in accordance with the above rules should, whenever possible, be taken down in writing and signed by the person making it after it has been read to him and he has been invited to make any corrections he may wish. □

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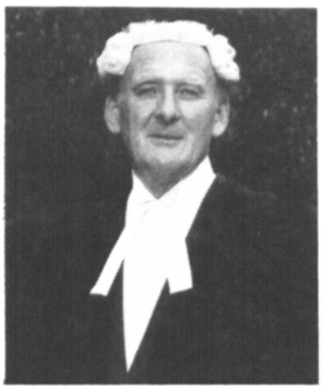

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27th January, 1984

A Regional Dinner of the International Bar Association will be held at the Law Society, Blackhall Place, on Friday, January 27th, 1984, at 7.30 p.m. for 8 p.m.

Sir Desmond Heap, founder of the Section on General Practice of the International Bar Association and a former President of the Law Society of England and Wales, will be the guest speaker.

A sizeable number of Irish solicitors are members of the International Bar Association and have attended recent conferences of the IBA or its Sections in Berlin, Delhi, Rome and Toronto. The next IBA Biennial meeting will be held in Vienna between the 2nd and 7th September, 1984. It is hoped to make group travel arrangements for the Irish members travelling to Vienna and details of this will be circulated to members of the Law Society shortly.

All Irish members of the International Bar Association and intending members are invited to attend the Regional Dinner. Reservations should be made with John Buckley, Solicitor, Dollard House, Wellington Quay, Dublin, 2. □

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BOOK REVIEW

SALE OF GOODS AND SUPPLY OF SERVICES. A guide to the Legislation. By Vincent Grogan, Thelma King and Edward J. Donelan. The Incorporated Law Society of Ireland. xxii and 133 pp. £6.00.

This book is the second guide to be published on those two major pieces of legislation to protect the consumer, the Consumer Information Act, 1978, and the Sale of Goods and Supply of Services Act, 1980, which followed the Whincup Report of 1973 and the recommendations of the National Consumer Advisory Council a year later. The first set of guides (there was one on each Act) was published quite some time ago by the Office of Consumer Affairs.

The book, a paperback, is not long, being only 128 pages in length or perhaps one should say 196 paragraphs because the authors have placed the sections of the Acts in the order they hope will seem to be the most logical and have numbered the text in paragraphs for easy reference. It is described in the Foreword as "an annotated consolidation of the statute law". Although the Guide is a short work, tables of contents, statutes and cases, and an Index have been added which make it easier to use.

The task which the authors have given themselves of compressing the text of a great amount of legislation and providing a commentary in the small space of 128 pages is an unenviable one. The way in which they deal with the problem is not to provide a commentary on all the sections quoted. They have taken the view that as there is no shortage of books on the 1893 Act unamended sections of the 1893 Act are, in general, allowed to speak for themselves. This approach should not prove to be a hindrance to the practitioner who has a well-stocked library but may not find sympathy among students.

The book commences with an examination of the interpretation sections of the 1893 Act and the 1980 Act. Here, the authors give the text of the provisions concerning two new concepts introduced by the 1980 Act, namely, "dealing as consumer" and the test of fairness and reasonableness. A useful list, which indicates careful analysis of the 1980 Act, is provided (at p.5) of places where the term "dealing as consumer" appears but perhaps some specific warning as to the importance of these provisions ought to have been given, say, by means of a historical introduction at the beginning of the book. Included, also, are two further lists: when Orders may be made by the Minister (at p.9); when, for the first time, criminal liability is imposed for non-compliance with the Act's provisions (at p.10).

In chapter 2 the reader is introduced to the amendments made to the 1893 Act by the 1980 Act. Every such amendment, one is informed, (at p.11), "is carried out by the substitution, for the original section, of a new section bearing the same number." The substitutions are summarised in a table on this page. While chapter 1 incorporated Part I of the 1980 Act and most of the provisions of Part VI of the 1893 Act, this chapter sets out the text of Parts I to V of the 1893 Act as amended by Part II of the 1980 Act, and follows the order of sections in the 1893 Act.

The discussion of the buyer's right to reject defective goods at pages 15 to 16 is instructive but then the reader should turn immediately to the text of section 18 rule 1 of the 1893 Act at page 32 and the treatment of sections 34 and 35, as substituted, of the 1893 Act at pages 38 to 39 to understand clearly what is meant by "acceptance". This is something of which the authors could perhaps have notified the reader. The authors give what could be useful practical advice at page 18 on the relationship between section 13 of the 1893 Act, as substituted, and section 17 of the Merchandise Marks Act, 1887. Section 14 of the 1893 Act, as substituted, now contains a definition of "merchantable quality" and the authors' detailed analysis of the definition merits careful study. Sections 11 to 19 and 22 to 24 of the 1980 Act are entirely new. The authors' comments on section 11 (the text of which may be read with profit at the same time as the text of section 22 of the 1980 Act, which by substituting a new section 55 in the 1893 Act, severely restricts the seller's powers of exclusion) will be of particular interest to practitioners, but they are not really sufficient for a draftsman of conditions of sale trying to ensure that his conditions will not be in breach of the Act. There is a long discussion of section 13 (at pages 25 to 26) but, unfortunately, the authors do not comment on section 13(7) which is an important example of the abandonment of the doctrine of privity of contract. The discussion by the authors of the legal status of manufacturers' guarantees in their treatment of such documents was interesting but perhaps a little too theoretical for a work of this type.

As the authors took the view that commentary was not necessary in general on unamended sections of the 1893 Act in the next fifteen pages the text of the provisions of Parts II to V of the 1893 Act is set out with hardly any comment save for that on sections 35 and 53, as substituted by the 1980 Act. This lack of comment may not find favour with all readers but can be explained by the fact, as already indicated, that it was part of the authors' overall plan in their work. It should be said, however, concerning these pages (pages 31 to 46 inclusive) that although a reference was made at the foot of the text of section 18 (at page 33) to *In re. Interview Ltd.* [1975] I.R. 382 there was no reference to later Irish and English cases concerning retention of title clauses. Surely, also, the case of *Flynn -v- Mackin and Mahon* [1974] I.R. 101 deserved a mention.

This pattern was not followed in Chapter 3 on Hire-Purchase and Letting of Goods where, in addition to the text of the relevant legislation, there are plentiful references to Irish as well as English cases. *McDonald -v- Bowmaker (Ireland) Ltd.* [1950] 84 I.L.T.R. 54 (officially reported at [1949] I.R. 317) was referred to with approval by Lord Justice Willmer in *Mercantile Credit Co. Ltd. -v- Cross* [1965] I All E.R. 577, C.A., but the authors, surprisingly, omitted this fact. Not one of the cases referred to was discussed. This is in contrast to the treatment given to the chapter on Sale of Goods where some of the cases cited were discussed. In this chapter the reader will find commentary, albeit somewhat brief in places, on sections of the Hire-Purchase Acts whether or not amended by the 1980 Act. In this chapter, also, there is an interesting comment on the differences between the definition in the Hire Purchase Acts of "hire-purchase agreement" and of "credit sale agreement". A reference to the legislation to which credit-sale agreements are subject would have been appropriate but none was given. However, the regulation by statute of hiring agreements (as distinct from hire-purchase agreements) is clarified. An attractive feature of this chapter — a feature

noticeable elsewhere in the work — is that much practical advice is given to the reader.

In chapter 4 the text of Part IV of the 1980 Act is given and there is an interesting discussion of section 39 which implies terms as to quality of service. Chapter 5 covers Misrepresentation and there is a detailed analysis of the meaning of sections 44 to 46 of the 1980 Act. Chapter 6 deals with Part VI of the 1980 Act but the lack of treatment of section 47 on unsolicited goods was disappointing.

While the authors made no criticism of the legislation in previous chapters they were, in chapter 7, critical of the method adopted in the Consumer Information Act, 1978, of merely amending and replacing certain sections of the Merchandise Marks Act, 1887, and said that it was unfortunate that the example in the Trade Descriptions Act, 1968 (U.K.) of replacing and modernising the 1887 Act was not followed. The authors' comments on the sections of the 1978 Act are interesting and informative. For example, they point out that the defences prescribed by section 22 are not available for offences under section 8 concerning misleading advertisements and suggest that publishers of advertising materials as well as persons requesting publication may be liable to prosecution under the Act. The authors refer readers to the equivalent provisions, if any exist, in the U.K. Act of 1968 and point out the differences between the two Acts. Two final points concerning this chapter: firstly, your reviewer found the major part of the discussion on the Director of Consumer Affairs, the Office and staff as being out of place in this work. Secondly, although the authors refer to the important case of *Tesco Supermarkets Ltd. -v- Nattrass* [1972] A.C. 153 and discuss its facts and explain the decision, no effort was made to assess the effect of the case.

Although this is a well-produced book your reviewer had some misgivings concerning presentation: Page 6: In their comment on section 3 of the 1980 Act the authors refer to paragraph (a). They are, of course, referring to subsection (1) (a) of section 3; Page 19: In the comment on section 14 of the 1893 Act, as substituted, it is stated that twenty-three words (which are quoted) do not appear in the equivalent definition of "merchantable quality" in section 7 of the Supply of Goods (Implied Terms) Act, 1973 (U.K.). The definition in section 14 has only three additional words (viz. "and as durable,"); Page 68: In line 9 of the commentary read "section 6 of the 1946 Act" for "section 6 of the 1949 Act"; Page 106: The effect of section 4(2) of the 1978 Act is to confine section 2(2) of the 1887 Act, insofar as it relates to trade descriptions, to sales in the course of trade, business or profession and not trade, business or manufacture as stated by the authors; page 125: The authors believe that the requirements of section 22(2) must be followed in order to rely on any of the defences in section 22(1). This is not what is stated in the Act. The requirements of subsection (2) need only be followed where the defence involves the allegation that the commission of the offence was due to the act or default of another person or to reliance on information supplied by another person. One wonders why the citations of the Irish Law Times Reports are given without the years of the Volumes in chapter 3 and with the years in chapter 2. This is inconsistent and is repeated in the Table of Cases; The commentaries at the beginning of each chapter are in ordinary type as are the texts of sections quoted. In chapter 7 commentary is given at all times at the beginning of a section or under a heading in similar ordinary type. This is unfortunate as readers who wish to use this chapter for quick commentary on the 1978 Act may miss the authors' comments. It would have been preferable, for this reason, to give the latter comments in the same small print used for commentaries after sections.

The approach of the authors throughout the book (with the exception of the chapter on Hire-Purchase and Letting of Goods) is to refer to analogous provisions of United Kingdom statutes so as to facilitate reference to English interpretation and commentaries and to comment on the differences between the British definitions and those of the Irish legislation. The commentary does not, therefore, purport to be exhaustive and readers will have to be prepared to refer to larger tomes from the United Kingdom for more detailed treatment.

This book is, nevertheless, a welcome addition to the few business law books already available in this jurisdiction. It will be found useful primarily by lawyers in practice, but also by law students and all concerned with consumer affairs. We should be especially grateful to the authors for guiding us through this mass of legislation and to the Law Society for publishing such an inexpensive and handy pocket-size reference work. □

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6. **REGISTERED OWNER:** Patrick Oliver Kelly; Folio No.: 249L; Lands: Baltray; Area: — ; County: **LOUTH.**
7. **REGISTERED OWNER:** John McLoughlin (deceased); Folio No.: 806 and 9728; Lands: (1) Bawnmore South, (2) Ballybahallagh; Area: (1) 54a. 2r. 4½p.; (2) 6a. 1r. 38p.; County: **CORK.**
8. **REGISTERED OWNER:** James O'Connor; Folio NO.: 8710F; Lands: (1) Effin, (2) Foxhall East; Area: (1) 54.463 acres, (2) 9.481 acres; County: **LIMERICK.**
9. **REGISTERED OWNER:** Christopher McNamara; Folio No.: 5300 now closed to 25538; Lands: (1) Newcastle, (2) Singland; Area: (1) 8a. 3r. 34p., (2) 37a. 0r. 4p.; County: **LIMERICK.**
10. **REGISTERED OWNER:** Leslie McNiece; Folio No.: 11476; Lands: Tomogrow (part); Area: 16a. 2r. 0p.; County: **MONAGHAN.**
11. **REGISTERED OWNER:** Sean Thomas Kelleher of Leiter, Ballieborough, Co. Cavan; Folio No.: 2179F; Lands: — ; Area: — ; County: **CAVAN.**
12. **REGISTERED OWNER:** Arthur J. Richardson; Folio No.: 7222F; Lands: Gurteenroe; Area: 0a. 2r. 10p.; County: **CORK.**
13. **REGISTERED OWNER:** George Lundy; Folio No.: 16519; Lands: (1) Greaghlatacapple, (2) Greaghlatacapple, (3) Greaghlatacapple; Area: (1) 12a. 2r. 30p., (2) 11a. 2r. 37p., (3) 4a. 2r. 29p.; County: **MONAGHAN.**
14. **REGISTERED OWNER:** John Robert Browne; Folio No.: 8042; Lands: Saintjohns; Area: 42.332 acres; County: **KILDARE.**
15. **REGISTERED OWNER:** Christopher McNamara; Folio No.: 13137R; Lands: Singland; Area: 1a. 0r. 0p.; County: **LIMERICK.**
16. **REGISTERED OWNER:** James Sullivan (Junior) deceased; Folio No.: 467 and 2495; Lands: (1) Anveyerg (part), (2) Anveyerg (part); Area: (1) 13a. 2r. 3p., (2) 6a. 1r. 37p.; County: **MONAGHAN.**
17. **REGISTERED OWNER:** Patrick Garvey; Folio No.: 1212F; Lands: (1) Beagh, (2) Beagh, (3) Beagh, (4) Beagh, (5) Beagh; Area: (1) 13a. 1r. 30p, (2) 20a. 3r. 4p., (3) 10a. 1r. 20p., (4) 6a. 1r. 10p., (5) 5a. 2r. 20p., (6) 2a. 0r. 22p., (7) 1a. 2r. 34p., (8) 1a. 1r. 20p.; County: **MONAGHAN.**
18. **REGISTERED OWNER:** William George Hussey; Folio No.: 5765; Lands: Duffsfarm; Area: 0a. 3r. 8p.; County: **LOUTH.**
19. **REGISTERED OWNER:** Edward and Helen Fitzgerald, 392 Tirellan Heights, Headford Road, Galway; Folio No.: 16513F; Lands: — ; Area: — ; County: **GALWAY.**
20. **REGISTERED OWNER:** Daniel O'Connor; Folio No.: 26345; Lands: Ballingarry Upper; Area: 0a. 2r. 33p.; County: **TIPPERARY.**
21. **REGISTERED OWNER:** Patrick Molloy, Rosgallive, Rosturk, Westport, Co. Mayo; Folio No.: 8227; Lands: (1) Rosgalliv, (2) Rosgalliv, (3) Bunnahowna, (4) Glennamaddoo, (5) Rosturk, (6) Rosturk, (7) Island of Inishcoragh; Area: (1) 8a. 0r. 19p., (2) 252a. 2r. 14p., (3) 197a. 3r. 33p., (4) 322a. 2r. 33p., (5) 235a. 2r. 33p., (6) 235a. 2r. 13p., (7) 8a., 0r. 10p.; County: **MAYO.**
22. **REGISTERED OWNER:** Hugh Slevin, Ballingarby, Moate; Folio No.: 10565; Lands: Aganargit; Area: 4a. 0r. 10p.; County: **WESTMEATH.**
23. **REGISTERED OWNER:** Denis Gleeson; Folio No. 6871; Lands: (1) Garrymaddock, (2) Garrymaddock; Area: (1) 26a. 1r. 36p., (2) 12a. 3r. 0p.; County: **QUEENS.**
24. **REGISTERED OWNER:** Thomas G. Mullins; Folio No.: 1946F; Lands: Ballintubbrid West; Area: 0a. 3r. 32p.; County: **CORK.**
25. **REGISTERED OWNER:** Sean O'Callaghan; Folio No.: 12592F; Lands: Part of the Townland of Ballinaspigmore; Folio No.: 12592F; County: **CORK.**
26. **REGISTERED OWNER:** Julie Doyle; Folio No.: 11429; Lands: Rostyduff Lower; Area: — ; County: **WICKLOW.**
27. **REGISTERED OWNER:** Denis Cahalan (Junior) Ballycoony, Kilnadeema, Loughrea, County Galway; Folio No.: 19908; Lands: (1) Ballycoony (part), (2) Coppanagh (part), (3) Boggaun; Area: (1) 45a. 2r. 0p., (2) 5a. 2r. 25p., (3) 0a. 0r. 18p.; County: **GALWAY.**
28. **REGISTERED OWNER:** Alice Rafferty (Deceased), New Street, Killaloe, County Clare; Folio No.: 15519; Lands: Knockyclovaun; Area: 0a. 0r. 14p.; County: **CLARE.**

Lost Wills

BURKE, Margaret. Would anybody who knows the whereabouts of the original Will of Margaret Burke of 13 Martin Street, or 74 South Circular Road, Dublin 8, please telephone 783691.

LYNCH, Bridget, deceased. Will anyone knowing the whereabouts of the Last Will and Testament of the late Bridget Lynch, late of Ballyneary, Butlersbridge, Co. Cavan, who died in June 1979, please contact Peter J. Cusack & Co., Solicitors, Orchard Road, Clondalkin, Co. Dublin. Tel. No. (01) 517864.

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INCORPORATED LAW SOCIETY OF IRELAND

GAZETTE

Vol. 77 No. 10 December 1983

The President 1983/84

Frank O'Donnell, Solicitor, B.C.L., LL.M., has been elected President of the Incorporated Law Society of Ireland, for the year 1983/1984. Mr. O'Donnell is a Partner in the firm of Bell Branigan O'Donnell & O'Brien, Solicitors, 22, Lower Baggot Street, Dublin 2.

Mr. O'Donnell is originally from Burtonport, Co. Donegal, and is the son of the late Patrick O'Donnell, Solicitor, and former President of the Incorporated Law Society of Ireland, and the late Mrs. Josie O'Donnell.

He was educated at Meenbanad National School, Co. Donegal, St. Vincent's College, Castleknock, Co. Dublin, University College, Dublin, and the Incorporated Law Society of Ireland.

Mr. O'Donnell attended Harvard Law School on a Scholarship, where he graduated with an LL.M. in 1966, having written his thesis in International Law, "On the Court Enforcement of Foreign Arbitration Awards in Britain".

Following his graduation in the United States Mr. O'Donnell worked as an Attorney, with the law firm of Messrs. Lord Bissel & Brook, Chicago, U.S.A.

Mr. O'Donnell has been Chairman of the Registrar's and Public Relations Committees of the Law Society, and of the Committee that sponsored "Wills Week".

He has been a Member of the Criminal Injuries Compensation Tribunal since its inception.

Mr. O'Donnell is Solicitor to the Attorney General, Peter Sutherland.

He is married to Dr. Maeve O'Donnell and they have five children.

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INCORPORATED LAW SOCIETY OF IRELAND

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Comment . . .

. . . The Legislation Log-Jam

ONE of the more worrying aspects of our legislative process is the long delay which takes place between the initiation of legislation and its implementation. While there have been welcome examples of urgently needed corrective legislation being enacted with commendable speed, these are far from the norm.

The primary fault is that of our legislators, not merely because our Parliament has so few sitting days, but also because the members seem reluctant to devote much of the limited parliamentary time which is available to the detailed consideration of legislation at the committee stage of bills. Instead they prefer to concentrate on the broader areas of second readings of bills, departmental estimates and budget debates.

It is notorious that there is always a queue of bills waiting to obtain parliamentary time. In such a situation it would be difficult to blame the departments responsible for the promotion of legislation for the length of time which such legislation takes to reach the statute book. If there is little prospect of a bill being introduced in the foreseeable future, then the work of consideration will naturally expand. That there are dangers in over-considering draft legislation has recently been highlighted by the inclusion of the unnecessary definition of mortgage as "including a charge" in the Building Societies Act, 1976. The inclusion of these words led to the refusal by Building Societies to lend on the security of lands which indemnified others against modest leasehold rents, a view which was upheld by the High Court in the case of *Rafferty -v- Crowley,* High Court, Murphy J. 24.6.83 — unreported, and necessitated the rectifying Building Societies Act, 1983.

The process whereby the "heads" of a bill are circulated to all government departments which may have an interest in the matters covered by the proposed bill may slow down the process considerably, particularly if there are inter-departmental differences of opinion, as reportedly there are in relation to the enactment into Irish legislation of the United Nations Convention on Human Rights.

As a result of these various influences we seem to have no regular programme of updating legislation. The penalties imposed by statutes have become totally eroded by inflation, as have any other monetary limits imposed.

Consolidation of "live" statutes has only been attempted in a limited number of areas, such as that of tax and social welfare. It is urgently needed in many more; the areas of licensing, planning, company law and landlord and tenant come readily to mind. If some of the resources currently devoted to the Statute Law Reform Office or the Law Reform Commission could be devoted to a regular review and consolidation of our laws, then the burden which lawyers presently bear of trying to identify the precise statutory provisions which are in force on any particular matter would be lightened. □

The Sex of a Parent as a Factor in Custody Disputes

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

LITTLE has been written in this country on the approach of the courts to the sex of the parent as a factor in determining the custody of children. Yet the courts have shown considerable interest in this theme. In this article we will examine briefly what the various Judges have said on this question and consider possible future developments in the law.

The *Guardianship of Infants Act 1964*[1] has nothing directly to say on this question. Of course, section 6(1) of the Act provides that "the father and mother of an infant shall be guardians of the infant jointly", thereby giving statutory expression[2] to the principle of equality recognised in the *Tilson*[3] case fourteen years previously as being required by the Constitution. The Act did not go further in attempting to specify the circumstances in which custody of a child would be awarded to the father or the mother. Section 3 merely provides in the most general terms that, in determining the question of custody, the court is to "regard the welfare of the infant as the first and paramount consideration". "Welfare" in this context comprises the religious, moral, intellectual, physical and social welfare of the child[4].

In determining the welfare of children, the courts have frequently addressed the competing claims of spouses in terms of the sex of either claimant. In the Supreme Court decision of *B. -v- B.*[5] in 1970, Budd J. said of a six-year-old boy:

> "He is of an age when he requires the care that a mother can give to his physical needs, and he needs her maternal affection."

Budd J. agreed with the view of the trial judge, Kenny J., that:

> "Young children are nearer to their mother than their father, and that they need a mother's care and affection. In my mind, the daughter [aged 8] is still of such an age that she needs maternal care; more particularly so because she is a girl. I regard the importance of a young girl being with her mother as far outweighing such advantages as there are in her remaining in a particular house such as the family home . . . ."[6]

In considering the welfare of the girl's brother, who was just under ten years old, Budd J. felt that:

> "it is a matter that should carry weight that he is now coming to the age where a boy tends to turn to his father for help and guidance in matters which perplex and worry a young lad."[7]

FitzGerald J. expressed his understanding of the law on this question as follows:

> "In normal circumstances where a husband and wife have parted but are equally suitable to have custody of a child or children, it seems to be generally accepted that children of tender years should be left in the custody of the mother while they are of an age where they naturally turn to their mother for the care and attention which she naturally provides for them, and which the father cannot so readily supply. It also appears to have been generally accepted that as time passes the child's demands upon its mother lessen somewhat with its development, and that the father is called upon to concern himself increasingly with the day-to-day problems of his son or daughter and has a capacity to cope with these problems. There is no hard and fast rule as to the age at which a court should consider the child sufficiently advanced to require the custody to be transferred from the mother to the father. There is a further matter which, in my opinion, is highly relevant and that is the sex of the child. While not wishing to lay down any hard and fast rule, I would think that in the case of a boy it is for his benefit, assuming that he is of normal health and mental development, that he should remain in the custody of his mother until he has reached the age of about eight years. In the case of a girl, I consider that it is not proper or for her welfare that she should be deprived of day-to-day contact with her mother at anything less than twelve years of age."[8]

In *J.J.W. -v- B.M.W.*[9], the following year, the trial judge, Kenny J. began his legal analysis by noting that [n]either the father nor the mother has any superior or special right of custody". But shortly afterwards he expressed a view of suitability based on the sex of the parent that may appear difficult to reconcile with this neutral introduction. The children in the case were all girls, aged 9, 7 and 3, respectively. Kenny J. stated:

> "What factors favour the wife? The ages of the

> children strongly favour her case because mothers are very much closer in sympathy and affection to young children than fathers are. His (*sic.*) role becomes much more important when the children are over 12. As all the children are girls this also supports the mother's case because fathers find it difficult to understand the minds and the physical and psychological needs of young girls. This intimate, intuitive relationship between mothers and young girls has assumed a particular importance today when there is a television in almost every household on which matters in relation to sex (which would have been unmentionable twenty-five years ago) are discussed openly and without restraint of any kind. Although some of us may deplore it and indeed, find much of it in appalling taste, we have to educate children who live with it and who are profoundly shaped by it. Therefore children must be given sex education and this should be done primarily by a parent. Fathers and grand-parents cannot give this instruction."[10]

Kenny J. awarded custody of the children to the mother. The several other considerations involved in deciding whether to make this order are not of present relevance. The Supreme Court reversed Kenny J. — again for reasons that need not now be considered. It is worth noting, however, that FitzGerald J. "readily accept[ed] that children of tender age, and particularly girls, would, other things being equal, be better in the custody of their mother . . . ."[11]

In *E.K. -v- M.K.*[12], in 1974, Kenny J. stated of a girl aged 3½ years that:

> "it is notorious that children of that age are much closer to and more dependent on their mothers than on their father."[13]

In Kenny J.'s view, "the same considerations of emotional attachment and dependence"[14] applied to a boy 5½ years old. He observed that:

> "fathers are ill qualified to look after children who are 5 and 3".[15]

Kenny J. awarded custody of the children to the mother — again after taking into account other considerations not relevant to the present article.

The Supreme Court reversed. Walsh J. noted that the children were:

> "at an age when their relationship with their mother is a very close one and if all other things were equal there could be no question that in a choice between a father and mother children of this age should be given into the custody of their mother. However, other things are not equal but even when they are not equal a removal of the children from the custody of their mother at such an age would be justified only when it has been found that the mother has been so greatly wanting in her duty to the children that the removal would be warranted."[16]

Later in his judgment, Walsh J. observed:

> "The very fact that it is widely accepted, as I myself accept, that the best place for young children of this age is with their mother is based upon the understanding and assumption that the mother is constantly to hand to care for the children if they should wake at night or require the many small attentions which children of this very tender age require."[17]

He noted that:

> "It is also mentioned that because the little girl suffers from a skin ailment which requires constant application of ointment that somebody should always be on hand to do this and that the mother does it effectively at the moment. So far as the medication or the application of medication is concerned it appears to me that the husband is sufficiently well-to-do to provide if necessary a properly trained children's nurse to look after his children."[18]

Budd J. said that he thought it:

> "true to say that if there is no great difference between the conduct of the parents the custody of very young children is usually given to the mother . . . ."

Budd J.'s slightly more restrictive statement later in his judgment should be noted:

> ". . . . I accept the position that other things being *equal* the custody and control of very young children at any rate is normally given to the mother." (Emphasis added.)

In the more recent decision of *Mac D. -v- Mac D.*[19], in 1979 the Supreme Court returned to the theme. Henchy J. expressed the following criterion:

> "In the case of very young children, having regard to ties of nature, the person *prima facie* entitled to their custody, where the parents are estranged, is the mother, for by reason of her motherhood she will usually be the person primarily and uniquely capable of ministering to their welfare. If the case is being made that by reason of her character, her conduct, or any other circumstances, she should be held to be disentitled to the custody, the onus of proof of that disentitlement should lie on the person making that case."[20]

Also worthy of note are Henchy J.'s observations that the children in the case had:

> "a daily need of their parents, especially their mother . . . ."[21]; that "custody with the mother is more likely to promote the physical and social welfare of the children . . . ."[22] and that "so long as she is ready as a loving and caring mother to do her best to see to the [moral and religious] welfare [of the children], the obvious need of these young children for her as a mother should weigh heavily in the balance in favour of her claim to be given custody."[23]

Kenny J. spelt out his approach in unambiguous terms:

> "The principal matter which must govern the approach to this case is the youth of the children (6½ and 4½). Young children have a much greater emotional need of their mother than they have of their father who, when they are young, seems to them to be a somewhat remote figure. A mother has an instinctive understanding of children's minds and needs. She provides warmth, visible signs of affection, love, a feeling of security, a last refuge in times of trouble and patience in listening to their petty complaints. The feeling that their mother is always available at home is an important element in the emotional life of a young child: from this comes confidence and courage to face the trials which life presents to a young child.
>
> In every case in which young children are involved, the factors I have mentioned create a strong *prima facie* case for giving them into the custody of their mother. The case may of course be rebutted if it is shown that the mother is an unfit person to have them in her custody. She may be promiscuous or addicted to alcohol or may be indifferent to the children (this last mentioned matter does occur in rare cases)".[24]

Griffin J. (dissenting) expressed himself less fully on this question. He said that he "would accept without question that, all things being equal, when parents are estranged the custody of young children should be given to their mother"[25]; but he pointed out immediately afterwards that "each case must depend on its own particular facts . . . ."[26]

He considered that:

> "Ordinarily the interests of children of tender years would be best served in the custody of their mother, and unless there are features in this case which permit a departure from the normal position, the custody should be awarded to the mother."[27]

Preference for the Mother

This substantial body of case law indicates that the Supreme Court appears at present to be satisfied that, where young children are concerned, the mother is the appropriate custodian unless countervailing considerations require otherwise. As we have seen, Judges have differed somewhat in their articulation of the precise weight to be given to this assumption. It has been cast in terms of a *"prima facie"* rule, or "a strong *prima facie* rule" the onus of proof of disentitlement lying on the person who makes that case. The preference for the mother may arise in cases where "all things are otherwise equal" or, more generously, if there is "no great difference between the conduct of the parents". Proof of disentitlement may be through any relevant evidence or (in Kenny J.'s view, expressed in *MacD. -v- MacD.*[28]), only by proof that the mother is "an unfit person" to have custody by reason of promiscuity, addiction to alchohol or indifference to the children.

It would also seem fair to say that the Judges evince a view of differences in parental functions between fathers and mothers. Fathers — especially of young children — tend to be regarded by the Court as remote figures in their children's lives; in contrast, mothers provide warmth, understanding and intimancy in responding to their children's "petty complaints".[29] The administration of medicine and telling the facts of life to girls are, in the Court's eyes, tasks for mothers rather than fathers.

Of course it can be argued that the Court is only responding to actual realities in family life. This may be so, but the extracts from the several judgments that have been set out above appear to make it clear that the Judges have a perception of "motherhood" as a discrete and specific concept, identifiably different in its functions from that of "fatherhood"; mothers *do* a wide variety of tasks and *are* a certain type of person *because* they are mothers; conversely fathers *do not do* several tasks and *are not* a certain type of person by reason only of their fatherhood.

This view of parenting is likely to fall foul of the charge of sexism, in implying that parents, by reason only of their particular sex, have certain differences in their response to their children[30] and have separate functions regading their upbringing. It may well be only a matter of time before the constitutionality of this approach is challenged on the basis that it offends against the guarantee of equal protection in Article 40.1, or against the constitutional

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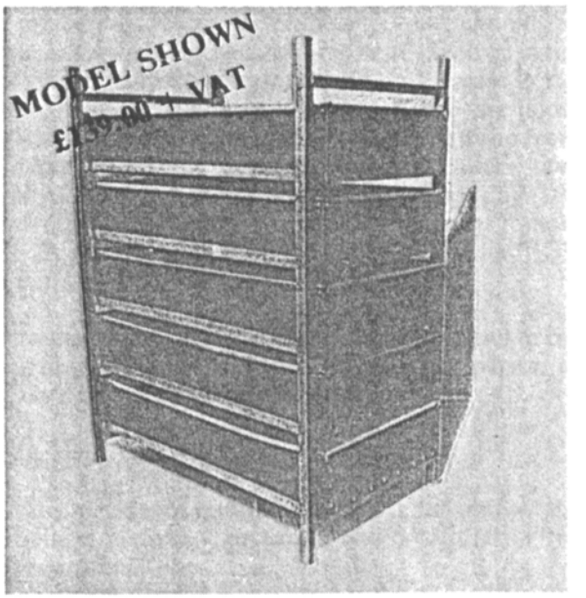

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rights of parents under Articles 41 and 42 (and arguably Article 40.3) to be permitted to rear their children.[31]

How the Court would respond to such a challenge is not clear. There is reason to believe that, at present at all events, it would not look upon it with favour. In *de Burca -v- Attorney General*[32], where the Supreme Court struck down jury legislation that included distinctions based on sex, Mr. Justice Walsh said that:

> "There can be little doubt that the Oireachtas could validly enact statutory provisions which could have due regard, within the provisions of Article 40, to differences of capacity both physical and moral and of social function in so far as jury service is concerned. For example, it could provide that all mothers with young children could be exempt from jury service. On virtually the same considerations, it could provide that all widowers, husbands with invalid wives, and husbands deserted by their wives would be entitled to a similar exemption if they were looking after their young children. It might also provide exemptions for the proprietors of one-man businesses who have no assistance, whether the proprietors be men or women. It could provide that certain occupations, such as a general practitioner in the medical profession (whether man or woman), be exempt because of the importance of the social function fulfilled by persons of such occupation.
>
> However, the provision made in the Act of 1927, is undisguisedly discriminatory on the ground of sex only. It would not be competent for the Oireachtas to legislate on the basis that women, by reason only of their sex, are physically or morally incapable of serving and acting as jurors. The statutory provision does not seek to make any distinction between the different functions that women may fulfil and it does not seek to justify the discrimination on the basis of any social function. It simply lumps together half of the members of the adult population, most of whom have only one thing in common, namely, their sex. In my view, it is not open to the State to discriminate in its enactments between the persons who are subject to its laws solely upon the ground of the sex of those persons. If a reference is to be made to the sex of a person, then the purpose of the law that makes such a discrimination should be to deal with some physical or moral capacity or social function that is related exclusively or very largely to that sex only."[33]

The words "very largely" would appear to permit legislation reinforcing concepts of "proper" sex roles. The concept of "social function", of which the Constitution speaks would appear to be capable of a very wide range of interpretation. Whether, therefore, the Court in future decisions will accept the perpetuation of sexual stereotypes on the basis of differing social functions remains to be seen. The reference in Mr. Justice Walsh's judgment to legislation exempting "*all* mothers with young children"[34] but the more qualified reference to fathers in a similar position would appear to suggest a tolerance of the concept of motherhood as a social function, in contrast to a sex-neutral concept of parenthood.[35] In the specific context of custody of young children this probably means that the Court would not regard its present approach as raising a constitutional issue.

In predicting future developments one should be realistic: with young fathers now far more involved in the upbringing of their children and with the increase in the number of married women working outside the home there is a strong likelihood of a gradual shift away from the rather stratified approach that the courts have generally favoured up to now. A similar trend is already apparent in other countries[36] but it is of interest to note that in England as late as 1977, in *Re K. (Minors)*[37] Sir John Pennycuick stated that:

> "the mother . . . ., not as a matter of law but in the ordinary course of nature, is the right person to have charge of young children".

In the same case, Stamp, L. J. referred to:

> "the dictates of nature which make the mother the natural guardian, protector and comforter of the very young".[38]

Summarising the position in England in 1981, Brenda Hoggett said that:

> "In practice . . . . the court may rely rather heavily on certain stereotyped ideas of a child's emotional needs. Here . . . . the mother enjoys a built-in advantage, for the courts tend to assume that the natural mother is best for a young child, irrespective of the real strength of the bond between them."[39]

It seems therefore that the Irish courts have been by no means acting in isolation in their approach to this question. Whether in coming years they will change at the same pace as courts in other countries remains to be seen.* □

* *This article is written in a personal capacity.*

(Footnotes)

1. No. 7 of 1964. See generally, A. Shatter, *Family Law in the Republic of Ireland*, 201-202, 210 ff (2nd ed., 1981), *Custody Disputes in the Irish Republic: The Uncertain Search for the Child's Welfare?* 12 Ir. Jur. (N.S.) 37 (1977).
2. Cf. *B. V. B.*, [1975] I.R. 54, at 61 (Sup. Ct., *per* Walsh J., 1970).
3. *In re Tilson Infants; Tilson -v- Tilson*, [1951] I.R. 1 Sup. Ct., 1950). See A. Shatter, *supra*, fn. 1, 207-209. See also *In re May, Minors*, 92 I.L.T.R. 1 (High Ct., Davitt J., 1957).
4. Section 2.
5. [1975] I.R. 54, at 67 (Sup. Ct., 1970, aff'g High Ct., Kenny J., 1969). (Budd J. and FitzGerald J. were dissenting in this case, but since not all the facts of the case are of direct relevance to the theme of the article, the reason for the dissent will not be examined here.)
6. [1975] I.R., at 71.
7. [1975] I.R., at 69.
8. [1975] I.R., at 72.
9. 110 I.L.T.R. 45, at 47 (Sup. Ct., reversing Kenny J., 1971).
10. *Id.*
11. *Id.* at 49.
12. Unreported, Supreme Ct., 31 July 1974 (86-1974), rev'g High Ct., Kenny J., 23 May 1974 (1973-1725p).
13. p. 5 of Kenny J.'s judgment.
14. pp. 5-6 of Kenny J.'s judgment.
15. p. 6 of Kenny J.'s judgment.
16. pp. 8-9 of Walsh J.'s judgment.
17. p. 15 of Walsh J.'s judgment.
18. *Id.*, pp. 15-16. See also, on this point, p. 11 of the judgment of Henchy J., who was dissenting.

19. Unreported, Supreme Ct., 5 April 1979 (70-1979).
20. pp. 7-8 of Henchy J.'s judgment.
21. p. 12.
22. p. 13.
23. p. 16.
24. Pages 6-7 of Kenny J.'s judgment.
25. Page 4 of Griffin J.'s judgment.
26. *Id.*
27. p. 5.
28. Cf. text above fn. 24, *supra.*
29. *Id.*, p. 6.
30. For criticism of this approach by the English Courts, see King, *Maternal Love – Fact or Myth?*, 4 Family L. 61 (1974). Cf. Samuels, *Custody and Access: Law, Principles and Practice*, 4 Family L. 141, at 142 (1974).
31. For an analysis of the constitutional implications of the "tender years" doctrine in the United States, see Jones, *The Tender Years Doctrine: Survey and Analysis*, 16 J. Family L. 695, at 724 ff. (1978), Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U. Calif. Davis L. Rev. 523, at 534-535 (1979). More generally see Foster & Freed, *Life with Father: 1978*, 11 Family L.Q. 321, at 325-340 (1981), Roth, *The Tender Years Presumption in Child Custody Disputes*, 15 J. Family L. 423 (1977).
32. [1976] I.R. 38 (Sup. Ct., 1975).
33. *Id.*, at 71.
34. Emphasis added.
35. Cf. Binchy, *New Vistas in Irish Family Law*, 15 J. Family L. 637, at 665 (1977).
36. See Bates, *The Changing Position of the Mother in Custody Cases: Some Comparative Developments*, 6 Family L. 125 (1976), Haddad & Roman, *No-Fault Custody*, 2 Fam. L. Rev. No. 2, 95 (1979); cf. Poulter, *Child Custody – Recent Developments*, 12 Family L. 5, at 5 (1982).
37. [1977] 1 All E.R. 647, at 655 (C.A.).
38. *Id.*, at 651.
39. B. Hoggett, *Parents and Children*, 54-55 (2nd ed., 1981).

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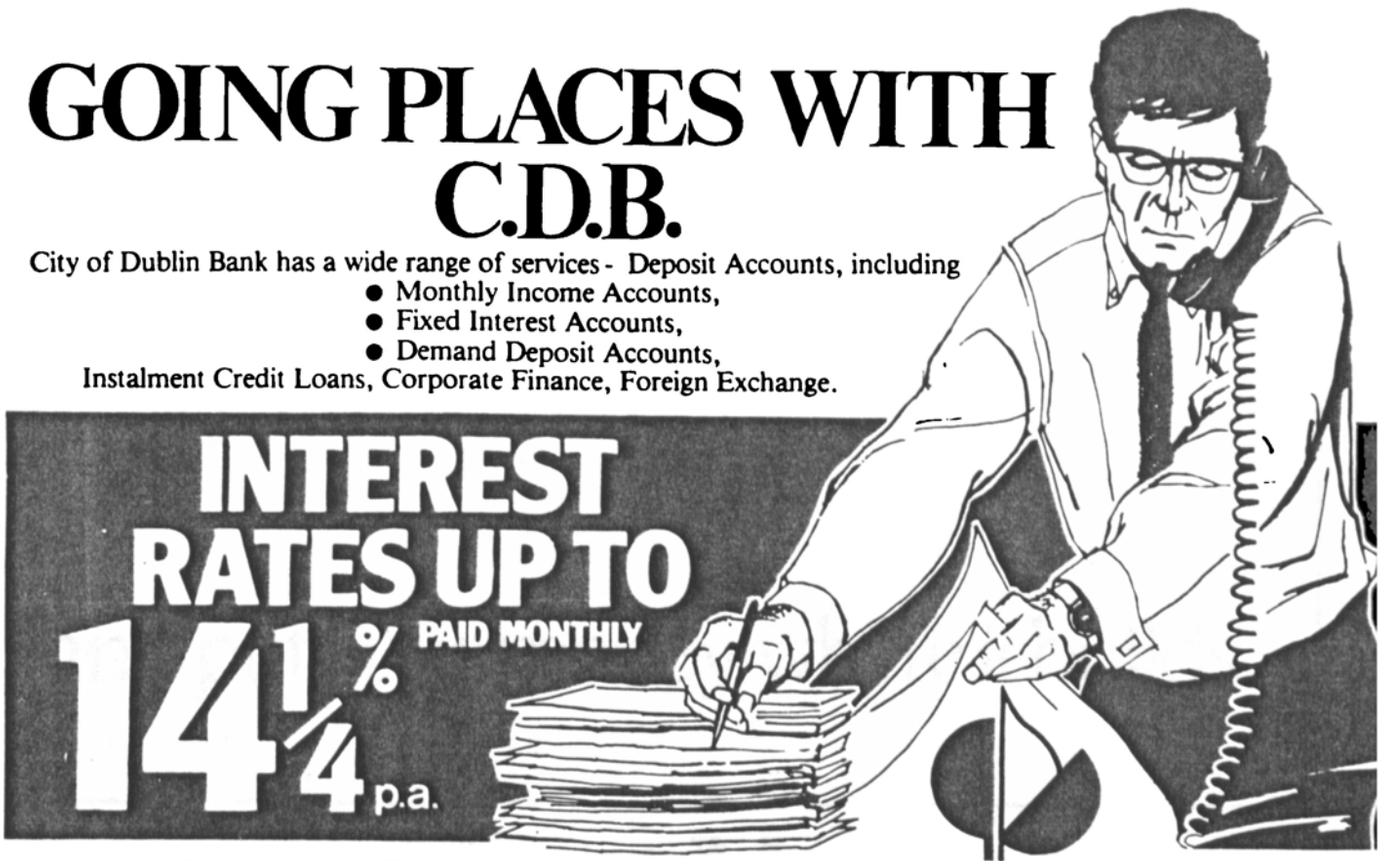

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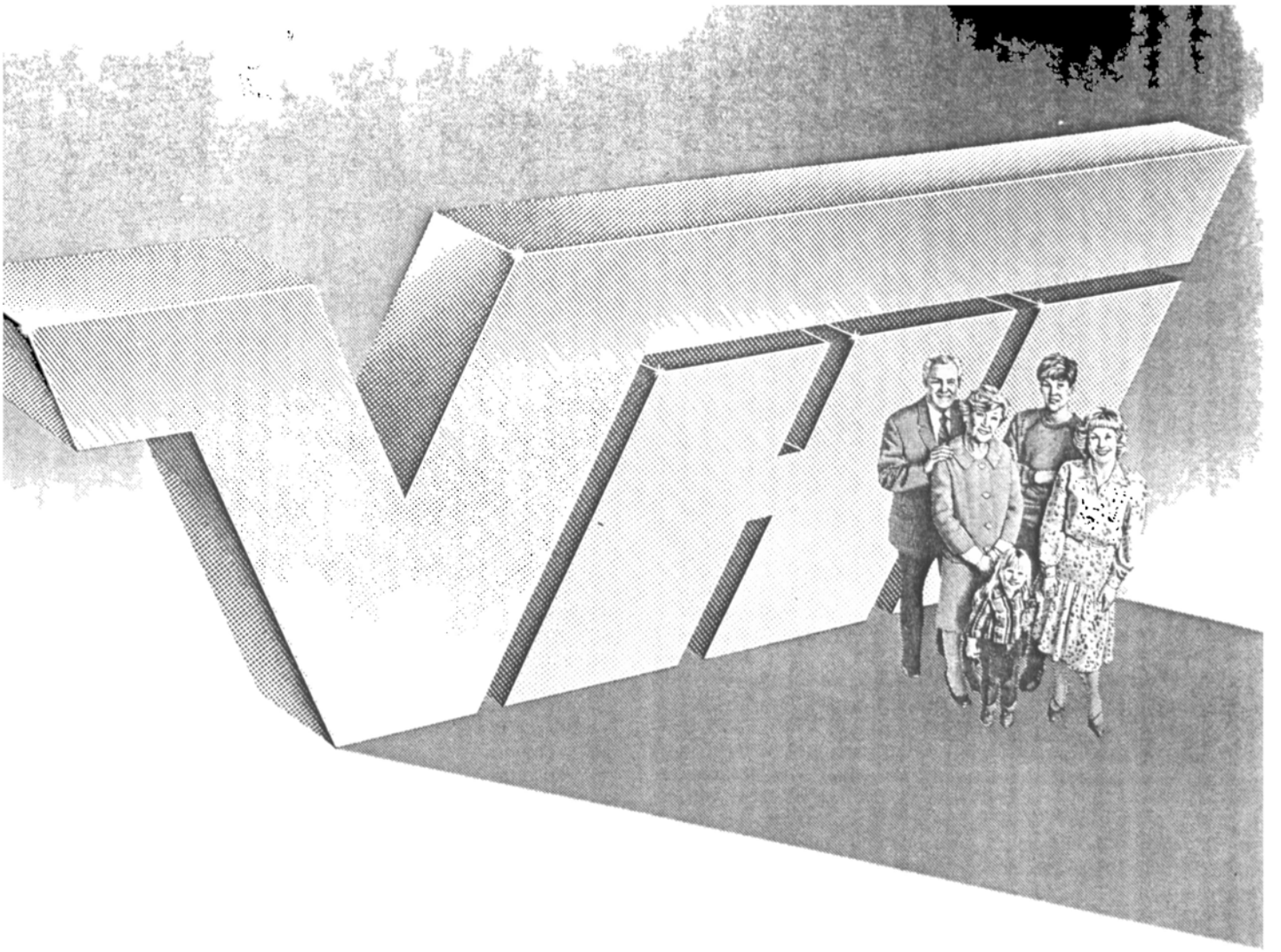

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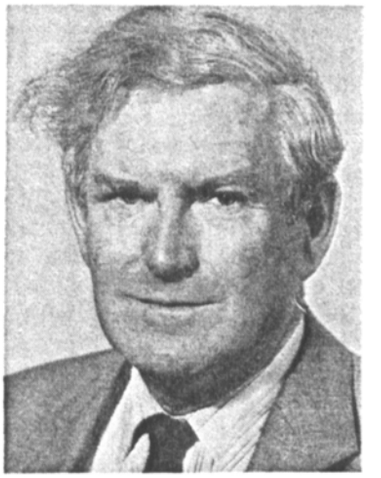
Anthony E. Collins
Senior Vice President 1983/84

Anthony E. Collins, the newly elected Senior Vice President, is Senior Partner in the firm of Eugene F. Collins & Son, Solicitors, 61, Fitzwilliam Square, Dublin and is a son of the late Desmond J. Collins.

He was at school at Xavier's, St. Gerard's and Downside and obtained the degrees of B.A. and B.Comm. at Trinity College, Dublin in 1961. He was admitted as a Solicitor in 1964 and has been a member of the Council since 1970. He has served on many of the Society's Committees and is a former Chairman of the Professional Purposes, E.E.C. and International Affairs and Premises Committees.



John F. Buckley
Junior Vice President 1983/84

Mr. Buckley was educated at C.B.S. Synge Street and University College, Dublin, where he took the Degrees of B.A. and LL.B.

He was admitted a Solicitor in the Trinity Term of 1956. He was a Lecturer in Conveyancing and Land Law to the Society from 1962 to 1972, Chairman of the Society of Young Solicitors from 1967 to 1969, and President of the Dublin Solicitors' Bar Association in 1978/79. He was elected to the Council of the Society in 1973, and served as Chairman of the Education Committee in the years 1974-1976 and 1978-1980, and as Chairman of the Public Relations Committee from 1980 to 1983. He has been a member of the Society's Textbook Publications Committee since its inception in 1969.

He was appointed Chairman of the Committee on Legal Education and Continuing Legal Education on the General Practice Section of the International Bar Association in 1981, and is also a member of the Council of the Section. He is a partner in the Firm of Hickey, Beauchamp, Kirwan, & O'Reilly, Solicitors, Dublin.

THE INCORPORATED LAW SOCIETY OF IRELAND

COUNCIL ELECTION 1983/84 — ORDINARY MEMBERS

VALID POLL 1621 (TOTAL POLL 1666)

	CANDIDATES ELECTED	TOTAL VOTES
1.	Quinlan, Moya	1,122
2.	Houlihan, Michael P.	1,116
3.	Buckley, John F.	1,014
4.	Ensor, Anthony H.	1,001
5.	O'Donnell, Rory (Roderick) D.	998
6.	O'Connor, Patrick	980
7.	Binchy, Donal G.	970
8.	O'Mahony, Michael V.	900
9.	Allen, W. Brendan	900
10.	Shaw, Thomas D.	900
11.	Bourke, Adrian P.	886
12.	Margetson, Ernest J.	841
13.	Collins, Anthony E.	837
14.	Daly, Francis D.	823
15.	Cullen, Laurence	798
16.	Shields, Laurence K.	781

17.	Smyth, Andrew F.	780
18.	Murphy, Ken	778
19.	Pigot, David R.	758
20.	Curran, Maurice R.	755
21.	O'Hagan, Donal P.	755
22.	Killeen, Carmel	752
23.	Monahan, Raymond T.	720
24.	Kelliher, Donal	713
25.	Reidy, John C.	709
26.	Glynn, Patrick A.	687
27.	Lynch, John R.	680
28.	McCague, Eugene	679
29.	Donnelly, Andrew J. O.	673
30.	Sweeney, Joseph R.	614

NOTE

Under Bye Law 29B the Senior Vice President (Mr. Patrick F. O'Donnell) is deemed to be elected.

	CANDIDATES NOT ELECTED	TOTAL VOTES
31.	O'Neill, Raymond St. J.	598
32.	O'Doherty, Patrick Hugh	597
33.	Malone, Paul L.	593
34.	White, Patrick	574
35.	Crowley, Vincent	574
36.	Horgan, Anne Moore	331

* * * * * *

PROVINCIAL DELEGATES — Returned Unopposed

CONNAUGHT	-	McEllin, Patrick J.
LEINSTER	-	Hogan, Michael J.
MUNSTER	-	Dundon, Joseph
ULSTER	-	Murphy, Peter

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Practice Notes

Referral Service —Flat Developments

The Conveyancing Committee has been asked to establish a referral system under which the firms of solicitors with expertise in the establishment and operation of schemes for the sale of flats would make their expertise available to other firms on a referral basis.

Accordingly the Committee would invite firms with expertise in this area to submit their names to the Committee with a view to being included on a panel of solicitors to whom referrals would be made.

The basic principle upon which the referral system will operate is that the consultant firm will not, in normal circumstances, accept from the client within 3 years of the completion of the consultancy assignment any work in the area of flat development schemes without the approval of the referring firm.

It is envisaged that it will not be essential in most cases for the consulting firm to deal directly with the client, but it is believed that there may be circumstances in which this would be in the interest of the client and of the referring firm.

Firms who are interested in having their names placed on the referral panel should apply to:

ANNA HEGARTY at the Law Society
Blackhall Place, Dublin, 7.

Adjudication of Leases

The Joint Committee of the Law Society and Building Societies' Solicitors has considered the practice of requiring the adjudication of the stamp duty on leases on housing estates. It was decided to recommend that henceforth solicitors for purchasers and lenders should not require the lease of a private house on a housing estate to be adjudicated when it bears what appears to be the appropriate duty. □

Mortgagees' Solicitors and the Borrowers —Conflict of Interest

Increasing attention is being paid to situations in which solicitors may find themselves faced with a conflict of interest. The Conveyancing Committee has recently been asked to advise a firm of solicitors acting for a bank in a provincial town, as to the propriety of their acting for the bank's customers in connection with the completion of mortgage documentation.

Not so many years ago there would not have been any documentation beyond a deposit of the Land Certificate or title deeds, often made directly to the Bank Manager without the intervention of any solicitor. The inadequacy of the equitable deposit in the absence of satisfactory collateral, as an enforceable security, has been only one of a number of factors which have encouraged banks to insist on mortgages or charges being in writing.

Three separate difficulties arise where the customer does not wish to enlist the assistance of his own solicitor, two for the bank's solicitor and one for the bank itself. The solicitor's first problem is that of conflict of interests, if he does agree to act for the customer — which he would be foolish to do — and the second arises if the customer insists on not engaging a solicitor, in ensuring that the queries on the title which must, in the light of the *Northern Bank -v- Henry* case, [1981] I.R. 1 be raised as answered with a sufficient degree of responsibility.

The bank's difficulty, particularly if its own solicitor arranges for the completion of the mortgage and spouse's consent, whether acting for the customer or not, is the allegation of undue influence. Recent cases in England, where the doctrine of undue influence does not seem to have been as frequently relied on as it has been in Ireland, principally *Lloyds Bank -v- Bundy* [1974] 3 All E.R. 757 and most recently *National Westminster Bank -v- Morgan* (The Times, July 5th 1983), have shown that the Courts there are likely to view banks as having such a fiduciary duty to the person executing the document in favour of the bank as to require such person to have independent legal advice.

Accordingly, solicitors acting for banks should not merely advise the customer that it would be unwise for the solicitor to act for or advise him in the matter, but should also advise the bank of the wisdom of ensuring that the customer and the bank receive adequate independent advice. □

SOCIETY OF YOUNG SOLICITORS

SPRING SEMINAR 1984

The Spring Seminar will be held on the 6th-8th April, 1984.

Topics will include:—

(1) Arbitration
(2) Divorce — a comparative study
(3) Negotiable Instruments
(4) Professional Indemnity and/or Pensions for Solicitors.

Full programme available later.

Addiction Problems Reviewed by Society's Symposium

Appraisal of the increase in alcohol and drug addiction in Ireland was undertaken at a symposium organised by the Law Society last month. The participants included doctors, social workers, clergy, senior officers of the Garda Drug Squad and solicitors.

The Minister of State at the Department of Health (Fergus O'Brien, T.D.), who is chairman of the Government Task Force on Drug Abuse, opened the symposium with statistics on the growth of drug abuse in Dublin, the increase in the number of patients treated in hospital, statistics of convictions for "pushing" — up from 24 in 1981 to 99 last year; and for seizures — up from 1,204 in 1981 to 1,873 last year.

His figures were elaborated by the panel of speakers including the Senior Registrar at the National Drug Advisory and Treatment Centre, Jervis Street Hospital, who said that "the number of young heroin abusers treated at the Centre increased from an average of five per month in 1979 to 250 a month last year". He considered that the heroin abuse problem by very young people in all classes of society was the major drug threat, followed by abuse of cannabis and synthetic opium such as diconal and palffium.

The approach to rehabilitation of drug addicts by the Coolmine Lodge Therapeutic Community was explained by James Comberton, executive chairman of the organisation, who emphasised the manner in which drug abuse can be detected by parents.

Dr. James Tubridy, Director of the Alcoholic Unit at St. John of God Hospital, Stillorgan, showed the number of alcoholic admissions to hospitals has risen steeply since 1965, with two "hiccups" in the graph — one caused by a very sharp rise in the price of alcohol in 1975 and the introduction of the breathalyser in 1978. He also emphasised the increase in prosecutions for drunken driving, with a special note on the greater number of women charged with this offence. Statistically, he commented, 5% of the poeple who drink alcohol become addicts, giving the country approximately 75,000 alcoholics.

He criticised the rise in the number of licensing exemptions granted — from 6,342 in 1967 to 42,111 in 1979.

Mrs. Odette Thompson, Director of the Hanly Centre, Dun Laoghaire, reviewed the effect of alcoholism on individuals and families; the use of Barring Orders, and the approach to rehabilitation through support groups.

The discussions which followed each paper were questioning and informative with the majority of the audience contributing. The Law Society was thanked by Inspector Denis Mullins, of the Garda Drug Squad, and by other participants for the concern shown in the organisation of the symposium.

Chairpersons for the sessions were Mrs. Moya Quinlan, Adrian Bourke and Anthony Ensor. □

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Barring Orders and Ouster Orders — Judicial Change of Attitude?

by
Paul McNally, Solicitor

ON 17th June, 1983, in the case of *O'B -v- O'B* (unreported) the Supreme Court (consisting of O'Higgins C.J., McCarthy and Griffin JJ. heard an appeal by a husband against the making of a barring order against him under Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976.* In relation to his appeal O'Higgins C.J. stated that this probably constituted the last occasion upon which the Court could consider the proper application of the statutory provisions to the making of barring orders.

On 20th June, 1983, in the case of *Richards -v- Richards* [1983] 2 AllER 807, [1983] 3WLR 173, the House of Lords (consisting of Lord Hailsham L.C., Lord Diplock, Lord Scarman, Lord Bridge of Harwich and Lord Brandon of Oakbrook) heard an appeal, again by a husband, against an "Ouster Order" granted to his wife by the High Court on 8th November, 1982, and confirmed on appeal by the Court of Appeal on 6th December, 1982. In respect of this appeal, Lord Brandon of Oakbrook stated: (at pp. 826/7)

> "It falls to your Lordships, in order to determine this appeal and to give guidance for the future, to do what the Courts below have signally failed to do, namely to examine, and having examined, to pay proper regard to, the statutory framework within which Courts dealing with applications for ouster orders are not only empowered, but also obliged, to operate."

The highest courts in both jurisdictions were asked, and felt themselves obliged, to determine the statutory basis on which orders requiring a spouse to remove himself/herself from the family home could be granted. While the wordings of the statutory provisions empowering the granting of these types of orders are different in the two jurisdictions, the decisions which the two appellate Courts arrived at, in effect, are similar.

Prior to the *Richards'* decision in England there had been a number of conflicting Court of Appeal decisions. On the one hand there was a line of decisions culminating in *Myers -v- Myers* [1982] 1 AllER 776; [1982] 1 WLR 247, which held that in order for a wife to succeed in obtaining an ouster order against her husband she must have "just and reasonable" grounds for making her application. On the other hand there was a line of decisions culminating in *Samson -v- Samson* [1982] 1 AllER 780; [1982] 1 WLR 252, which held that the wife did not have to have "just and reasonable" grounds in making her application in order to succeed so long as the welfare of the children of the marriage required that the order be made. In *Samson's case* the wife had succeeded on the grounds that she could not bear to be in the same house as her husband. When the *Richards' case* was before the English High Court, Pennant J. had found that:

> "the wife is strongwilled and does not wish to be in the same house as her husband and says she cannot bear to be with him. But it is not true that she cannot. I think it is thoroughly unjust to turn out this father but justice no longer seems to play any part in this branch of the law."

He granted the wife the ouster order she sought.

The Richards' Case

In brief, the facts of *Richards' case* were as follows:

Mr. and Mrs. Richards were married in November 1974. There were two children of the marriage, a girl and a boy, aged 6 and 4 respectively at the time of the hearing. Mr. Richards was in regular employment. The family (matrimonial) home was a council house. Mrs. Richards had left her husband on a number of occasions. Other men had been involved, but Mr. Richards had always forgiven his wife and cohabitation had been resumed. In January 1982 while the parties were still cohabiting Mr. Richards received a divorce petition signed by his wife. It alleged that their marriage had irretrievably broken down and it sought to establish this by proving that Mr. Richards had "behaved in such a way that (Mrs. Richards) cannot reasonably be expected to live with him (Mr. Richards)." Mr. Richards opposed this petition, which had not been heard at the date of the House of Lords' judgment (June 1983).

On the institution of the divorce proceedings Mrs. Richards moved out of her husband's bedroom but continued to live in the house and continued cooking for him. In June 1982, Mrs. Richards left the home and took the two children with her. She went to live with a lady friend Mrs. Moore in admittedly overcrowded conditions. On 15th October, 1982, Mrs. Richards issued a summons upon which the appeal before the House of Lords was based. In her grounding affidavit Mrs. Richards claimed an injunctin against molestation and another injunction restricting communication. Both of these were rejected and not persisted in. She also sought an Order that the husband should quit and deliver up possession of the matrimonial home and not return thereto. At the hearing before the High Court on 8 November, 1982, Mrs. Richards said that she could not stay at the house of her lady friend beyond 22nd November, 1982, and that, although she had tried to get accommodation from the local council, the best they

could offer, at least at the moment, was a caravan. She added that she would not return to the matrimonial home while her husband was there. Pennant J. found that Mrs. Richards "had no reasonable grounds for refusing to return to live in the same house as her husband "but that the existing accommodation where she was then living was overcrowded and not a fit home for the children". The Judge felt constrained to follow *Samsons'* case rather than *Myers'* case on the ground that the matrimonial home "was a (council) house provided by the public as a home for four people and that being so the public interest is best met by installing their mother too and that although it is unjust to the husband, it seems right to grant the order sought in the interests of the children". The Court of Appeal upheld that decision.

In the House of Lords there was a difference of opinion between on the one hand Lord Brandon supported by Lord Hailsham, Lord Diplock and Lord Bridge and on the other hand Lord Scarman. Lord Brandon's view was that the grounds for determining when an ouster order should be granted are set out in Section 1 (3) of the Matrimonial Homes Act 1967 and that each of the grounds as set out there are of equal significance, without any one ground being paramount to any other. Lord Scarman was of the opinion that the application for an ouster order could not be considered in isolation to the question as to custody care and control of the children and that as such the principal of paramountcy of the welfare of the children as enshrined in the Guardianship of Minors Act should have effect. However Lord Scarman took the view that it had not been proved that the children's welfare could be enhanced by having their father removed from the family home and he allowed the appeal on the facts.

Section 1(3) of the Matrimonial Homes Act 1967 reads as follows:

> "On application for an order under this section the Court may make such order as it thinks just and reasonable having regard to the conduct of the spouses in relation to each other and otherwise, to their respective needs and financial resources, to the needs of any children, and to all the circumstances of the case."

On the basis that both the English High Court and the Court of Appeal failed to have regard to one of the matters which Section 1(3) of the 1967 Act required them to have regard to, namely, the conduct of the wife in refusing to return to the matrimonial home when there were no reasonable grounds for such refusal, Lord Brandon allowed the appeal.

In summary, prior to the decision of the House of Lords in *Richards' case* there was confusion in this area of the law as a consequence of conflicting Court of Appeal decisions. As a result of this decision an English court in determining whether an ouster order should be granted must take into account the grounds for the making of such an order as set out in Section 1(3) of the Matrimonial Houses Act 1967 and the welfare of the children is not to be a paramount consideration. The conduct of the parties is a relevant factor and the granting of an ouster order must be just and reasonable.

O'B -v- O'B

In the Irish case of *O'B -v- O'B* (17th June, 1983, S.C. unreported) the parties were married in October 1972 and had two children, one born in August 1973 and the other in March 1976. Since 1979 the parties had not had sexual relations and the husband had left the home in April 1979. On 12th February, 1981, the wife obtained a barring order in the District Court under Section 22 of the Family Law (Maintenance of Spouses and Children) Act 1976 ("the 1976 Act"). An appeal was brought to the Circuit Court which was ultimately allowed in June 1981 and in the meantime, the District Court order was discharged. On 23rd March, 1981, proceedings in the High Court by way of Special Summons were issued by the wife which included a claim for a barring order under Section 22 of the 1976 Act.

Following the appeal to the Circuit Court in June 1981 the husband returned to the family home and the High Court proceedings were adjourned generally and the husband continued to live in the family home. In March, 1982, the High Court proceedings were reactivated and the wife sought a barring order. The matter initially came before the High Court by way of Motion in April 1982 but a barring order was not granted then. The matter was ultimately heard in the High Court (per Costello J.) in June 1982. Costello J. accepted the wife's evidence and resolved in her favour any conflict of evidence between her and the husband. On the appeal to the Supreme Court against the High Court decision both O'Higgins C.J. and McCarthy J. were of the opinion that Costello J. had founded his decision on the basis that the parties were incompatible and that the marriage had irretrievably broken down.

Section 22 of the 1976 Act was the statutory provision governing the granting of barring orders, but this provision was superceded by Section 2 of the Family Law (Protection of Spouses and Children) Act 1981 ("the 1981 Act") which Act came into operation on 24 July, 1981, being one month after its passing. Section 17 of the 1981 Act repealed Section 22 of the 1976 Act but also provided that an application to the High Court under Section 22 which had not been determined before the commencement of the 1981 Act could be dealt with by the High Court under the 1981 Act.

Section 2 of the 1981 Act provides in the same terms as Section 22 of the 1976 Act for the making of barring orders by the Court "if it is of the opinion that there are reasonable grounds for believing that the safety and welfare of the applicant spouse or any child so requires". However, the long title of the 1981 Act indicates expressly that the cause for the court application must be the conduct of the other spouse. This is not the case with the 1976 Act.

According to O'Higgins C.J. the use of the "word "safety" probably postulated a necessity to protect from actual or threatened physical violence eminating from the other spouse". The word "welfare", according to O'Higgins C.J., "was intended to provide for cases of neglect or fear or nervous injury brought about by the other spouse". O'Higgins C.J. approved the sentiments of Costello J. in the High Court who had stated that it has been the practice to accord a very wide ambit to the Section, particularly in considering what is meant by "welfare". But O'Higgins C.J. made this approval subject to the condition that "what endangers welfare must be attributed to the conduct of the other spouse".

All three judges in the Supreme Court held that in order for a barring order to be granted the applicant had to show that the "safety or welfare" of the applicant spouse

or children was endangered by the misconduct of the respondent spouse. O'Higgins C.J. and McCarthy J. allowed the appeal on the ground that the decision of Costello J. was based on the fact that the marriage had irreconcilably broken down rather than on the misconduct of the husband and was therefore wrong in law.

Griffin J., while approving the principle established by the other two Judges, held that Costello J. had granted the Order on the factual basis of the misconduct of the husband and that his decision was justified and he therefore refused the appeal.

O'Higgins C.J., while approving the view of Costello J. that the word welfare should be given very wide ambit, was of the opinion that the behaviour of the husband towards the wife, in this instance, was not sufficient to justify the granting of a barring order (per O'Higgins C.J.):

> "The evidence of the Plaintiff indicates that various incidents occurred — rudeness by the husband in front of the children, a lack of sensitivity in his manner to her and efforts by him at dominance in running the house — none of which, in themselves, could be regarded as amounting to serious misconduct, and all of which would probably have been tolerated, overlooked and forgiven, if the marriage were viable. There was, as the learned Judge found, no case of violence to be made against the Defendant".

In summary, the Supreme Court held that barring orders can only be granted when the 'safety or welfare' of the applicant spouse or children is endangered by the misconduct of the respondent. A barring order cannot be granted simply on the basis of the irretrievable breakdown of the marriage. The circumstances in which a barring order can be granted depends upon the facts of the particular case. However, in addition to situations of physical violence, the Courts are entitled to grant barring orders where the mental, emotional or moral welfare of the applicant spouse or children are endangered by the misconduct of the respondent spouse.

In comparing the judgments in *Richards -v- Richards* and *O'B -v- O'B* it is interesting to note that while the welfare of the children was the principle issue of concern in the English case this aspect was never mentioned in the Irish case. The House of Lords concentrated on the justice and reasonableness of granting an ouster order as against the paramountcy of the welfare of the children in determining their decision. The Supreme Court concerned itself with the issue of the conduct of the guilty spouse as against the situation of a complete breakdown in the marriage. However, as a result of the decisions in both Courts the legal position in the two jurisdictions is very similar. The Courts in both jurisdictions have to take into consideration the conduct of the spouses, and the welfare of the children is not to be a paramount factor; and overall, the order made must be just and reasonable.

The decision in *O'B -v- O'B* highlights particular problems in Irish Family Law. Firstly, barring orders are not to be granted on the grounds of the irretrievable breakdown of marriage or the incompatability of the spouses. O'Higgins C.J. stated:

> "It seems to me that this secion indicates that the barring order, which is contemplated by the Act, is intended to deal with a situation which is changeable and remedial by the act of the parties or one of them but not with a situation of complete marital breakdown which may be beyond the competence of either to remedy".

If this is the case and it would appear to be as a consequence of the Supreme Court decision — it is surely wrong for statutory law to allow the remedial barring order to be available to parties to a marriage which is encountering difficulties, without at the same time providing a back-up welfare service to enable the parties to resolve the difficulties of a marriage which has not irretrievably broken down. It is unfair on a married couple to in effect separate them for the purposes of enabling them to retrieve their marriage without at the same time giving them positive assistance to accomplish this end.

Secondly, barring orders are not available in cases of irretrievable marital breakdown. The only legal remedy open to parties to a marriage in such circumstances is Divorce '*a Mensa et Thoro*', which is only available in very restricted circumstances. This represents a serious lacuna in the law and a grave hardship for parties to marriages which have run into such difficulties, especially where there are children involved, and who find that there is no effective legal remedy available to assist them. □

* **Note:** *Since 24th July, 1981, the relevant statutory provision is Section 2 of the Family Law (Protection of Spouses and Children) Act 1981, which superceded and extended the provisions of Section 22 of the 1976 Act.*

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SYMPOSIUM ON CRIMINAL JUSTICE — 29 NOVEMBER, 1983

Attending the Symposium were (l. to r.): Mr. Niall Fennelly, S.C., speaker; Mr. Frank O'Donnell, Solicitor; Mr. John Paul McMahon, Deputy Commissioner of the Garda Siochana; Mr. Michael Houlihan, President of the Law Society and Mr. Patrick McEntee, speaker.

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BOOK REVIEW

Osborn's Concise Law Dictionary, 7th edition, by Roger Bird, Sweet and Maxwell. 389 pages. £4.50 (Stg.)

When I was first asked to review a dictionary I felt that it would be as useful an exercise as writing an index for one. Thankfully this book is a lot more than a dictionary. It is a mini-encyclopaedia of legal words and phrases. The major portion of the book is taken up with an A-Z of legal words and phrases which are not merely defined, but explained in a very concise and comprehensive fashion. Where appropriate, case references and statutory references are given. While these references are to the relevant British Law, they are, nonetheless an excellent source for Irish practitioners.

With our system of legal education geared towards the examination system, the study of law does not always allow the luxury of a wider study of legal terminology and maxima. This book contains a great number of Latin phrases and for those wishing to impress their colleagues or friends this book is a must. For the practitioner the book is a very useful reference work and for the student of law an excellent source of concise and simple definitions. For the practitioner who is consulted for the first time in a dispute over foldage, a quick search in Osborn will reveal that foldage is the right of the Lord of the Manor of having his tenants' sheep to feed on his fields so as to manure the land in return for which the Lord provides a fold for the sheep. The law has changed considerably since Percy George Osborn brought out the first edition of this book in 1927 and Mr. Bird has made an excellent job of up-dating the definitions. The definition of injunction contains a reference to a Mareva injunction. The Anton Piller Order is also defined although curiously classified under Piller Anton. The Anton Piller Order is also cross-referenced in the definition of discovery of documents.

I was somewhat disappointed in the definition of Eire which states "Southern Ireland". The definition goes on to state that the Ireland Act, 1949, recognised and declared the independence of the Republic of Ireland and that Eire ceased to be part of H.M. dominions "but it is not a foreign country". I tried to follow up the benefits or drawbacks of not being a foreign country, but I am afraid the definition of foreign merely says "outside the jurisdiction".

The book finishes with a detailed list of Law Reports and their abbreviations and a list of English Sovereigns and their Regnal years. The list of Reports is certainly very useful. The list contains the abbreviations of most Irish Law Reports, but omits the Irish Law Reports Monthly. This list is comprehensive enough to contain Watermeyers Supreme Court Reports Cape of Good Hope, but unfortunately does not contain any references to American Law Reports, which I feel is a surprising omission due to the increase in recent times of the use of American case law, particularly in the U.K. I would strongly recommend this book, either as a source of information or as a source of good spelling and at £4.50 Stg. it is excellent value. □

Gary Byrne

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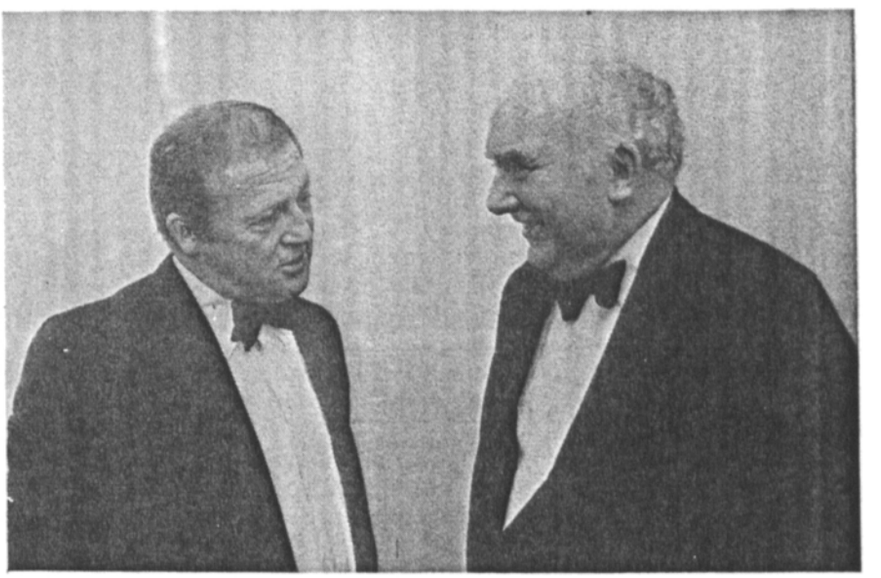
Law Society Annual Dinner Dance
18 November, 1983

Mrs. Anthony Ensor; Mr. Peter Sutherland, Attorney General; Mr. Anthony Ensor and Mr. Ernest Margetson, Dublin.



(l to r) Mr. Frank Daly, Dublin (President of the Society 1983/84) and The Hon. Mr. Justice Donal Barrington.

(l. to r.) Mrs. Peter Sutherland, Mrs. Ernest Margetson, Mrs. John F. Buckley, Dublin and Mrs. Anthony Ensor.

Mr. Michael Houlihan, President of the Law Society 1982/83, planting a tree in the garden of Blackhall Place, to mark the conclusion of his year in office.

The President, Mr. Michael Houlihan, with newly elected Council members Mr. Eugene McCague, Solicitor (left) and Mr. Ken Murphy, Solicitor.

COMPANY SERVICE

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PRESENTATION OF PARCHMENTS — NOVEMBER, 1983

Mr. Michael Houlihan, President of the Society, presenting Mr. Puru Govender with his parchment, with Professor Laurence Sweeney in attendance.

The Medico-Legal Society of Ireland

Patron:
Professor P. D. J. Holland,
Royal College of Physicians in Ireland.

President:
Miss Carmel Killeen,
Solicitor.

1984 LECTURE PROGRAMME

1. **Thursday, January 26th, 1984.** Dr. John Wall, M.B., B.S., D.Obst. R.C.O.G., Deputy Secretary of The Medical Defence Union on **"Doctors and the Courts in the 1980s".**

2. **Thursday, February 23rd, 1984.** Mrs. Mary O'Connor of the Forensic Science Laboratory, Department of Justice and Detective Inspector John J. McGroarty of the Drugs Squad, Dublin Castle, on **"Drugs of Abuse".**

3. **Thursday, 22nd March, 1984.** Mr. Desmond O'Mahony, Principal Psychologist of the Department of Justice, on **"Incest".**

Members are invited to join the Council and the guest speakers for dinner at 6.30 p.m. on the evening of each lecture.

Members intending to dine should communicate in advance with the *Honorary Secretary*, Mr. Eamonn G. Hall, Solicitor, 'Donaghmoyne', 22 Belgrove Lawn, Chapelizod, Dublin 20 (Tel. Office (01) 748888 ext. 561 or home (01) 264773.

The meetings will commence at 8.00 p.m. The meetings and the dinner will be held in the **Kildare Street and University Club**, 17 St. Stephen's Green, Dublin 2, by kind permission.

Persons seeking to become members of the Society should communicate with the Honorary Secretary.

Eamonn G. Hall,
Honorary Secretary.

Companies (Amendment) Act, 1983

Part 2

by
William Earley, Solicitor

THIS is the second of what will now be three articles on the Companies (Amendment) Act, 1983, and deals with portion of Part III of the Act dealing with the capital of a company. The balance of Part III and the rest of the Act will be dealt with in the final Article.

Issue of Share Capital

Section 20 of the Act provides that directors of either a private company or a public company (but subject to subsection (9) discussed below) may not exercise any power of the company to allot "relevant securities" unless they are given an express authority to do so. The purpose of this part of the Act is to give greater control to shareholders over the issue of share capital and the position is significantly different from that under the previous legislation pursuant to which a company's Articles could give the directors unrestricted authority (subject to existing provisions relating to issue of shares to the public) to allot or grant options over the share capital of a company.

"Relevant securities" are defined in Section 20 subsection (10) as all shares and rights to subscribe for or convert into shares other than subscribers' shares and shares allotted under an employee's share scheme. "Employee's Share Scheme" is defined in Section 2 of the Act and means any scheme for the time being in force, in accordance with which the company encourages or facilitates the holding of shares or debentures in the company or its holding company by or for the benefit of employees or former employees of the company or any subsidiary of the company including any person who is or was a director holding a salaried employment or office in the company or any subsidiary of the company. (It should be noted that this definition is somewhat different from the corresponding English Act: c.f. Section 87 (1) U.K. Act of 1980).

The authority must be given either under the company's Articles or by an ordinary resolution of the company and must state the maximum amount of the relevant securities that may be issued under it and the date on which it is to expire, which must not be later than five years after the date of incorporation of the company, if the authority is in the original Articles, or the date of the resolution in any other case. The authority may be a general authority in respect of all relevant securities or it may be more specific and it may be conditional or unconditional. The authority may be renewed from time to time by the company in general meeting for a further period or periods not exceeding five years or it may be revoked or varied.

Any such ordinary resolution must be filed in the Companies Office and annexed to the company's Articles and is valid notwithstanding that it may vary the Articles.

Relevant securities may be allotted by the directors after an authority has expired if they are allotted pursuant to an offer or agreement made before such expiration provided that the authority itself permitted the making of an offer or agreement in circumstances when the securities might have to be allotted after the authority expired; this latter point should be borne in mind when the authority is drafted.

Section 20 sub-section (9) provides that these provisions apply immediately to a newly-incorporated public limited company but otherwise do not apply to the allotment of securities made under an offer or agreement which is made before the end of the transitional period or before the first general meeting of the company after registration or re-registration as a public limited company if that occurs before the end of the transitional period.

The validity of any allotment made in contravention of these provisions is not affected but any director who is knowingly a party to any such contravention is guilty of an offence.

Further, an offence is created by Section 21 of the Act where a private company offers or allots its shares or debentures to the public or with a view to such shares being offered to the public; this does not, however, invalidate any such allotment or agreement to allot. Any officer of the company in default is also guilty of an offence.

Section 22 provides that public limited companies may not allot shares offered for subscription unless the shares are fully subscribed or the offer states that they will be allotted even if the shares offered are not fully subscribed. It should be noted that this provision does not affect the existing prohibition on the allotment of shares offered to the public for subscription unless the sum payable on application for the "minimum amount" has been paid. Also, this provision has, in practice, been complied with in public issues for some time.

Pre-emption Rights

Subject to the exceptions outlined below both private and public limited companies must comply with the new statutory pre-emption provisions either immediately, in the case of newly-incorporated public limited companies, or, in other cases, after the end of the transitional period or (if earlier) the date on which the company holds its first general meeting after re-registration as a public limited company.

Subject to the exceptions, Section 23(1) of the Act provides neither a private nor a public company may allot "equity securities" for cash unless it has first offered them on a pre-emptive basis to holders of either "relevant

shares" or "relevant employee shares". This rule is of considerably more significance to a public company as a private company may exclude the requirement by its Memorandum or Articles.

Broadly speaking "equity securities" means all shares, including rights to subscribe for or convert into shares, except shares giving a right to participate in distributions limited to a specified amount (usually preference shares), bonus shares, employees' shares and subscribers' shares. Such "equity securities" must first be offered to all holders of "relevant shares" or "relevant employee shares" (as defined in sub-section (13)) that is all shares other than shares carrying a fixed right to participate in distributions (and for this purpose employees' shares are included). It should be stressed that these provisions do not apply if the equity securities are to be wholly or partly paid up otherwise than in cash. "Cash" for the purposes of the Act, bears a special meaning set out in Section 2(3) of the Act and referred to in more detail in connection with Section 29 (see below). The offer need not be made to persons who only hold conversion or subscription rights but must be made to holders of all classes of shares, provided that the shares otherwise qualify, so that a person may be entitled to receive an offer of shares of a different class from his existing shareholding. The Act lays down the detailed procedure for making the offer and the rules for acceptance.

Section 23 contains provisions excluding or limiting the application of the Section in certain cases. The drafting of these provisions is bordering on Delphic but, in summary:

(a) if any company has provisions in its memorandum or Articles which requires it to make an offer as described in Section 23(1) to each person who holds relevant shares or relevant employee' shares of any class if it proposed to allot equity securities existing of relevant shares of that class, then the company may allot such securities in accordance with such provisions and sub-section (1) shall not apply;

(b) such securities may be allotted either to the original allottee or to anyone in whose favour he has renounced his rights;

(c) sub-section (7) and (8) provide that any offer, whether made pursuant to sub-section (1) or to provisions in the Company's Memorandum or Articles, must be made by serving the same in accordance with Regulations 133, 134 and 135 of Table A and must state a period of not less than 21 days during which the offer may be accepted; and the offer shall not be withdrawn before the end of that period;

(d) sub-section (1) does not apply if the securities are allotted under an employee's share scheme (even if the person entitled under that scheme has renounced or assigned his rights to the securities).

It is very important to note that a private (but not public limited) company may exclude, in its Memorandum or Articles, the application of sub-sections (1), (7) and (8) of Section 23, and a requirement or authority contained in the Memorandum or Articles of a private company shall, if inconsistent with any of these sub-sections, have effect as excluding them.

Sub-section (11) provides that the company (and every officer thereof who knowingly authorised or permitted a contravention) shall be jointly and severally liable to compensate any person to whom an offer should have been made under the Section, for any loss damage, costs or expenses incurred (subject to a two year limitation period commencing from the date of delivery to the Registrar of a return of allotments (or where equity securities other than shares are granted, from the date of the grant).

In addition to the power for a private company to exclude the pre-emption requirement in its Memorandum or Articles the directors of either a private or a public company may under Section 24 be given a power, where they are generally authorised under Section 20, to allot equity securities without regard to the pre-emption requirements, or with such modification as they may determine. The power may be conferred by the Articles or by a special resolution but lasts only as long as the authority to allot and should therefore be renewed by special resolution when the authority expires. Such power may also be given to the directors, in relation to a particualr allotment, by a special resolution but in this case the directors must circulate with the notice of the meeting a written statement setting out their reasons for making the recommendations and giving certain other particulars of the proposals.

It should be noted that the Stock Exchange will usually only permit such authorisation, in the case of a quoted company, to be given for maximum period of one year without being renewed and will only, as a rule, permit such power to be given in respect of not more than five per cent. of equity capital. (See Clause 13 of Stock Exchange Listing Agreement).

The directors may allot equity securities pursuant to an offer or agreement made before the power to allot lapses provided that the power enabled the company to make an offer or agreement in those circumstances. This point should be borne in mind in drafting the relevant Article or special resolution.

Payment for Share Capital

The new provisions relating to payment for share capital contained in Sections 26 to 37 are designed to ensure that a company receives satisfactory consideration for the shares that it issues, particularly when the consideration is otherwise than in cash.

Subject to certain transitional provisions it is now illegal for any company, whether private or public, to issue shares at a discount. The other provision which relates to private companies (after the transitional period) is that any shares allotted and any premium payable on them may only be paid up in money or "money's worth" which includes goodwill and know-how. Most of the other provisions discussed under this heading, which only apply to public limited companies, do not apply until the company passes the requisite resolution for registration or re-registration as a limited public company.

For a public limited company "money's worth" does not include an undertaking to do work or perform services but these provisions do not prevent any company from allotting bonus shares or from paying up amounts unpaid on its shares with sums that are "available for the purpose", the meaning of which will be discussed more fully in the final article in this series when dealing with restrictions on distribution.

A public company may not allot shares, except under an employees' share scheme, unless at least 25 per cent of the nominal value and the whole of any premium has been received and where shares are allotted in contravention of this requirement they are treated as if 25 per cent. of the nominal value and the premium had been received. The allottee in such situation is liable to pay the company the minimum amount which should have been received, (except in the case of bonus shares where the allottee is not liable unless he knew or ought to have known of the irregularity).

Furthermore under Section 29, a public company shall not allot shares "otherwise than in cash" if the consideration includes an undertaking that may be performed more than five years after the allotment and accordingly any such undertaking should be subject to a condition that it is to be performed within five years. There is moreover, in Section 26(2), an absolute prohibition on a public company accepting, in payment of its shares, an undertaking to do work or perform services. As stated earlier, the meanings of "cash" and "otherwise than in cash" require careful consideration: cash includes foreign currency, a cheque where the directors have no reason to believe it will be dishonoured, the release of an obligation to pay a liquidated sum and an undertaking to pay cash at a future date to the company (but not to any other person).

Even where non-cash consideration is permitted certain conditions have to be complied with, unless the allotment of shares relates to an offer by the company to all the shareholders of another company to acquire some or all of their shares or the company proposes to acquire all the assets and liabilities of another company in exchange for the issue of shares to the shareholders of that other company.

Expert's Report

Section 30 provides that a public limited company is not permitted to allot shares as fully or partly paid up (as to their nominal value or any premium payable on them) otherwise than in cash unless —

(a) the consideration has been valued by an expert in accordance with the Act;

(b) a report with respect to its value has been made to the company by the expert within six months prior to allotment; and

(c) a copy of the report has been sent to the proposed allottee. (It should be noted that there is no express obligation in the Act on the Company to send the report to the allottee but presumably it arises indirectly by virtue of this provision.)

The "expert" must be an independent person qualified to be auditor of the company at the time of the report (presumably the actual auditors will largely be used) save that the expert, in respect of specific assets forming part the consideration, may use the services of a person who appears to him to have the requisite knowledge and experience to value such assets, e.g. land, intellectual property, etc.

Section 30 sets out detailed provisions as to the contents of the report of the expert or any other person whom he arranges to make the valuation.

The Section does not apply:

(a) to shares allotted by way of bonus issue;

(b) to shares issued in connection with an "arrangement" (defined in sub-section 30(14)) whereby the consideration for the shares is to be produced by the transfer to the company of all or some of the shares in another company, or of shares of a particular class in that other company, has by the cancellation of all or some of the shares in that other company (with or without the issue to the company of any shares in the other company);

(c) shares issued in connection with a "merger" (as defined in sub-section (4) of that company with another company.

The Act imposes civil liabilities for contravention of these rules. For example, if a public company accepts an undertaking to do work or perform services the holder of the shares will be liable to pay to the company the amount of capital or premium that was treated as being paid up by the undertaking, together with interest; if shares are issued at a discount the allottee will be liable to pay the amount of the discount; and in certain other circumstances the allottee will also be liable to pay to the company an amount equal to the amount of capital or premium that has been treated as paid up, together with interest, where there has been a contravention of these rules.

The Act also lays down in Section 32 conditions relating to the acquisition of non-cash assets from subscribers to the Memorandum of a public company within two years of the date of registration or re-registration as a public company. A company may not enter into an agreement with such person for the "transfer" (defined in Section 2(4)b) of the Act) of non-cash assets where the value of the consideration will exceed 10% of the nominal value of the share capital except in the ordinary course of its business, where the agreement is entered into under the supervision of the Court or where, in other cases, certain conditions have been satisfied. These conditions are (i) that an independent person has valued the non-cash assets to be received by the company together with any non-cash consideration to be given for them by the company, (ii) that independent person has submitted a report to the company, (iii) copies of the report have been circulated to members and (iv) the terms of the agreement governing the proposed acquisition have been approved by an ordinary resolution of the company.

Where a public company acquires a non-cash asset from a member in contravention of these provisions and the member knew or ought to have known of the contravention, then the company is entitled to recover from the member the amount of any consideration that it has given, which did not consist of the allotment of shares. If the whole or part of the consideration is the allotment of shares, the allottee is liable to pay to the company an amount equal to the capital or the premium that is to be treated as paid up by the non-cash asset.

The Act also contains, in relation to these rules, provision for the extension of liability to subsequent holders, relief in certain circumstances from civil liability, provisions for contribution by other person and criminal sanctions for contravention. □

(Continued).

At the Presentation of Parchments ceremony on the 17th of November 1983, Mr. Thomas V. (Val) O'Connor, Past President of the Law Society, presented his youngest son, Tony, with his parchment. Mr. O'Connor's three other sons, Tom, Pat and John are also solicitors. Also in the picture is Professor Laurence Sweeney, the Society's Director of Training.

INCORPORATED LAW SOCIETY OF IRELAND

IMPORTANT NOTICE

SOLICITORS' ACCOUNTS REGULATIONS 1967 (AS AMENDED)

ACCESS TO CLIENTS FILES

The Compensation Fund Committee of the Society has recently made a ruling on the question of the auditors' access to clients files.

It will not be satisfactory, in future, to deprive an auditor from the examination of clients files purely on the grounds of privilege. The auditor has specific duties under the Solicitors' Accounts Regulations and it is the Society's view that these duties can only be carried out by vouching the transactions in the books of account with the supporting files. It should not be necessary, however, to disclose the entire file to the auditor but the correspondence covering payments/receipts should be made available to the auditor.

A policy decision has been made by the Society to investigate any solicitor's practice who refuses that auditor access to clients files. Where the Society appoints an accountant pursuant to Section 20 of the Solicitors' Accounts Regulations 1967 as amended, the said accountant has the statutory right to inspect all of the relevant files, vouchers, etc.

Correspondence

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

September, 1983

Dear Sir,

There are a number of points in your article on the Housing Finance Agency in the July/August issue of the *Gazette* which require comment.

Regarding criticism of delays, I would like to confirm that since the first loan was paid in August 1982 there has been no delay in the disbursement of funds from the Agency to local authorities, the requests for funds from authorities in the majority of cases being met within a few days of receipt.

Regarding your comments on the inherent risks for borrowers arising from an interest rate based on inflation I would like to make the following points:

1. The example quoted in your article was published by the Agency at a time when annual inflation was running at over 15%. Since then there has been a considerable fall in inflation and the annual rate up to May, 1983, was 9.2%. This resulted in an interest rate on H.F.A. loans in the first year of charge of 12.45% (9.2% plus 3.25%) which compared favourably with the rates on local authority and building society loans at 12.5% and 13%, respectively. Because of the increase in the cost of funds to the Agency the amount to be added to the rate of inflation to determine the interest rate on Agency loans issued on or after 1st July, 1983, will be 4.25%. A table showing an example of a repayment pattern on a loan of £20,000 is included on the handout recently issued by the Agency.
2. You will note that the handout mentions that if a borrower from the HFA opts to make repayments of 18% of his previous year's income (the minimum repayment payable by a borrower receiving a loan of three times his previous year's income) he would not benefit from appreciation in the value of the house in the same way as a borrower with a conventional mortgage if he decides to re-sell. However, it is open to the borrower to pay more than the minimum required up to the amount he would pay on an annuity basis and have his capital debt reduced in line with borrowers who have building society loans. On this basis he may change house on approximately the same terms as the borrower with a loan from a building society and the benefit he derives will depend on the housing market at the time. HFA borrowers who can afford to do this but who decide to make the minimum payment required only have the benefit of money for other purposes in the early years of the mortgage. While the ultimate decision on the amount he will repay rests with the borrower it is suggested tht he should be advised to give very serious consideration to the advantages of paying more than the minimum where he can afford to do so.

One should note that the Agency scheme is geared mainly to help those people who might not otherwise be able to do so to provide their own homes. There is no requirement that the borrower should have money on deposit for a definite period before he is considered for a loan and borrowers who cannot undertake the burden of comparatively high repayments in the early years of a mortgage can opt for income related repayments. The benefits of the scheme to those who, without it, might have to look to the private rented sector for accommodation are considerable; as for other applicants, the scheme gives them the choice of providing their own house or looking to the local authority for re-housing.

Yours faithfully,
John Carroll,
Managing Director,
Housing Finance Agency,
Phoenix House,
27 Conyngham Road,
Dublin 8.

EDITORIAL NOTE: There is perhaps an air of unrealism about the suggestion that it is open to the Borrower to pay more than the minimum required. The HFA scheme is intended to cover those whose incomes are not sufficiently high to enable them to qualify for Building Society Mortgages.

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

15th November, 1983

Dear Sir,

I refer to the recommendation of Joint Committee of Building Societies/Law Society (issued as a supplement to the *Gazette* of the Incorporated Law Society of Ireland, September 1983, Vol. 77. No. 7) wherein the Joint Committee opined that there is no necessity to have a deed made in pursuance of Section 14 of the F.H.P. Act, 1976, adjudged duly stamped.

This direction struck me as curious, in that in past experience in cases where the "Section 14 exemption" was invoked, when a deed was lodged for adjudication the Revenue Commissioners reserved their right to judge each case on its merits. For example, if a large area of land was involved, then the Revenue would allow an exemption from stamp duty for the family home and the land "reasonably appurtenant thereto"; stamp duty would then be levied on the remaining land at half the normal rate (not *Ad Valorem*, as the parties are husband and wife). The Adjudication Office employed two criteria in coming to their decision, i.e., (1) the value of the land and (2) the amount of land involved.

I have raised the point with the Adjudication Office and it has been confirmed that the position has in no way altered so far as they are concerned.

Accordingly, the direction of the Joint Committee may be slightly misleading in that practitioners may construe the direction as an *imprimatur* to register all deeds without adjudication (regardless of the amount of land involved) made in pursuance of Section 14 where the appropriate certificate is contained in the deed.

Yours faithfully,
Alan Synnot, B.C.L.,
35 Landscape Crescent,
Churchtown,
Dublin 14.

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

17th November, 1983

Dear Sir,

Re: Court Winding up

The recent requirement of Mr. David Munro, Examiner of the High Court, in the winding up of a company by the Court, may be of interest to members of the profession. An Official Liquidator, who has evidence of any fraudulent trading or improper conduct by the Directors in carrying on the business of the defunct company, is obliged to make a report to the Examiner. The Examiner will then submit the matter to the relevant High Court Judge who will decide whether or not to forward the papers to the D.P.P. with a view to the latter instituting a Criminal Prosecution.

Because of the stringent requirements imposed on a Liquidator by Section 297 of the Companies Act, 1963, in proving fraudulent trading and, in many cases, due to scarcity of funds available to a Liquidator to take such an action, the ruling is clearly designed to ensure recalcitrant Directors will not escape. In this regard the ruling is to be welcomed.

Yours sincerely,
Nicholas Comyn,
Solicitor,
Ronan Daly Jermyn & Co.,
12 South Mall,
Cork.

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HANDWRITING

Mr. T. R. Davis, M.A. (Oxon.), B. Litt., Department of English, University of Birmingham, P.O. Box 363, Birmingham B15 2TT, England, will undertake the examination of handwriting for forensic purposes (anonymous letters, forgeries, etc). For further details contact him at the above address or phone either Birmingham (021) 472-1301 ex. 3081, or Dublin 684486.

Professional Information

Land Registry —

Issue of New Land Certificate

REGISTRATION OF TITLE ACT, 1964

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

Dated 24th day of December, 1983.

B. Fitzgerald (Registrar of Titles)

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

1. **REGISTERED OWNER:** Nicholas Furlong (deceased); Folio No.: 2857; Lands: Maytown; Area: 52a. 1r. 13p.; County: **WEXFORD.**
2. **REGISTERED OWNER:** McMullan Bros. Limited; Folio No.: 13032 and 17277; Lands: (1) Clonbrusk (F. 17277), (2) Clonbrusk (F. 13032); Area: (1) 0a. 0r. 33p., (2) 0a. 2r. 18p.; County: **WESTMEATH.**
3. **REGISTERED OWNER:** Christopher and Niamh Bain; Folio No.: 2178F; Lands: Gilroe; Area: 1a. 0r. 20p.; County: **GALWAY.**
4. **REGISTERED OWNER:** James Anthony Costello & Ann Costello; Folio No.: 3816F; Lands: Trughanacmy; Area: 0a. 2r. 6p.; County: **KERRY.**
5. **REGISTERED OWNER:** Richard Dalton; Folio No.: 2305; Lands: Clashacrow; Area: 22a. 1r. 17p.; County: **KILKENNY.**
6. **REGISTERED OWNER:** Patrick Farrell, Turloughalanger, Athenry, Co. Galway; Folio No.: 6378; Lands: (1) Turloughalanger, (2) Furzypark; Area: (1) 10a. 3r. 16p., (2) 18a. 1r. 5p.; County: **GALWAY.**
7. **REGISTERED OWNER;** Leo Doyle; Folio No.: 17233; Lands: Brockagh; Area: — ; County: **QUEENS.**
8. **REGISTERED OWNER:** Patrick Murphy; Folio No.: 6297; Lands: Davidstown; Area: 33a. 1r. 12p.; County: **WICKLOW.**
9. **REGISTERED OWNER:** William Henry Leicester Stanhope; Folio No.: 18735 and 18736; Lands: Logaunshire; Area: 50a. 1r. 14p.; County: **LIMERICK.**
10. **REGISTERED OWNER:** William Ryan; Folio No.: 1969; Lands: (1) Coolnapisha, (2) Coolnapisha; Area: (1) 7a. 2r. 0p., (2) 66a. 0r. 0p.; County: **LIMERICK.**
11. **REGISTERED OWNER:** James Gorman; Folio No.: 301R now closed to 18580; Lands: (1) Forest Lower, (2) Townparks; Area: (1) 31a. 2r. 0p., (2) 12a. 3r. 0p.; County: **QUEENS.**
12. **REGISTERED OWNER:** Patrick Coary; Folio No.: 9475; Lands: Cloonlunny; Area: 24a. -r. 5p.; County: **ROSCOMMON.**
13. **REGISTERED OWNER:** John Ryan; Folio No.: 2137; Lands: Shauacloon; Area: 20a. 3r. 27p.; County: **LIMERICK.**
14. **REGISTERED OWNER:** Patrick Crowe; Folio No.: 5903; Lands: Gortussa (part); Area: 26a. 3r. 20p.; County: **TIPPERARY.**
15. **REGISTERED OWNER:** Joy Frances Semple; Folio No.: 4843; Lands: Drummin West; Area: 4a. 3r. 9½p.; County: **WICKLOW.**
16. **REGISTERED OWNER:** James Delahunty; Folio No.: 12162; Lands: Ballymaddock; Area: 47a. 0r. 14p.; County: **LAOIS.**
17. **REGISTERED OWNER:** Gabriel T. Tierney; Folio No.: 26415; Lands: Munlough North; Area: 0a. 1r. 23p.; County: **CAVAN.**
18. **REGISTERED OWNER:** Rosemarie O'Hara; Folio No.: 29514; Lands: Foxford (Part); Area: 10 perches; County: **MAYO.**
19. **REGISTERED OWNER:** Joseph Keane, Lisdoonvarna, County Clare; Folio No.: 3193; Lands: Ballyinsheen More; Area: 16a. -r. 30p.; County: **CLARE.**
20. **REGISTERED OWNER:** James Bourke, Oldtort, Portumna, Co. Galway; Folio No.: 16442; Lands: (1) Shanvally, (2) Sawnagh, (3) Claggernagh West; Area: (1) 14a. 1r. 24p., (2) 11a. 0r. 28p., (3) 7a. 1r. 2p.; County: **GALWAY.**

Lost Wills

COLLINS, Frederick Howard, deceased, late of Northern Bank Ltd., Ramelton, County Donegal. Date of death: 3rd October, 1983. Would any person holding a Will on behalf of the above-named please contact the undermentioned Solicitors. Osborne & Co., Solicitors, Milford, County Donegal.

McDARBY, Leo, late of Newtownpillsworth, Maganey, Co. Carlow and also 24 Beechwood Park, Carlow, died on the 22nd September, 1983. Would any person holding a Will on behalf of the above named please contact the undermentioned solicitors. Clarke Jeffers & Co., Solicitors, 15, Dublin Street, Carlow.

PYNE, Richard, late of Tiernaglohane, Cooraclare, (otherwise Gower South, Cooraclare) Kilrush in the County of Clare and formerly of New Zealand, Farmer. Will any person having knowledge of the whereabouts of any Will of the above-named deceased who died on the 1st day of November, 1983, please communicate with Messrs. McMahon & Williams, Solicitors, Kilrush, County Clare.

Professional Information

R. V. SHANNON & CO., A.C.C. House, Swords, Co. Dublin, wish to advise that they have taken over the legal practice of D. D. MacDonald & Co. of 55 Merrion Square, Dublin 2.

Miscellaneous

PRACTICE TO PURCHASE required by experienced solicitor. Partnership or association considered. Area: Galway, Connemara. Reply Box No. 072.

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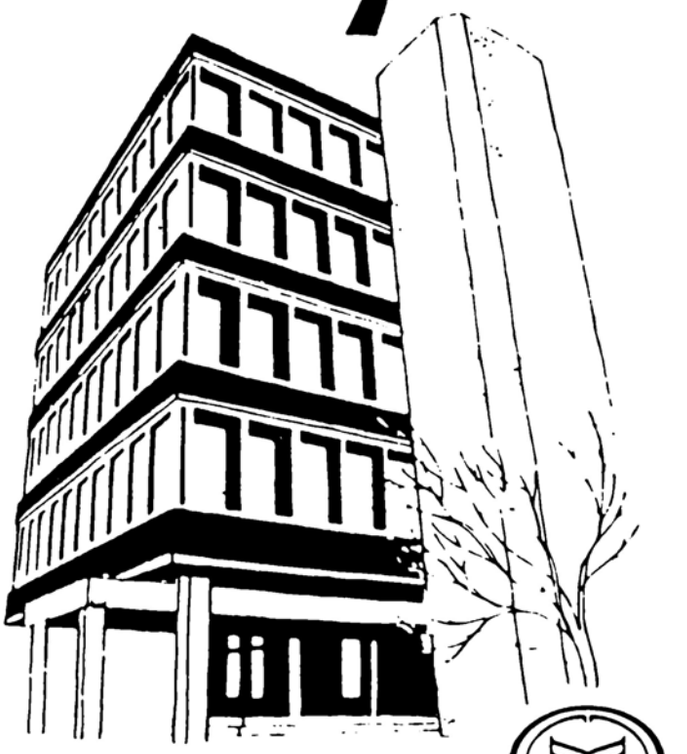

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Recent Irish Cases

COPYRIGHT

Production drawing depicting 3 Dimensional Objects. Whether copyright in drawings can be infringed by unauthorised reproduction of the objects depicted therein. Whether damages recoverable under S.22 and S.24 of Copyright Act 1963.

The Paintiffs claimed an injunction against and damages for infringement of their copyright in certain production drawings of plastic fish boxes. (The drawings had also been registered as designs under the Industrial and Commercial Property (Protection) Act 1927 but it was conceded on behalf of the Plaintiff that the designs had been wrongly registered, and an Order rectifying the register pursuant to S.29 of the 1927 Act was made.)

The first-named Defendant had acted as a manufacturer's agent and had imported sold and advertised plastic fish boxes manufactured by the second-named Defendant which the Plaintiffs claimed were reproductions infringing their copyright.

The Court **Held** that the Plaintiffs could claim copyright protection in product drawings (even though based on earlier product drawings) where the designer had performed sufficient independent labour to justify copyright protection i.e. that the drawings in this case contained significant technical improvements on an earlier (missing) drawing, illustrating the principle that copyright protection is given to the work, not the idea.

The Defendants argued that even if the drawings were "original" drawings, they were not subject to copyright protection because of the provisions of S.172 of the 1927 Act, which when combined with S.3(11) of the Copyright Act, 1963 has the effect that if the drawings on which the Plaintiff relied were capable of being registered as "designs" under the 1927 Act, they could have no copyright protection. The Court however **Held** that the design in this case was a shape in which all the features were dictated solely by the function which was to be performed by the article to which the share was applied, that the shape possessed no features beyond those necessary to enable the article to fulfil its function and therefore could not be regarded as "Designs" within the meaning of the 1927 Act.

On the question of whether the Defendants had infringed the Plaintiff's copyright, the striking similarities between the Plaintiff's fish boxes and those produced by the second-named Defendants raised a *prima-facie* case that a substantial part of the Plaintiff's copyright work had been copied and the second-named Defendants were unable to rebut this with evidence.

The Defendants could not rely on S.14(7) of the 1963 Act, as the making of the object in three dimensional form would appear to a non-expert to be a reproduction of the artistic work in two dimensions. The first-named Defendant had infringed the Plaintiff's copyright by the advertisement importation and sale of the offending fish-boxes but as his infringement was found to be innocent, he could rely on the protection of S.24 of the 1963 Act. The Plaintiffs were entitled to damages against the second-named Defendants for the infringement of their copyright by the importation and sale of the fish-boxes. An injunction was granted against both Defendants.

Damages under S.22 of the 1963 Act were measured against loss of profit on the sale of a consignment of fish boxes which it would have made had the Defendants not made such a sale. The Plaintiff also claimed damages under S.24 of the 1963 Act for wrongful conversion of copyright. It was held that Sections 22 and 24 were cumulative and not alternative, but to make an award under both sections in the present case would result in an award of exemplary damages, which the Court felt itself precluded from doing in the absence of such an express provision in the 1963 Act.

Allibert S.A. v. James O'Connor, trading as James O'Connor & Associates and Can-Am Containers Limited (High Court) (per Costello J.) 1982 ILRM 40.

Daire Hogan

FAMILY LAW

Adoption Act 1974 — Death of Natural Mother — Order sought to dispense with consent.

An illegitimate child, born 6 March 1977, was subsequently validly placed for adoption by the natural mother with the Southern Health Board on 14 June 1977. The Board placed the child with the Plaintiffs, who were the prospective adoptive parents, on 20 June 1977. The Plaintiffs applied for an Adoption Order on 4 July 1977 but before the consent of the natural mother was obtained, as it was necessary, the natural mother died on 2 October 1977. The question was whether the consent of the natural mother was essential to the making of the final Adoption Order.

The Court **Held** that the consent being dispensed of by the court under Section 3 of the Adoption Act 1974 must be a necessary consent at the date of the Court Order to the making of the Adoption Order, and such consent must be withheld through neglect, failure or refusal. In this case the consent of the natural mother was not necessary after her death. The necessary consent was that of the guardian or person having charge and control of the child under Section 14 Adoption Act 1952, at the date of the court order. Section 3 was held not to be relevent in the instant case and no claim was being made by any person, either the grandparents, or the Southern Health Board in relation to the custody of the child, other than the Plaintiffs. The persons who, had charge and control over the child at the date of the court order were the plaintiffs and theirs, therefore, was the only consent necessary under Section 14 of the Act.

However, the Court left open the question whether any other person — either a relation of the child or the Southern Health Board — would have the right to claim that they were guardians or were in charge or in control of the child, and thereby necessitating their consent or the dispensing of same to the making of an Adoption Order. This however was not a matter at issue in the instant case.

T.H. & N.H. v. An Bord Uchtala, (High Court) (per McMahon J.) — unreported — 20 November 1981.

Nicola Barr

FAMILY LAW

English father of English child entitled to rely on provisions of Irish Constitution to oppose English adoption.

Application was made to the High Court by the Plaintiffs (into whose care a child had been placed by Juvenile Court in Kettering) for an Order returning the child to their care in England as the child had been unlawfully removed from the jurisdiction of the English Courts by its father.

The parents of the child were married and domiciled in England, and the child was born in England. The mother was agreeable to it being adopted but the father was not. The Court was satisfied that if the child was returned to the Plaintiffs in England it would be adopted, a development not permissible under Irish law.

In the ordinary course of events, the Court having regard to the order of the English Court would have ordered the return of the child to the Plaintiffs. However, Art. 41.1 of the Constitution guarantees and protects the rights of the family "as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights antecedent and superior to all positive law." These rights are so recognised by the Constitution and the Courts in this jurisdiction, but not by the law or the Courts in England. These rights are — as stated by Walsh J. in *McGee v. A.G.* [1974] I.R. 284 – "part of what is generally called the natural law", and the natural law is of universal application and applies to all human persons, be they citizens of this State or not.

In these circumstances the Court **Held:**

(1) That the father of the child is entitled to rely upon Art. 41 for the purpose of enforcing his rights as father, and that the fact that he is not a citizen of this country cannot prevent him from relying on the constitutional protections given by Art. 41.

(2) That an order be refused at this stage for return of the child to the Plaintiffs.

(3) That as the child also has natural rights which must be protected and vindicated, it would be necessary to have a full plenary hearing to ascertain whether the child's rights are being protected before any final order could be made in this case.

Northampton County Council v. A.B.F. and M.B.F., (High Court) (per Hamilton J.,) — 2 November, 1981 — unreported.

George J. Gill

LICENSING

In determining whether a holder of a Restaurant Certificate is entitled to a renewal of his Certificate evidence should be available from the officer in charge of the Licensing area as to the bona fide use of the premises as a Restaurant supplying substantial meals to the public during the previous licensing session.

Patrick Walsh applied to the District Justice for the Bray District Court Area for a renewal of a Certificate under Section 12 of the Intoxicating Liquor Act of 1927 in respect of buildings at Leopardstown Race Course in County Dublin. He applied as Nominee of the Leopardstown Club Limited. The District Justice stated a case to the High Court for opinion. In Paragraph 4 of the case submitted it was shown that evidence was given for the Applicant that:—

1. There are four separate restaurant areas with extensive and well equipped kitchens and 18 bars within the race course premises.
2. One of the bars is open the year round during permitted hours.
3. There were 26 race meetings during the year and persons attending could and many did have substantial meals in the restaurant from about 12 noon to 7 p.m. on those occasions.
4. Numerous dinners and dinner dances were held during the year for particular organisations and substantial meals were served; some of these functions were private and some were public to the extent that a member of the public could attend on payment of the admission price.
5. House dances or discos were held on 4 nights of every week which were open to any member of the public on payment of £3.00 admission. The £3.00 included the price of a set meal which was available for patrons if they required it. A patron could order a meal from an a la carte menu, in which case an allowance would be made towards the menu price of the meal but this did not happen during the year. The a la carte menu was also available from 8 p.m. to 11 p.m. on these nights but sales were negligible and may be disregarded.
6. Special exemption orders under Section 5 of the Intoxicating Liquor Act 1927 as amended by Section 12 of the 1962 Act were granted in respect of all the house dances and discos and most of the other functions mentioned.

   Other occasional functions such as childrens Christmas parties and parties for orphanages were held during the year; these were private functions and where a meal was served the nature of the meal and the price were agreed beforehand.
8. An effort was made to promote a luncheon business during the year but this was abandoned.
9. Save on the occasions aforesaid the restaurants were not open.

The Intoxicating Liquor Act of 1927 provides at Section 12 (1) as follows:—

"Where on the occasion of any application for a Certificate for a new On Licence or a Certificate for the transfer or renewal of the On Licence, the Applicant requests the Court to certify that the premises in respect of which the Certificate is sought are a restaurant for the purposes of this Act, the Court, if satisfied after hearing the officer in charge of the Garda Siochana for the Licensing area that such premises are structurally adapted and bona fide and mainly used as a restaurant, refreshment house or other place for supplying substantial meals to the public, shall grant to such applicant a Certificate (in this section referred to as a Restaurant Certificate) certifying that such premises are a Restaurant for the purposes of this Act."

The District Justice had difficulty in deciding the Application and stated a case for the opinion of the High Court posing the following questions:—

1. "On an Application under Section 12 of the Intoxicating Liquor Act 1927, if the officer in charge of the Garda Siochana for the Licensing Area says he has no objection must the Court grant the Applicant?
2. Is the supply of substantial meals at private dinners, public dances or discos properly taken into account in deciding whether a restaurant business is carried on for the purposes of Section 12 of the 1927 Act.
3. Is the supply of substantial meals to race goers on race days properly taken into account in deciding

whether a restaurant business is carried on for the purpose of the said section.

4. Are the meals supplied as set out in paragraph 4 hereof supplied to the public within the meaning of the said section.
5. On the facts stated in paragraph 4 hereof is the Applicant entitled in law to the Certificate sought."

In the High Court, Counsel for the Applicant argued that in this case the principal difficulty was as to whether or not the meals supplied were supplied to the public. No question arose in this case as to whether or not the premises were structurally adapted for use as a restaurant but a question did arise as to whether it was bona fide and mainly used for such purpose.

The Court **Held** that an application for a renewal of an On Licence with a Certificate under Section 12 of the 1927 Act, the Applicant must be able to show, if so required, that apart from lawfully exempted occasions or events he has used his premises bona fide and mainly for supplying substantial meals to the public. Normally the assurance by the officer in charge of the Garda Siochana of the Licensing area that there has been no departure by the Licensee in the use of his premises from the qualifications prescribed by the statute should suffice. In case of doubt, as for example, if meals are supplied only in circumstances provided for by Exemption Orders and private functions and not otherwise, evidence should be offered on behalf of the Applicant, with the assistance of the Garda Superintendent by observation. Explanation or evidence should be given to the Court. It is not sufficient for the Superintendent to say "I am leaving it to the Court" as happened in this case. The District Justice has no investigative function and is dependent entirely upon the evidence adduced before him.
Court. It is not sufficient for the Superintendent to say "I am leaving it to the Court" as happened in this case. The District Justice has no investigative function and is dependent entirely upon the evidence adduced before him.

In relation to the premises the subject matter of this application it appears to have been constructed at a site where it is reasonably anticipated that members of the public will attend in large number for race meetings and will require substantial meals and other refreshments. If members of the public attend for other reasons they should be able to find the services of a licensed premises certified under the 1927 Act to be a Restaurant. Whether such services are sufficiently available to the public within permitted hours to indicate that the premises are bona fide and mainly used for supplying substantial meals to the public is a matter of inference from evidence of use. A court might take the view that there are special circumstances of the location and pattern of public resort thereto which might justify the Licensee as a matter of prudence not to keep his premises continuously open during all permitted hours for supplying substantial meals to the public. On the other hand the Court might take the view, taking all the circumstances into consideration, that members of the public resorting to the premises have insufficient opportunity to avail of the services of substantial meals and consequently the premises are not bona fide or mainly used as a Restaurant.

The Court answered the queries of the District Justice as follows:—

1. It is not obligatory on the court to grant the Application with no more than the absence of objection by the officer in charge of the Garda Siochana for the Licensing area.
2. The supply of substantial meals at private functions or in circumstances provided for by exemption orders should not be taken into account.
3. The Supply of substantial meals to racegoers on race days should be taken into account.
4. As the circumstances relating to the supplying of meals as set out in paragraph 4 differs significantly as between exempted and non exempted functions it is not possible to answer this query in the form posed. Regard should be had to the reference in the foregoing opinion to the opportunities available to the public as a matter of their choice as against restrictive qualifications imposed by the user of the premises.
5. As some of the relevant evidence in this case was adduced after the questions were submitted the Court left the final question unanswered and remitted the case to the District Justice with the Courts opinion as aforesaid and the answers to the other queries.

In the matter of Section 12 of the Intoxicating Liquor Act 1927 (Patrick Walsh Applicant). (The High Court) (per Gannon J.) — 30 November 1981 — unreported.

Thelma King

PRACTICE — SOLICITOR'S COSTS

It is not the function of the Taxing Master to assess the nature, quality or value of work done by Council in relation to the conduct of a case. The Taxing Master's rulings on Solicitor's costs in High Court proceedings are subject to review by the Court whether for error in principle or not.

The matter came before the High Court by way of Application pursuant to Order 99 rule 38 of the Rules of the Superior Courts by the Solicitor for the prosecutor for a review by the Court of the Certificate of the Taxing Master in respect of the taxation of costs awarded to the prosecutor. The prosecutor had obtained a conditional order of certiorari quashing an order discharging him from the Defence forces upon the alleged grounds that his military service was unsatisfactory. The prosecutor had also been successful in making the conditional order absolute. The first named respondent appealed unsuccessfully to the Supreme Court and that Court affirmed the High Court Order and awarded the prosecutor the costs of his appeal.

In due course the prosecutor's Solicitor proceeded for the taxation of his costs before the Taxing Master. The Taxing Master made certain disallowances in relation to (A) the Solicitor's own charges which resulted in reductions of the Solicitor's instructions fees and disallowances for attending certain consultations, for attending on Counsel in Court on two unsuccessful ex-parte applications, for attending Counsel for the settling of draft notices of motion and certain affidavits and, (B) reductions in disbursements made by the Solicitor which consisted of disallowances of fees paid to Counsel for attending certain consultations, for settling draft affidavits, for settling a draft notice of motion, fees on briefs, the preparation of a list of Authorities for Court reference and postal charges.

In ruling on the application the Court **held** that

(1) It is not the function of the Taxing Master to assess the nature or value of the quality of the work done or required to be done by Counsel in preparing for Court hearing or in the conduct of cases in Court. The case of *Dunne-v-O'Neill* [1974] IR 180 applied.

A legal Accountant with experience of drawing and taxation of Solicitors' costs before Taxing Masters is a person who should be in a position to keep the Taxing Master informed up to date of the standards of the reasonable, careful and prudent Solicitor in practice in relation to the fees properly charged by and payable to Counsel.

(2) The Courts recognise and respect the special skills and experiences of the Taxing Master in assessing the quality and value of the work of Solicitors. However, his rulings on these matters nevertheless are subject to review by the Court whether for error in principle or not.

Cases referred to in the judgment; Lavan v. Walsh (No. 2) [1967] *IR 129, Dunne v. O'Neill* [1974] *IR 180 Irish Trust Bank Limited v. The Central Bank of Ireland Limited (Parke J., unreported, 12 March 1976, summary in Gazette April 1976).*
Kelly v. Breen (Hamilton J. unreported, 4 April 1978).
The State (at the Prosecution of John Patrick Gleeson) v. The Minister for Defence and the Attorney General, High Court, (per Gannon, J.) 23 June 1980 - unreported.

E. G. Hall

PRACTICE
Single set of Proceedings — Separate causes of action — application for separate Trials — O.18 R.8.

The Plaintiff instituted proceedings against the first and second named Defendants for damages for personal injuries sustained in an accident in June 1977 and against the third named Defendant for damages for personal injuries sustained in an entirely separate unrelated accident in October 1977. The Plaintiff alleged that the combined effect of these two accidents was to render him totally incapacitated for employment and issued proceedings as envisaged in Section 12 sub section 2 of the Civil Liability Act 1961.

The first and second named Defendants brought a Motion under the provisions of 0.18 r.8 seeking separate trials of the two causes of action maintaining they could not be conveniently disposed of together. In this application they were supported by the third named Defendants.

In the High Court, Mr. Justice Hamilton refused the application and the first and second named Defendants appealed.

The Supreme Court **Held** that the onus lay on the first and second named Defendants to establish that a joint trial of the two causes of action could not conveniently take place and that these Defendants had failed to discharge that onus. The majority decision held that as both accidents occurred in Dublin where all the Defendants carry on business it could not be suggested that any particular inconvenience would be caused to any Defendant by providing for a Common Trial and that to order otherwise would make it impossible to guard against the risk that an incomplete or warped version of the sequel of the accidents or the responsibility for them might be presented to the Jury. The case of *Hammerstone v. O'Leary* [1921] 2KB 664 showed how, with the aid of skilful advocacy one defendant, with the field to himself because of the absence of a co-defendant may distort the hearing in favour. In his dissenting judgement Kenny J. held that in considering Section 11 s.s.1 and S. 12 s.s. 2 fo the Civil Liability Act 1961 it would be extremely difficult for a Jury to apportion damages as between the three defendants distinguishing *Baker v. Willoughby* [1970] AC 467, which was relied on by the Plaintiff, as not being relevant. Appeal dismissed.

Patrick Byrne v. Triumph Engineering Ltd. and Ors. (Supreme Court) (O'Higgins, C.J. and Henchy J., Kenny J. Dissenting). [1982] 1 LRM, 317.

David R. Pigot

MATRIMONIAL
Nullity — Duress — Mental Capacity.

This case involved a petition for Nullity brought by the Husband against the wife. By Masters order, two specific issues were raised for decision by the court.
1. Whether the Petitioner was induced to be a party to the ceremony of marriage through pressure, fear, duress and undue influence imposed by the Respondent.
2. Whether by reason of his mental capacity and state of mind at the time of the marriage, the Petitioner was able to understand the nature,purpose and consequences of the marriage contract.

A third issue was raised by consent but without prejudice to the submission on behalf of the Respondent that even if the arguement succeeded, it was not a good ground for declaring a marriage void.
3. Was the Petitioner suffering from such disease of the mind on 21 June 1978 (the wedding day) that he was unable to maintain and sustain a normal relationship with the Respondent or any children there might be of the Proposed marriage, and was he thereby incapable of contracting a valid marriage with the Respondent.

The parties met in September 1976. The Petitioner was a farmer in comfortable circumstances. He had a mother and six sisters who were devoted to him. There was a history of psychiatric illness in his family, his father having spent prolonged periods in mental hospitals and his brother also having received psychiatric treatment. The Respondent was a nurse with a successful career.

In February 1977 the Petitioner suffered a panic attack. He had palpitations of his heart and he feared that his heart would stop. He was admitted to hospital and the Respondent was informed accordingly. He told her that he had been drinking whiskey and taking pills. The results of his tests were satisfactory and the Respondent was happy that there was nothing wrong with him.

In March and April 1977 the parties split up for a short period.

In June 1977 the Petitioner complained of depression. The Respondent did not consider him depressed in the medical sense but nonetheless referred him to a senior psychiatrist known to her, who saw the Petitioner on a number of occasions.

On a further occasion the Petitioner complained of cold sweats at night. The Respondent thought that he might be suffering from Brucellosis and referred him to a specialist. The tests proved that he did not have the illness. The Respondent may have concluded that the Petitioner was a hypochondriac, but was not seriously worried at any stage about his health.

In September 1977 the Petitioner and Respondent had a discussion about their future, which the Respondent took to be a proposal of marriage. From the same discussion the Petition stated he believed that the

Respondent had proposed to him.

The Respondent was subsequently introduced to the Petitioner's mother and sisters and the parties became formally engaged. The Petitioner maintained that he was ill at the time and had no intention of marrying. Meanwhile the Petitioner's mother became ill and she died in January 1978. The Petitioner moved to live with one of his sisters who found him to be very depressed. The Respondent was unaware of the extent of his depression as the petitioner displayed a more cheerful disposition to her, she put any hesitations he had down to pre-marital nerves.

The Petitioner did express hesitations about the fortcoming marriage but never stated clearly that he did not wish to proceed with the marriage. He maintained that he attempted to break off the relationship from the Sunday before the wedding but did not get the opportunity. Prior to the wedding the petitioner made a will referring to the Respondent as his intended wife. Very shortly after the marriage there were a number of rows and minor assaults on the wife. After eight months the Respondent left the family home as she felt the Petitioner did not want her.

The court heard evidence from three Psychiatrists who treated the Petitioner but none of them had seen the Petitioner either immediately before or after the marriage. The psychiatric evidence was to the affect that the Petitioner understood the nature of marriage but might find it difficult to understand and face up to relationships within marriage. The court accepted that both before and after his marriage the petitioner suffered from some sort of personality defect or illness similar to schizophrenia, and that this made it difficult for him to have a successful marriage.

In answering questions 1 and 2 the court considered the evidence was coercive that the Petitioner was at all material times able to understand the nature, purpose and consequences of the marriage contract. It was equally clear from the facts of the case that there was no pressure, fear, duress or undue influence exercised by the Respondent on the Petitioner. Accordingly the reply to question 1 is No, and the reply to question 2 is Yes.

On the third question the Court stated that there is no precedent in Irish Law for this argument. Counsel for the Petitioner submitted that even if he had freely entered into the marriage and knew the implications thereof, he was still not capable of contracting a valid marriage as he was so ill, he was unable to sustain a normal relationship with his wife. It was further submitted that marriage implied an intention on behalf of both parties to live in some form of society and if one party (through illness as suggested in this case) has not the capacity to sustain a relationship with the other, a real marriage becomes impossible. The court drew an analogy between the argument submitted on behalf of the Petitioner and impotence as a ground for avoiding a marriage. The court was of the view that what was contended here was a more serious impediment to marriage than that of impotence. The court further considered that the illness of one of the parties, they both in other respects being capable of contracting a valid marriage, could not make the marriage void providing both knew of the illness. To hold otherwise would be an unwarranted interference with the right to marry. By contrast the court accepted that if it could be shown that at the date of the marriage the Petitioner through illness lacked the capacity to form a caring or considerate relationship with his wife then the court would enterain this as a ground on which a decree of nullity might be granted. The court drew a further analogy with the law of impotence in holding that if such a ground were to be successful it would make a marriage voidable and thus would only void the marriage if the other party had previously repudiated the marriage.

In conclusion the court stated that it found the Petitioner's own evidence in many respects unsatisfactory and was not satisfied that he had proved that on the date of his wedding he was so incapacitated as to make the marriage void or voidable. Even if it were voidable the marriage would be voidable only at the instance of the wife and there was no evidence in the case that the wife had repudiated the marriage. The petition was accordingly dismissed.

R.S.J. v. J.S.J. (High Court) (per Barrington J.) [1982] ILRM 263.

Mary Griffin

TORT

Malicious abuse of Court Process — claim for Damages where proceedings for specific performance and registration of Lis Pendens instituted and maintained maliciously and without reasonable or probable cause, resulting in damage.

Negotiations took place between the parties Estate Agents and then their Solicitors in 1979 for the leasing of the Defendants ("Suedes") factory premises in Clanbrassil Street in the City of Dublin. In the course of correspondence Suedes offered a lease to the first named Plaintiff ("Dorene") "subject to contract" and other conditions. On 9 October 1979 Suedes informed Dorene that it was no longer interested in granting a lease. Dorene instituted proceedings for specific performance and damages for misrepresentation and registered a lis pendens against the property. Suedes immediately replied by telling Dorene that if it went on with its action Suedes would claim damages as the proceedings were preventing a sale of its property to a third party. In December 1979 Dorene were advised by Counsel that their action would not succeed but they did not then discontinue their action but continued the proceedings. But in the meantime proceedings had been filed and Suedes had counterclaimed damages for the wrongful institution and maintenance of the proceedings; its claim, in effect, being one for damages for the malicious abuse of the Court's process.

Dorene's Counsel firstly argued that the Defendant had no cause of action. He accepted that a claim for maliciously instituting criminal proceedings lies and also for maliciously instituting proceedings in bankruptcy and to wind up a Company, but that no action lies for instituting a civil action (even one maliciously brought) because the basis of the tort is damage done to the public by the wrongful institution of proceedings and no such injury is suffered by a Defendant in an ordinary inter-partes action. Alternatively it was argued that if an Action lay for maliciously instituting a claim for specific performance, on the facts of this case Suedes' claim was unsustainable. The Court examined the following authorities and case law:—

Holdsworth: History of English Law (Vol. 81. p. 385 et seq).
Salmond on Torts: 16 Ed. p. 427
Wylie: Irish Conveyancing Law
The Walter D. Wallet (1893) P. 202
Saville -v- Roberts (1698) 1 Ld.Ray. 374

Roy -v- Prior [1971] A.C. 470
Quartz Hill Gold Mining Company -v- Eyre (11 Q.B.D. 674)
Tims -v- John Lewis and Co. [1951] 2 K.B.
Tempest -v- Snowden [1952] 1 K.B.
Abbott -v- Refuge Assurance Co. Ltd. [1962] 1 Q.B. 432.
Pike -v- Waldrum [1952] 1 Lloyds Report 431, 451
Rooney -v- Byrne [1933] I.R. 609
Flynn -v- Buckley (24 April 1980)
Barry -v- Buckley (9 July 1981 — reported)

The Court **Held** that:

(1) At common law an action for maliciously abusing the courts processes lay and such an action is not limited to claims arising from the institution of a criminal prosecution and to bankruptcy and winding-up proceedings. The authorities establish that a claim for damages at common law will lie for the institution or maintenance of a civil action if it can be shown that the action was instituted or maintained (a) without reasonable or probable cause (b) maliciously and (c) that the claimant had suffered special damages or that the impugned action was one which the law presumes will have caused the claimant damage.

2. If it is shown that the proceedings had been instituted without reasonable or probable cause it is necessary to show in addition that they were instituted or maintained maliciously. An intent to use the legal process in question for some other than its legally appointed and appropriate purpose can amount to "malice" in this connection. Obviously where a Plaintiff has obtained legal advice before instituting or maintaining legal proceedings the nature of that advice could be a highly material factor in considering whether he was motivated by an indirect or improper motive, as it may assist in showing whether the Plaintiff was using the proceedings for some legally inappropriate purpose.

3. As to proof of damage, when a claimant shows he has suffered some special damages as a result of a civil action which has been brought or maintained without reasonable or probable grounds and maliciously, then a cause of action has been established. In the absence of Special Damages a claimant will have to show that the impugned action is one which the law regards as causing damage, e.g. if the claimant is injured "in his fair name".

Applying these principles to the facts of the present case the Court **Held** that

(i) there was no legally binding agreement to grant a lease when the proceedings were launched;

(ii) the proceedings were not instituted maliciously but they were maintained by Dorene to assist them in their negotiations; Accordingly the proceedings were not used for their appropriate purpose and were maintained maliciously;

(iii) Suedes suffered damage; They would have sold their premises to a third party had Dorene discontinued the proceedings and vacated the lis pendens in December '79;

(iv) Suedes did not contribute to their loss by failing to apply to have the lis pendens vacated.

The Court would take evidence at a future date on the quantum of damages.

Dorene Limited and Dorene Separates Limited -v- Suedes (Ireland) Limited. (High Court) (per Costello, J.)[1982] ILRM 126.

Franklin J. O'Sullivan

COURTS ACT — Irish Language

Failure to affirm an order that the Government and the Minister for Justice failed to fulfill the obligation imposed on them by section 72 of the Courts of Justice Act 1924.

The complainant, Tomas Ó Monacháin, was twice convicted in the District Court in Bunbeg, Co. Donegal, on 2 February, 1976 and 11 May, 1976 respectively. On both occasions it was stated that he was responsible for development contrary to section 24 of the Local Government (Planning and Development) Act 1963 without the necessary permission. On the first occasion before District Justice Keenan Johnson, who was on temporary duty that day, the complainant sought to have the case conducted through the medium of Irish, but the Solicitor for the County Council and also one of the Witnesses wished to give evidence in English, therefore the District Justice heard the case with the aid of an Interpreter. On the second occasion, District Justice Larkin also availed of the services of an Interpreter to translate to English the evidence given in Irish.

The proceedings were commenced in the High Court by way of Plenary Summons in June 1976. The complainant claimed the following:
(1) An Order affirming that the Government and the Minister for Justice failed to fulfill the obligations imposed on them by Section 71 of the Courts of Justice Act 1924.
(2) An Order of Mandamus to compel the Government and the Minister for Justice to fulfill these obligations.
(3) An Order of Certiorari to nullify the two convictions.
(4) Damages for the period he spent in prison because he would not pay the fines.

The complainant failed on all grounds in the High Court and on appeal to the Supreme Court the appeal was dismissed on the grounds that as Section 71 of the 1924 Act was the basis of the claim and the primary purpose of Section 71 being to provide Native Irish speakers with an opportunity to give evidence in their native language then when a Justice is appointed to an area in which the Irish language is in general use, he must be qualified to operate without an Interpreter when evidence is given in Irish. But the Court stated that it is not an unconditional right under Section 71 that a hearing of that sort would be available in every case.

The onus was on the complainant to show that it was because of a lack of sufficient understanding of Local Irish that District Justice Larkin availed of an Interpreter. The complainant failed to satisfy that onus of proof and therefore he failed in every claim which he made in pursuance of the offences before District Justice Larkin.

Walsh J. disagreed with Henchy J. on that point. He said he was satisfied that the Government and the Minister for Justice had failed to fulfill their statutory duties. District Justice Larkin was appointed to the district in question on 29 September, 1961 and there had been sufficient

opportunity in the interim to appoint a suitable Justice to the area before 11 May, 1976.

With regard to the offences before District Justice Johnson, the Court stated that as the County Council Solicitor wished to open and plead the case in English, and as one of the witnesses wished to give evidence in English, District Justice Larkin could not be justified in hearing the case without an Interpreter. District Justice Johnson also stated in the High Court that he was not satisfied that he himself had sufficient Irish to properly conduct the proceedings; but he was merely on temporary duty on that occasion. It is a basic Principle of Law, that it is neither just nor lawful to hear a case in any language whatsoever, without giving sufficient opportunity to persons who do not speak that language.

The Court **Held** that this was not a new principle of law and citing the case of *O Foghludha v. McClean* [1934] I.R. 649, the Judgement in that case being relevant to the case in point.

There are cases where a complainant would be justified in obtaining a hearing in the District Court under Section 71 of the 1924 Act, but the present case could not be classed as one of them.

If a Justice acted thus, in the present case, the hearing would be repugnant to the Constitution, as it would be contrary to natural justice, not to mention being based on an incorrect interpretation of the correct meaning of Section 71 of the Courts of Justice Act 1924.

Ó Monacháin v. An Taoiseach and another. (Supreme Court) (per Henchy J., Walsh J. and Griffith J.) — 16 July, 1982 — unreported.

Leachlain O'Kane

O'MONACHAIN v. AN TAOISEACH AGUS EILE

AN CHUIRT UACHTARACH

Theip ordú á dhearbhu gur theip ar an Rialtas agus ar an Aire Dlí agus Cirt na dualgais a leagadh orthu faoi Alt 71 den Acht Cúirteanna Breithiúnais 1924 a chomhlíonadh.

Ciontaíodh an gearánaí, Tomás Ó Monacháin, faoi dhó sa Chúirt Dúiche sa Bhun Beag, Co. Dhún na nGall. An chéad uair, ar an 2ú Feabhra 1976, dúradh go ndearna sé forbairt in aghaidh Alt 24 den Acht Riaitais Aitiúil (Pleanáil agus Forbairt) 1963, gan an cead riachtanach a bheith aige. Triaileadh é os comhair an Bhreitheamh Keenan Johnson, a bhí ann mar Bhreitheamh sealadach an lá úd. Thug an gearánaí a chuid fianaise as Gaeilge. Ba mhian le Aturnae an Chomhairle Chontae an cás a phlé i mBéarla. Thug an chéad fhinné a chuid fianaise as Gaeilge ach thug an dara finné a chuid fianaise as Béarla toisc nach raibh an Ghaeilge aige. Dá bhrí sin, d'éist an Breitheamh leis an gcás le cúnamh ó fhear teanga agus bhí se cúramach, chomh maith, faoin fhiontar go mb'fheidir nach dtuigfeadh sé gach aon fhocal de chaint Dhún na gGall.

An dara huair, ar an 11ú Bealtaine 1976, triaileadh an gearánaí os comhair an Bhreithamh Dúiche, an Bhreitheamh Larkin, ar ghearán go nearna sé an cion céanna ar ócáid eile. Baineadh úsáid as ateangaire leis chun an fhianaise a tugadh i nGaeilge a aistriú go Béarla.

Deinadh na himeachtaí seo a thionsnamh san Ard-Chúirt i mí Meithamh 1976, le toghairm iomlánach. Is iad seo na rudai a bhi á n-éileamh ag an ngearanaí.

(1) Ordú á dhearbhú gur theip ar an Rialtas agus ar an Aire Dlí agus Cirt na dualgais a leagadh orthu faoi Alt 71 den Acht Cúirteanna Breithiunais, 1924, a chomhlíonadh.

(2) Ordu i bhfoirm mandamus a chuirfeadh iachall ar an Rialtas agus ar an Dlí agus Cirt na dualgais sin a chomhlíonadh;

(3) Ordú i bhfoirm certiorari chun an dá chiontú a chur ar neamhní;

(4) Damáistí i leith na treimhse a chaith sé i bpriosún toisc nár íoc se na suimenna.

Theip ar an ngearánaí san Ard-Chúirt leis na gearáin seo.

Rinne se achomharc in aghaidh breithe na hArd-Chúirte agus díbheadh an t-achomharc sa Chúirt Uachtarach ar na bunanna seo a leanas: —

Duirt an mBreitheamh Ó hInnse gurbhé Alt 71 d'Acht 1924 bun-údar na néileamh seo uilig. Sé an priomh-chúis gur ritheadh Alt 71 go dtabharfaí cothrom na féinne do chainteoirí Gaeilge ó dhuchas a bheadh ag tabhairt fianaise sa Chúirt Dúiche ina gcanúint Gaeilge aitiúil. Má cheaptar Breithamh do dhúiche ina bhfuil liomatáiste ina bhfuil an Ghaeilge in úsáid ghinearálta, ní mór dó bheith cáilithe chun feidhmiú in éagmais ateanaire nuair a thugtar fianaise tré Ghaeilge. Ach dúirt an Breitheamh Ó hInnse nach mbeadh sé de dhualgas neamh-choinníollach faoi Alt 71 go mbeadh éisteacht den chineál sin le fáil i ngach cás.

Bhi se de dhuagas ar an ngearánaí a theaspaint gur cheal dóthain tuiscint ar Ghaeilge na háite a chas an Breitheamh Larkin ar aeangaire a úsáid. Theip air an dualgas cruthúnais sin a shásamh. Dá bharr sin, theip ar gach éileamh a dhean sé de bhun a chiontaithe os comhair an Bhreitheamh Larkin.

Ní raibh an Breitheamh Breathnach ar aon intinn leis faoin bpointe sin. Dúirt se go raibh sé sásta gur theip ar an Rialtas agus ar an Aire Dlí agus Cirt a ndualgais reachtúla a chomhlíonadh. Do sannaíodh an Breitheamh Larkin chuig an dúiche ar an 29ú Meán Fómhair 1961. Bhí go lear ama chun Breitheamh oiriúnach a cheapadh don dúiche roimh 11ú Bealtaine 1976.

Ar ciontú os comhair an Breitheamh Johnson, de bhrí gur mhian le Aturnae an Chomhairle Chontae an cas a oscailt agus a phlé i mBéarla agus nach raibh an Ghaeilge ag finné amhain, na bheadh an ceart ag an mBreitheamh eisteacht le cas in eagmais cunaimh o ateangaire, duirt an Breitheamh Ó hInnse. Dúirt an Breitheamh Johnson san Ard-Chuirt nach raibh se sásta go mbeadh a dhóthain Gaeilge aige. Duirt an Breitheamh O hInnse, gur bunprionsabal dlí é, nach bhfuil se cóir na dlisteanach éisteacht le cás i dteanga ar bith gan seans a thabhairt do dhaoine nach bhfuil an teanga sin acu.

Duirt sé nach aon dlí nua a bhi á chur ar aghaidh aige agus luaigh se an cás *Ó Foghludha v. McClean* [1934] I.R. 4969. Dúirt sé go raibh an breithiúnais seo ábhartach so chas a bhí ós a chomhair.

Tá cásanna ann ina mbeadh ceart ag gearánaí éisteacht a fháil sa Chúirt Dúiche faoi Alt 71 ach dúirt sé nárbh fhéidir an cás seo a áireamh ina measc.

Dá ndeanfadh an Breitheamh amhlaidh sa chás seo, éisteacht aimhreireach leis an mBunreacht a bheadh ann, toisc í bheith contrártha don cheartas aiceanta, gan trácht ar i bheith de bhun mhí-thuiscint ar an mbrí cheart a bhaineann le hAlt 71.

Ó MONACHÁIN v. AN TAOISEACH AGUS EILE.

AN CHÚIRT UACHTARACH.

(BREITHIMH: Ó hINNSE, BREATHNACH AGUS Ó GRÍOFA) 16u IUIL 1982. Nior tuairisciodh.

Edited by Gary Byrne.

Editorial Note:

In the November 1982 issue of Recent Irish Cases, the summary in the case of *The State (Flynn & O'Flaherty Ltd.) v. The Lord Mayor, Alderman and Burgesses of the City of Dublin* was accredited to John F. Buckley. The summary was in fact prepared by William Earley, and the error is regretted.

Copies of judgments in the above cases are available to members on request from the Society's Library.

Recent Irish Cases

BANKING — Opening of additional bank account held not to discharge Guarantee. Duty of care of paying banker.

The Plaintiff was managing director and controller of K. Ltd. which was indebted to the defendant bank.

In order to secure advances to K. Ltd. by the defendant the Plaintiff in 1971 lodged with the defendant title deeds of land owned by him part of which was leased to K. Ltd. As additional security the plaintiff on 2 November 1972 executed in favour of the defendant bank a guarantee ("the Guarantee") in connection with the accounts of K. Ltd. with the bank. At that time K. Ltd. had two trading accounts with the bank.

Under the Guarantee the plaintiff guaranteed payment to the Bank of "all and every sum or sums of money heretofore or hereafter advanced to or paid for or on account of K. Ltd. by the bank "on foot of . . . current account or otherwise howsoever" subject to a limit of £75,000 plus interest. The Guarantee was to be "a security for any ultimate balance that shall remain unpaid" by K. Ltd. to the bank.

By May 1973 K. Ltd. was in severe financial difficulties and, rather than liquidate or countenance the appointment of a Receiver, the plaintiff sought to find a purchaser. At a meeting in the plaintiff's office on 24 May 1973 an arrangement was made whereby the plaintiff was to transfer his interests in K. Ltd. to the control of L., resign as a director of K. Ltd., and L. guaranteed that by the end of October 1973 the deeds of the plaintiff's property would be returned to him by the bank and that L. would lodge with the bank the necessary collateral security to secure such release. The arrangement remained to be confirmed by the bank. On the same day, the plaintiff's son (who was to be retained in the employment of K. Ltd.), his accountant, W., and L. met the manager of the relevant branch of the bank. The plaintiff was not present. On the date in question the two trading accounts of K. Ltd. were overdrawn in the sums of £25,800 and £63,000 respectively. This was in excess of the credit which the Bank would permit. In order to provide working capital for K. Ltd. the bank manager suggested that a third account should be opened and that it should not be set off against the first two accounts without the consent of the directors of K. Ltd. This was agreed, it was further agreed that moneys standing to the credit of the No. 3 account would not be set off for the purposes of interest against the liability of the Company on foot of the Nos. 1 and 2 accounts. It was held by the High Court (Hamilton J.) that the plaintiff was later that day informed of the opening of the No. 3 account but not of the arrangements in respect thereof between the Bank and K. Ltd. It was further held that W. was not the agent of the plaintiff at the meeting with the bank manager (although the plaintiff had subsequently claimed the contrary in correspondence) but no appeal was taken from that finding. (Kenny J., however, concluded that W. had the authority of the plaintiff to make the arrangement with the bank manager), L. failed to honour his obligations and left the jurisdiction. In May 1975 the bank had demanded payment of the plaintiff of £75,000, being the limit of his liability under the Guarantee).

Following his inability to enforce a court order against L., the plaintiff instituted proceedings against the bank claiming a declaration that he had been discharged from his obligations under the Guarantee, recovery of the title deeds of his property, detinue, and damages for negligence in conducting the company's accounts and paying certain cheques. The bank counterclaimed for the amount due under the Guarantee.

The substantial question for determination in the action was whether the arrangement made by the bank with L., on behalf of K. Ltd., whereby K. Ltd., already having a No. 1 and No. 2 account, should open a No. 3 account, was permissible under the terms of the Guarantee.

The Supreme Court **Held**:

(1) when a guarantee guarantees a transaction between two persons, neither of them may make any alteration in the terms of the contract guaranteed unfavourable to the interest of the guarantor without his consent and that if they did so, the guarantor would be discharged. *Holme v. Brunskill* [1878] 3 QBD 495, CA, adopted by the Privy Council in *Ward v. National Bank of New Zealand Ltd,* [1883] 8 App. Cas. 755, PC, and *Egbert v. National Crown Bank* [1918] AC 903 applied. (The above principle was accepted by the bank).

(2) (reversing the decision of the High Court) that the Guarantee applied to all current accounts which K. Ltd. might have with the bank from time to time, that it was not limited to the two accounts in existence prior to 24 May 1973, and that accordingly it applied equally to the No. 3 account, the existence of which the plaintiff knew on that date and that to ascertain "the ultimate balance that shall remain unpaid" the No. 3 account had to be considered; therefore, the arrangement in relation to the No. 3 account was not a variation of the plaintiff's obligation under the Guarantee and he was not thereby discharged from the said obligation; it followed that he was not entitled to the return of his title deeds. *National Bank of Nigeria v. Awolesi* [1964] WLR 1311, distinguished.

(3) a paying bank was under a contractual duty to exercise such care and skill as would be exercised by a reasonable banker and that such care and skill included, in appropriate circumstances, a duty to enquire before paying and that a reasonable banker would make such enquiries when there were grounds for believing that the authorised signatories were misusing their authority for the purpose of defrauding the company of which they were agents, but that drawing of cheques on the accounts of private companies in order to discharge personal expenses was common practice and that in the instant case the bank was not put on enquiry and the action for negligence would be dismissed. *Karak Rubber Co. Ltd. v. Burden (No. 2)* [1972] 1 All ER 1210 adopted but case distinguished on its facts.

(4) Accordingly, the appeal by the bank from the decision of Hamilton J. was allowed and the cross-appeal by the plaintiff was dismissed.

John P. McEnroe v. Allied Irish Banks Limited, Supreme Court, (per Griffin J. Parke J. concurring and Kenny J), unreported, 31 July 1980.

Patrick J. C. McGovern

LICENSING — Six Count Summons — Limited Company — Nominee — Liability of Company as Licence Holder — Liability of Nominee for aiding and abetting.

This case was an appeal by way of case stated from a decision of the

District Court dismissing two summonses. On 9 January, 1980 Murtagh Properties Limited ("the Company") appeared before the District Court as Defendants on a Six Count Summons alleging that they being the holders of an On-Licence in respect of the premises had unlawfully:

1. Sold Intoxicating Liquor.
2. Opened the premises for sale of Intoxicating Liquor.
3. Kept open their premises for the sale of Intoxicating Liquor.
4. Exposed Intoxicating Liquor for Sale.
5. Permitted Intoxicating Liquor to be consumed on their premises.
6. Permitted persons to be on the premises contrary to the form of the Statute in such case made and provided.

At the same Court, Thomas Wright appeared as a Defendant in a Summons in which he was named as Thomas Wright (Nominee of Murtagh Properties Limited) alleging that he had aided and abetted the Company in the commission of the offences at the same premises. It was proved that the Company was incorporated on 21 March, 1963, and had been since 1972 and was the owner and occupier of "The Sheaf O'Wheat"; that Thomas Wright a Nominee of the Company was at all materials times the Licensee; that at 1.10a.m. on 12 March, 1979 a Sergeant McMahon observed at least four persons seated at the Bar, and saw a Barman serving Intoxicating Liquors; that the Sergeant knocked and received no reply; that he observed a Barman removing bottles and glasses and washing and cleaning the Counter; that he the Sergeant continued knocking and was admitted at 1.55a.m. and found on the premises Thomas Wright, who said he was the Manager of the premises, two barmen and two other persons.

The learned District Justice raised the point, that on the first Summons the complaint was against the Company "as holders of an on-licence in respect of the said premises" whereas in fact Thomas Wright was the Holder of the Licence as Nominee of the Company, and he suggested that the scheme of The Intoxicating Liquor Acts was such, more particularly with regard to Indorsement of Licences, that the Company might more properly have been prosecuted as a principal party since it was beneficial owner in possession of the premises and the business, and that Thomas Wright would then properly have been prosecuted for aiding and abetting, the words in the title of his summons "Nominee of Murtagh Properties Limited" being treated as surplusage in which event no conviction could be recorded on the Licence, or alternatively that the Company might properly have been prosecuted as a Principal party, and that Thomas Wright as Holder of the Licence might also have been prosecuted as a Principal Party, and in the latter event, a conviction or convictions against him would in an appropriate case be recorded on the Licence. The State Solicitor for the Complainant submitted that if Mr Wright could be described as Holder of the Licence (which the State Solicitor did not admit) he held the Licence for the Company, and that therefore the Company was rightly prosecuted as Holder. There being no Application to amend the first Summons by striking out the words "being the Holder of an On-licence in respect of the said premises" the learned District Justice dismissed both Summonses. It appears the Case Stated raised no formal question, but by Agreement the Appeal proceeded on the basis of whether the learned District Justice was right in dismissing the Summonses for the grounds stated. The High Court held firstly that a Limited Liability Company is entitled itself to hold a Licence without resorting to the device of having a Nominee. Secondly it is not incorrect to refer to the Nominee as being the "Holder" of the Licence, as long as it is remembered that the Company is the beneficial and real Holder of the Licence. The Nominee must comply with all legal instructions of the Company in relation to the Licence, and he is in effect no more than a peg on which the Company finds it convenient to hang its Licence. This being so, if the Company, through its Agents, breaks the law in the running of the business, it is at all times liable as the Holder of the Licence. The Nominee provided he does no more than hold the Licence commits no offence, but if the Nominee is also the Manager of the business, or if he assists in the commission of an offence, then he may be liable for aiding and abetting the Company as Holder of the Licence, notwithstanding that he is a nominal "Holder" himself. The learned Justice was held wrong in dismissing the Summonses against the Defendants, and the case was referred back to him to enter continuances. *Kelly v. Montague* 16L.R.I. 424; *R. v. Lyon* [1898] 14TLR 357; *R. v. Jones* [1895] 59 J.P. 87; *The King (Cottingham) v. Justices of Co. Cork* [1906] 2.I.R. 415; and the *State (John Hennessy and Chariot Inns Limited) Applicant v. Superintendent J. Commons Respondent* [1976] I.R. 238 considered.

Sergeant Bernard McMahon Complainant, and Murtagh Properties Limited and Thomas Wright, Defendants, The High Court (per Mr Justice Barrington) unreported 20 October 1981.

Barry O'Reilly

JURISDICTION — International Law — Institution of Civil Proceedings and Service of Notice thereof outside the jurisdiction — Court's Discretion.

A Motion was brought by the third-named Defendants (Total) in the High Court pursuant to Order 12 Rule 26 of the Rules of the Superior Courts to set aside of discharge an Order of the High Court of 17 December, 1981 authorising the Institution of proceedings against the Defendants and the service of notice thereof on Total outside the jurisdiction.

Total had not yet entered an appearance to the Summons notice of which had been served on it.

This Motion was one of 37 Motions arising from the disaster of 18 January, 1979 at the oil terminal at Whiddy Island, Bantry Bay, Co. Cork which resulted in the deaths, of among others, the entire crew of the motor vessel Betelgeuse which was at all material times owned by Total. The terminal and jetty were owned and occupied by the first-named Defendant. The first-named Plaintiff was the Administrator of the Estate of, and the second-named Plaintiff was the widow and dependant of, a member of the crew of the Betelgeuse who died in the tragedy. The Plaintiffs were bringing their claim under the Civil Liability Act 1961 and claiming damages for negligence, nuisance and breach of Statutory Duty. Thirdy five Motions dealt with deceased crew members of the Betelgeuse, the other two dealt with the wife of a crew member and an executive of Total. Not all of the victims died aboard the Betelgeuse. The bodies of four were found on the jetty.

The second-named Defendants reserved their position on the Motion. The first-named Defendants wished the matters at issue to be determined in Ireland. The Court had to decide two questions:

a) Whether the Irish Courts had jurisdiction to try any of the thirty seven cases referred to and;
b) even if jurisdiction was established, whether the Irish Courts ought in their discretion to decline.

As regards the first question the Court **Held**:

1. Counsel for Total submitted that the Irish Courts had no jurisdiction to try any of the thirty seven cases because all the victims were Nationals employed under French Contracts of Service, the ship was French registered and that in most, if not all, cases the victims lost their lives as a result of happenings on board a French ship on French national territory governed by French national law. In rejecting this submission the Court held that the disaster took place in Irish waters and within the Court's jurisdiction. In reaching this conclusion the Court adopted the reasoning of Lord Atkin in *Chung Chi Cheung v. R* [1938] 4 All ER 786 in preffering the jurisdictional theory in International Law "that a public ship in foreign water is not and is not treated as territory of her own Nation." Whilst the present case dealt with a private ship and the law of tort, the argument in favour of subjecting a private ship to the Civil Law of the littoral state appeared equally strong, even if the occurrence was confined to the Betelgeuse entirely.
2. Immediately prior to the accident the Betelgeuse was berthed at a jetty owned by the first-named Defendant it seems reasonable to assume that the first and third-named Defendants while denying liability would blame each other and it would be strange if the Plaintiff were prevented from suing both Defendants in the jurisdiction where the tort was alleged to have been committed.
3. It was urged on behalf of Total relying upon the Statement of Haugh J. in *Freedman v. Opdeheyde* [1945] I.J.R. page 22 that save in exceptional circumstances the Plaintiff must seek out the Defendant in the Defendant's jurisdiction and the Court **held** that one of those exceptional circumstances was when the action is founded on a tort alleged to have been committed by a foreign resident within the Irish jurisdiction.

On the second question the Court **Held**:

1. It was argued that issues of French law best interpreted by a French Court were raised. In particular the fact that the Plaintiffs in these actions who were suing as Representatives or as dependants of deceased members of the crew, had received, and were receiving substantial compensation under the French Social Security system.
2. The Plaintiffs contended that the comparative costs and convenience of the Irish Courts as compared to the Courts in England (where the first defendant was registered) Pennsylvania (where the second defendant was registered) and France (where Total was registered) respectively favoured having the case tried in Ireland more especially since 79 potential witnesses were permanently resident in Ireland.
3. If the Plaintiffs had not joined Total in the proceedings the first-named Defendant would have applied to issue third party proceedings against them, because, in the event of the Plaintiff succeeding against the first-named Defendants, the first-named defendants would be seeking contribution or indemnity from Total.
4. These factors favoured having the Action tried in Ireland the deciding factor being whether the Defendants were liable to the Plaintiffs under the law of tort in Ireland.

The application was refused and this decision governed the position in all thirty seven motions.

Laurence O'Daly and Marie Claude Reverte v. Gulf Oil Terminals (Ireland) Limited, Gulf Oil Corporation and Total Compagnie Francaise de Navigation — High Court (per Barrington J.) (unreported) 7 July 1982.

Kenneth Morris

PRACTICE — certiorari — natural justice — Absolute order of Certiorari granted in respect of decision of Governor of detention Institution revoking a grant of temporary release as the principles of natural justice had not been applied.

The prosecutor had been serving a sentence of twelve months detention in St. Patrick's Institution. On 19 May 1981 subject to certain conditions, he was granted full temporary release to the expiration of his sentence on 22 October 1981.

On 15 June 1981, while on temporary release, the prosecutor was arrested under Section 30 of the offences against the State Act 1939. He was charged, with others, with attempted murder and possession of a fire-arm with intent to endanger life. The prosecutor was then remanded in custody to St. Patrick's Institution and given clothing appropriate to a person who had been sentenced. The prosecutor was told he was being kept in custody because of the seriousness of the offences alleged against him.

On 23 September 1981, the prosecutor obtained a conditional order of certiorari in respect of the order of the Governor of St. Patrick's Institution in revoking the grant of temporary release. The order was granted upon the ground that the decision of the Governor to terminate the temporary release was reached otherwise than in accordance with natural justice.

The argument put forward by the prosecutor was that the Governor did not hold a hearing before revoking his temporary release. The Governor denied this claim and argued that the principles of natural justice had not been broken.

The only evidence available to the Governor was that the prosecutor had been charged with serious offences. The Governor was not in possession of any evidence which related to a breach of any condition to which the prosecutor's temporary release was made subject. The Court stated that it followed that there could not have been a hearing and, accordingly, not a hearing which followed fair procedures.

The Governor also argued that there had been excessive delay on the part of the prosecutor in obtaining relief. Reference was made to *State (Cussen) v. Brennan* [1981] IR 181.

The Court **held** in making absolute the conditional order that;

1. A hearing is required in any case where the rights of an individual are seriously threatened and such individual would not otherwise have any means either of seeking to vindicate himself or to alleviate the hardship which he might suffer.
2. In view of the potential loss of liberty of the prosecutor some hearing of the allegation against the prosecutor that he was in breach of a condition to which his release was made subject was required.
3. In the circumstances of this case the essentials of a valid hearing required:
   (a) Evidence from which it would have been fair to hold in favour of the allegation;
   (b) Notification to the Prosecutor of the nature of such evidence sufficient to enable him to prepare a defence;
   (c) Time for the prosecutor to prepare a defence;
   (d) An opportunity to make that defence. The hearing, however did not have to be of a very formal nature provided that the above minimum requirements were met.
4. On the question of delay, there was

no element of any possible prejudice to any party. The prosecutor was entitled to relief.

The State (at the prosecution of Michael Murphy) v. The Governor of Saint Patrick's Institution — High Court (per Barron J.) [1982] ILRM 475.

E. G. Hall

BROADCASTING — Section 31 (1) of the Broadcasting Authority Act 1960 (as inserted by Section 16 of the Broadcasting Authority (Amendment) Act 1976) does not contravene the Constitution — Locus Standi of applicant.

The Respondent was one of seven candidates standing on behalf of the Sinn Fein Party in the General Election of February 1982. In its coverage of that election Radio Telefis Eireann agreed to allow Sinn Fein a two minute broadcast. The Respondent was selected to make the broadcast on behalf of his party. When RTE's decision to allow the broadcast was announced, the Minister made an Order entitled the "Broadcasting Authority Act (Section 31 (No. 2) Order 1982" (Statutory Instrument 21 of 1982) which specifically prohibited the proposed broadcast. The Order was made under Section 31 (1) of the Broadcasting Authority Act 1960 as inserted by Section 16 of the Broadcasting Authority (Amendment) Act 1976, which gives to the Minister the power to order RTE to refrain from broadcasting certain matters where he is of the opinion that they would undermine the authority of the State, or promote or incite crime.

The Respondent challenged the Order, and the Section pursuant to which it was made, on several grounds, including the claim that it constituted an infringement of the Citizen's Right to express convictions and opinions as provided for in Article 40.6.1 of the Constitution.

The Respondent succeeded in the High Court before O'Hanlon J. who accepted that the Section gave the Minister a far reaching power of veto over material for broadcasting which he found was not susceptible of control by the Courts, as the Minister's opinion did not admit of judicial review and accordingly the Section enabled the Minister to act in an unfettered and unreviewable manner and contravened the Constitution.

On appeal to the Supreme Court and in considering the constitutionality of the Order and The Locus Standi of the respondent the Court **held**:

(1) The decision of the High Court Judge followed opinions expressed by the Supreme Court in 1940 and again in 1957 to the effect that the expression "is of opinion" did not admit of judicial review. However, judicial thinking has since undergone a change and recent decisions show that the power of the courts to subject the exercise of administrative powers to judicial review has a wider reach than that shown by the older decisions.

Article 40.6.1 of the Constitution enables the State, in certain instances, to control the freedom of expression and free speech granted by the Constitution. It places an obligation on the State to ensure that the organs of public opinion (for example, television) shall not be used to undermine public order or morality or the authority of the State. It is the State's duty to intervene to prevent broadcasts which are aimed at, or which in anyway would be likely, to have that result. These however are objective determinations and the fundamental rights of citizens to express their opinion cannot be restricted on any irrational or capricious ground. It must be presumed that when the Oireachtas conferred these powers on the Minister it intended that they be exercised only in conformity with the Constitution. The Section does not exclude review by the Courts and any opinion formed by the Minister must be one which is bona fide held and factually sustainable and not unreasonable. The invalidity alleged against the Section has not been established.

(2) The Respondent had a sufficient locus standi to bring the action. Although a citizen does not have access as of right to television, radio etc. RTE had agreed to afford him the opportunity of making the political broadcast, and the Minister's action deprived him of that benefit. As a result, the Respondent was entitled to complain that this deprivation was unlawful.

(3) Although it might be preferable in other circumstances to have questions concerning the constitutionality of legislation dealt with by declaratory action, with the benefit of pleadings, the securing of the relief sought in this particular case was of the utmost urgency, and the Respondent was quite entitled to use the quick and effective method of certiorari.

(4) The Order made by the Minister was not invalid, as alleged, on any of the other grounds claimed by the Respondent. *Firstly*, the prohibition was within the type of Order authorised by the Section. *Secondly*, the Order was not made without regard to the requirements of Justice. Even though the Respondent was not notified of the Minister's intention to make the Order, the Minister was bound to act immediately as he did, both by the Statute and the Constitution, as time was short and delay and debate would have defeated the very object of the Section. This was not a case where justice required that the person affected be heard. *Thirdly*, on the basis that the Order is reviewable by the Court, there are no grounds where the Court should set aside the Order. The Minister has disclosed fully on affidavit the factual evidence on which he made his decision, none of which the Respondent has controverted, and which evidence clearly shows that Sinn Fein aimed at undermining the authority of the State. The fact that the contents of the proposed broadcast did not merit any condemnation is an irrelevant consideration, as the purpose of the broadcast was to support an organisation which the Minister had reasonable grounds for believing was intent on undermining the State.

The State (At the Prosecution of Sean Lynch) v. Patrick Cooney, Minister for Posts & Telegraphs, and the Attorney General — Supreme Court (per O'Higgins C J nem. diss.) (unreported) 28 July 1982.

Karl Hayes

Edited by Gary Byrne

Copies of judgments in the above cases are available to members on request from the Society's Library.

Recent Irish Cases

ROAD TRAFFIC ACT

Where a person has been charged with driving while having more than the prescribed amount of alcohol in his urine the arrest by the member of the Garda Siochana on the basis of a positive result from the breathalyser test will be valid.

The defendant in this case stated had been stopped at a check point and when the Garda heard the applicant's replies to routine questions and also smelled his breath he formed the opinion that the applicant had consumed an intoxicant and then gave him a breathalyser test which proved positive. As a result of this the Garda arrested the Defendant without a warrant in that he formed the opinion that the Defendant was driving while under the influence of an intoxicant to such an extent as to be incapable of of having proper control of the vehicle in accordance with section .49 (6) of the 1961 Road Traffic Act as inserted by section 10 of the Road Traffic (Amendment) Act 1978. Later at the Garda Station the Defendant gave a sample of his urine and a certificate of analysis later showed the alcohol level to be above the prescribed limit. The applicant was charged with driving while his urine alcohol content was at this level rather than with driving while under the influence of an intoxicant to such an extent as to be incapable of having proper control of the vehicle which is one of the three separate offences laid down in section 49 of the 1961 Act and which was the offence of which the arresting Garda formed the opinion as stated by him in evidence. The applicant was convicted in the District Court and he appealed to the Circuit Court from where the case was stated.

The basic question at issue was whether the arrest was valid i.e. whether the Garda could justifiably form the opinion that the Defendant was unfit to drive without observing any defects in his driving or his demeanour and purely on the basis of the breathalyser test. It was **held** that the opinion formed by the Garda was invalid in the absence of any demonstrable defects in driving or demeanour in that the breathalyser merely showed that not less than a particular amount of alcohol had been consumed. It certainly gave no indication of a person's capacity to drive which would vary from person to person with the same level of alcohol.

It was also considered that when the Garda formed his unjustified opinion he must also have formed the opinion, even though not stated in evidence, that the applicant had driven when there was an excessive concentration of alcohol in his blood or urine. The first unjustified opinion would encompass this second opinion. This second opinion proved justifiable when the certificate of analysis was produced. Therefore the arrest had been valid though not for the reason given in evidence but for an appurtenant and implied reason that an offence separate from the one of which the arresting Garda formed the opinion, had been committed.

It was also felt by Kenny J. that a Garda may form his opinion by relying solely or partly upon the breathalyser. He referred to the decision of Mr. Justice Costello in *Hobbs v. Hurley* (1980 no. 165 SS unreported) which seemed to suggest that the Garda must observe certain matters over and above the breathalyser result to enable him to justifiably form the requisite opinion. Kenny J. would disagree with this suggestion.

Held (per Henchy J. and Griffin J.) The positive result of a breathalyser test on its own is not sufficient to justify an arresting Garda in forming an opinion that a driver is under the influence of an intoxicant to such an extent as to be incapable of having proper control of a vehicle but it is sufficient to justify an opinion that his blood alcohol or urine alcohol levels are above the prescribed limits. An arrest will therefore be valid but the defendant must be charged with an offence specific to urine or blood alcohol level and not simply with the offence of incapacity to drive.

Held (per Kenny J.) The positive result of a breathalyser test on its own is sufficient to justify an arresting Garda in forming an opinion that a driver is under the influence of an intoxicant to such an extent as to be incapable of having proper control of a vehicle. An arrest will therefore be valid and the defendant may be charged with the simple offence of incapacity to drive or with an offence relating to blood or urine alcohol level. *The Director of Public Prosecutions v. Gilmore*, 1981 ILRM 102.

Brendan Garvan

NULLITY — DURESS

The Petitioner and Respondent met one another on holidays in 1970. In the ensuing two years they became friendly, but the friendship was not of a close personal nature. The parties never contemplated marriage. In 1972 sexual intercourse took place between the parties which resulted in the Petitioner's pregnancy. The Petitioner was nineteen and the Respondent was twenty-one. Both were living at home. The Petitioner had just commenced a career in the Bank, and the Respondent was in poorly paid employment.

The Petitioner was deeply attached to her mother and very dependant on her. When the Petitioner's mother discovered the pregnancy she informed her that she must marry or leave home. At the time the Petitioner's father was suffering from ill health.

The Respondent's parents informed him that he had no option other than to marry. The Respondent had to leave home and live with a friend.

The two sets of parents met, in the absence of the Petitioner and the Respondent, and decided that a marriage should be arranged. The Petitioner's mother directed her to organise the ceremony with the priest. The Respondent took no part in the arrangements. He described himself to the Court as "feeling trapped". he was still in poorly paid employment and had no arrangements made for a home in which the parties could live after the marriage.

The parties marries in September 1972. Two weeks after the wedding the Petitioner miscarried. The relationship deteriorated thereafter and the parties separated in 1975. The Petitioner sought a Decree of Nullity on the ground of Duress. In reviewing the case law, the court identified two distinct approaches to the law on duress.

The more stringent principals as enunciated in *Szechter v. Szechter* [1970] 3 All E.R. *Parojcic v. Parojcic* [1959] 1AllER, *Griffith v. Griffith* [1944] I.R. and *Buckland v. Buckland* [1967] 2 All E.R., required that the will of one or both parties should be overborne by threats calculated to produce fear of loss of life, limb or liberty.

In two more recent Irish cases that of *B v. D* June 1973 (unreported High Court) and *S v. S* November 1978 (unreported High Court). A broader approach was adopted and summarised in the judgment of Finlay P. where he stated "essentially it seems to me that the freedom of will necessary to enter into a valid contract of marriage is one particularly associated with emotion, and a person in the emotional bondage of another could not consciously have that freedom of will".

In deciding to adopt the broader line of thinking of *B v. D* and *S v. S* the court looked to section 13 of the Matrimonial Causes and Marriage law (Ireland) Amendment Act 1870 which provides that the High Court in exercising its

Jurisdiction is "to proceed and act and give relief on principals and rules which in the opinion of the said Court shall be as nearly as maybe conformable to the principals and rules which the Ecclesiastical Courts of Ireland have heretofore acted on and given relief". The court was influenced by the fact that the Ecclesiastical Tribunal had in the circumstances of this case granted a Church annulment which was an indication that canon law may embrace not only violence and threats of violence but also certain moral pressures of the type evident in this case.

Held that a decree of nullity be granted on the ground of duress, as the will of both the Petitioner and the Respondent was overborne by the compulsion of their respective parents to whom they had been subject in the parent child relationship and which drove them to marriage, neither desired nor gave their consent to. The duress exercised was of a nature that they were constitutionally unable to withstand nor extract themselves.

M.K. (otherwise M. McC) v. F. McC, [1982] ILRM 277.

Mary Griffin

CONTRACT —

Agreement to build silent as to a term, related to services, implied term should be included in the Agreement. Council found to be in breach of the implied term and must compensate for damage sustained by the Plaintiff.

The Plaintiff a Building Contracting company claimed damages for alleged breach of an Implied term of a building agreement dated 25 July 1974 (the Principal Agreement) wherein it was agreed that the Contractors execute and do all works required in accordance with the Contract and to the satisfaction of the council's engineer for the completion of twenty houses on the Council's site at Town Parks, Skerries County Dublin. This site was adjacent to a site owned by the Plaintiffs on which they also intended to build forty houses.

A dispute then arose in that necessary connections for certain services which were essential for the carrying out of the works according to the above agreement, were not provided for or available on the council's site nor did the agreement specify the responsibility of either party.

In order to resolve the problem and the dispute which had arisen between the parties it was agreed that the Contractors should secure an agreement, with the adjacent Developer, Lincoln Developments Limited whereby this Company granted the Contractors the said rights of connections and services, subject to the Contractors paying £7,500 to the Company for the said rights.

A Supplemental agreement dated 25 May 1976 between the Plaintiffs and the Council stipulated that the said connections and services were to be provided from the lands belonging to Lincoln Development Limited to the Council's site, and this Supplemental agreement was to be read in conjunction with the Principal Agreement and it was agreed in this Supplemental Agreement that the council would reimburse the Contractors the £7,500 paid to Lincoln Developments Limited and did so.

This dispute resulted in 19 weeks delay, and the Contractors claimed for loss and damage which they sustained on account of this delay on the basis that an implied term should be read into the Principal Agreement that there was an obligation on the part of the Council its servants, and agents to provide and supply the said connections and services on the Council's said site to enable the Contractors to complete their obligations, and in failing to do so the Council should be held liable for loss and damage sustained.

The Council argued against this:

(a) That the obligations of providing such connections and services could not be so implied.
(b) That the Plaintiffs were estopped from claiming damages for delay on foot of the Supplemental Agreement.
(c) That the delay was due to a difficulty that arose in regard to the invert levels at the boundary between the Council's site and that of Lincoln Development Limited.
(d) That the Contractors did not need to negotiate on behalf of the Council with Lincoln Development Limited, but for themselves as they were building forty houses next to the Council's site.
(e) That when including all precontractual documents and drawings subsequent to the Principal Agreement the situation shows that the Contractors were responsible for the connections and services.

The Court **held** that neither party considered or proposed that the Contract should or could be frustrated. The Court can imply a term which will implement the presumed intention, to do what the parties would have agreed but for their inadvertent omission.

This power is vested in the Court since the case of the *Moorcock* [1889] 14 P.D 64. The law looks at what is presumed the obvious intention of the parties, and draws implications into the Contract with the object of giving efficacy to the transaction. The Court **held** in the instant case that the course of the conduct of the parties and the corrspondence indicated that a term or condition could be read into or implied in the Principal Agreement, which if it had been originally included would have resolved the dispute in issue and further that the relationship between the parties was that of employer and contractor and that the work was carried out on the employer's site, and if the Contract failed to provide the necessary term, that the Council would pay the Contractors the cost thereof as part of the Contract price. The court also accepted the statement that in the ordinary way it's for the owners/developers of a building site to provide or obtain the necessary and essential services for the development.

The Council therefore was in breach of an implied term of the Principal Agreement, and were held liable to compensate the Contractors for damages suffered by them.

Keegan and Roberts Limited v. Comhairle Chontae Atha Cliath. High Court (per Ellis J.) — 7 July 1981 — unreported.

John Gore-Grimes

PLANNING —

Compensation for refusal of Planning Permission — Undertaking for alternative development under Section 57 (3) of Planning Act, 1963 — Validity of undertaking — Whether claim for compensation is precluded by Undertaking.

The Claimant, applied for outline Planning Permission for residential development on 65 acres of his land at Portmarnock. The Application was refused by the Respondents and by An Bord Pleanala, on appeal. The Claimant then applied for £2.4m. compensation for such refusal under Section 55 of the Local Government (Planning and Development) Act, 1963 (The Act). The claim was referred to the official Arbitrator. Before the hearing before the Arbitrator commenced, the Respondents furnished to the claimant a document purporting to be an Undertaking to grant Permission for a development to which Section 57 of the Act applied. The Undertaking contained recitals referring to the claimant's application and its refusal and the Respondents proceeded to undertake to grant permission for the construction of hotels, theatres or structures for the purpose of entertainment or any combination thereof subject to conditions in relation to... (being the matters specifically mentioned in Section 57(3) of the Act).

The Respondents submitted that the delivery of the Undertaking was a complete answer to the claimant's claim for compensation. The Official Arbitrator stated a case for the opinion of the High Court in which he raised questions as to whether the Respondents had power to give a valid Undertaking to grant Planning Permission in accordance with Section 57 (3) of the Act and, if they had such a power, whether the Undertaking actually furnished was valid and had the effect of

precluding the Arbitrator from awarding compensation.

The Court **held**: It was clearly demonstrated that if the Undertaking to grant Permission were to be equated to a grant of permission, it would not be possible to give the expression a sensible construction consistent with the other provisions and regulations of the Planning Acts. The function of the Court when presented with the statutory requirements of the Oireachtas is to accept them, inept though they may be, and so far as possible to give them effect in a sensible manner in accordance with the manifest intention of the statute as shown by its provisions.

It is not intended that the Undertaking to grant Permission, is to be equated to a grant of Permission, nor is it necessary that they should be equated. Section 57 can be construed despite the demonstrated weakness of expression, and can only be construed as meaning that Section 57 precludes an award of compensation to a Claimant, such as the Claimant in this case, who has land capable of being developed in a manner indicated in subsection 4 of Section 57 if the Planning Authority expressly states that it undertakes that it will grant permission for some such development. Accordingly, the questions submitted by the Arbitrator were answered to the effect that the Respondents had power to and did give a valid Undertaking, that the Undertaking was in force for the purposes of Section 57 and was given in time to preclude the Arbitrator from awarding compensation as aforesaid.

Ignatius Byrne v. Dublin Co. Council. (High Court (per Gannon J.) — 29 July 1982 unreported.

William Dundon

CONTRACT — INSURANCE

Fire — building destroyed — no reinstatement clause in policy. Whether insured entitled to indemnity against loss or cost of reinstatement — negotiations presumed to be conducted on basis of brokers knowledge of policy conditions.

The Plaintiff Company entered into associated Contracts of Insurance in respect of property situate at Maxwell Street, Glasgow, purchased in May 1977, with other adjoining property, for approximately £25,000.00. Of this price £15,000 approximately was apportioned to the property with which this case was concerned. Having purchased the property the Plaintiff employed a firm of Brokers to arrange to have it insured against fire risks. The Brokers sought cover from the second named Defendants ('Provincial') for £30,000.00. By letter dated 24 May 1977 to the Brokers Provincial confirmed cover for £30,000 and went on to state "the floor area of the building is about 4,000 square feet so that the total floor area is some 20,000 square feet. The present sum insured of £30,000 therefore affords a rebuilding cover of £1.50 per square foot. A realistic figure should be fixed; but please note that whilst the building remains unoccupied our maximum acceptance would be £50,000 so that we should expect you to find co-insurers for the balance above this amount". The Brokers then approached the first named Defendant ('Sun Alliance') and by letter dated 23 June 1977 they wrote to Atlantic as follows: "Dear Sirs, *Fire Proposal*... St. Albans Investment Company Limited, 69 Highfield Road, Rathgar. With reference to your recent conversation with our Mr. Murphy regarding the premises No. 85 Maxwell Street, Glasgow, we confirm holding cover for a sum of £250,000 for Fire Perils only. We understand the premises will shortly be occupied and we will then arrange to have the risk surveyed. As soon as our Surveyors Report is available we will contact you again."

During June and July the proprietor of the Plaintiff Company consulted Architects and Quantity Surveyors for the preparation of plans for converting part of the premises into a public house and the preparation of the necessary documents for an application for a liquor licence. Before any Policy was issued and before any further step had been taken the property was destroyed by fire on 15 August. A short time later Policies were issued by both Defendants in the standard Policy form which provided for payment to the insured of the value of the property at the time of the happening of its destruction with an option to the Company to reinstate the property. Evidence was given that where the reinstatement of property is required by an insured, the Policy will contain what is described as a "reinstatement clause". No such clause was contained in these Policies.

As a result of the fire the building had to be taken down at a cost estimated by the Court at £9,000. The value of the site after demolition was estimated at £20,000.00. The Plaintiff claimed entitlement to the sum of £300,000.00, the cost of rebuilding being considerably more than this.

Both Defendants denied that they insured the premises on the basis of rebuilding or reinstating them and evidence was given that such cover was not sought and that the Policies issued after the fire were in accordance with the original agreement between the parties. They explained the reference to rebuilding in the letter of 24 May 1977 as an indication to the Brokers that in the case of partial damage a clause as to "general average" would apply and that in the case of partial destruction the Insured would only recover such proportion of the cost of repair as the total sum insured would bear to the cost of rebuilding the entire premises if totally destroyed. They claimed, therefore, that the Plaintiff was entitled to compensation only on the basis of the market value of the premises at the time of the fire less the site value after deduction of the cost of demolition. They relied very strongly on the fact that the Plaintiff placed its insurance through a Broker who should have been fully aware that an agreement to indemnify the cost of rebuilding would require a reinstatement clause in the Policy and should have been fully aware of the application of general average provisions.

The Court **held** that on the facts, the Policies did not cover the cost of reinstatement. The Plaintiff originally proposed to insure on the basis of being compensated for loss in accordance with the value of the property and it is a reasonable proposition that negotiations must be presumed to have been conducted on the basis of the Brokers' knowledge of the position about reinstatement Clauses. The Plaintiff was awarded £54,000.00 calculated on the value of the property at £65,000.00 from which must be deducted the value of the site, less the cost of the demolition.

St. Albans Investment Company v. Sun Alliance & London Insurance Limited and Provincial Insurance Company Limited. The High Court (per McWilliam J.) 30 April 1982 — unreported.

Franklin J. O'Sullivan

CONSTITUTIONAL/ ADMINISTRATIVE LAW

Constitutionality of Sections 29 and 30, Turf Development Act, 1946 — Articles 40 and 43 — Compulsory Acquisition — Natural and Constitutional Justice.

In November, 1978 Bord Na Mona (BNM) published advertisements in the newspapers indicating their intention to acquire certain lands, including 132 acres the property of the Plaintiff, pursuant to their powers under Section 29 and 30 of the Turf Development Act, 1946. Section 29 empowers BNM to acquire land permanently or temporarily by agreement or compulsorily and to acquire various rights in or over land. Section 30 empowers BNM prior to agreement on compensation to enter and take possession of any land or exercise any right in land. The Plaintiff objected in writing through his Solicitor on 1 December, 1979. The Plaintiff with other affected landowners then wrote to BNM setting out general objections to the proposed acquisitions applicable to all the owners of the lands in question. At a

meeting on 15 February, 1979 between the Plaintiff and BNM the Plaintiff made it clear that he objected in principle to his lands being acquired but stated that if they had to be so acquired it was his desire that he should not lose the ownership of his lands but rather at the end of the period necessary for the removal of the peat the land should revert to him. Representatives of BNM indicated that their policy was to acquire the freehold to land. On 21 March, 1980 the Managing Director of BNM submitted a report to the Board, which contained the objections contained in the letter sent by the Plaintiff and others on 1 December, 1979. No reference was made in the Report to the particular objection to the acquisition of the fee simple of the lands made at the meeting on 15 February, 1979. The Board purported to pass a resolution compulsorily purchasing the Plaintiff's lands in fee simple. The Plaintiff brought an action in the High Court claiming that:

1. Sections 29 and 30 of the Turf Development Act, 1946 were invalid having regard to the provisions of the constitution in that firstly the Sections failed to respect, defend and vindicate the personal rights of the Plaintiff as guaranteed by Article 40, Section 3, and secondly that they contravened the Plaintiff's right to private ownership of his lands as guaranteed in Article 43.
2. BNM had acted in excess of their powers and otherwise than in accordance with natural and constitutional justice in the procedures which they had adopted prior to the making of the decision to acquire the Plaintiff's land.

It was **held** in the High Court on 18 March, 1981 that Sections 29 and 30 of the Act were invalid having regard to the provisions of the Constitution in that the act of BNM in making a Compulsory Purchase Order was a judicial and not an administrative act and that the power contained in the Act, enabling them so to decide without any form of appeal or confirmation by an external Tribunal violated the maxim of natural and constitutional justice that no man should be a judge in his own cause. While not making an Order on the second claim the Court expressed the view that on the facts BNM had made the "Order" without having considered the substance of the Plaintiff's objection and in so doing had acted in breach of natural and constitutional justice and in particular the Rule Audi Alterem Partem.

On appeal to the Supreme Court it was **Held:**

1. The act must be viewed as constituting a decision that the common good requires that bog land be available for compulsory acquisition. The Act vests this decision in BNM.
2. This purpose and effect of the Statute does not vest in BNM an arbitrary or capricious power. The power is subject to review by the Courts should it in any particular instance act from an indirect or improper motive or without due fairness of procedures or without proper consideration for the rights of others.
3. The making of or refusal to make an Order for compulsory acquisition is essentially an administrative act.
4. Neither the absence of a right of appeal (as distinct from a right of review) nor the absence of a confirming external authority constitutes a breach of the Plaintiff's constitutional rights.
5. Sections 29 and 30 of the Turf Development Act, 1946 are not invalid having regard to the provisions of the constitution.
6. In this case fair procedures, natural and constitutional justice required three necessities:
   Firstly, that the Plaintiff should have ample and sufficient notice of the intended compulsory acquisition;
   Secondly, that he be given ample and sufficient opportunity of making objections or representations and;
   Thirdly, that the objections and representations should be adequately communicated to the Board and considered before the decision is made.
7. In this case the first and second requirements were fulfilled but the third requirement was not fulfilled because there was a failure by the Board to properly hear the objections and representations of the Plaintiff in that they did not consider the Plaintiff's specific representations relating to the possibility of an acquisition for such period only as was necessary for the extraction of the peat and thereafter a reversion to the Plaintiff.
8. The Plaintiff is entitled to a Declaration that the procedures were not in accordance with natural justice and the purported resolution to acquire the lands is therefore null and void.

Richard O'Brien v. Bord Na Mona and the Attorney General. Supreme Court (per O'Higgins C. J. and Finlay P., two issues nem diss) — 9 December 1982 — unreported.

Eugene O'Sullivan

Edited by Gary Byrne

Copies of judgments in the above cases are available to members on request from the Society's Library.

Recent Irish Cases

TRADE MARKS

Unauthorised use of registered trade mark. Whether exclusive rights, under Section 12 of Trade Marks Act 1963 in respect of registered trade marks are limited to use of the goods in the course of trade.

The Plaintiffs were registered proprietors of the mark "Conquest" in Part A of the Register Class 34 in respect of the goods tobacco, whether manufactured or unmanufactured.

The Defendants, The Health Education Bureau, produced an imitation packet of cigarettes, containing pieces of paper folded to look like cigarettes, on which were printed pieces of advice on how to give up smoking. To the casual observer the packet looked like and was intended to look like a packet of cigarettes bearing the brand name "Conquest". The Defendants had been unaware that by using the word "Conquest" it was making use of a registered trade mark — it had caused a search to be made in the Register but the searcher had failed to search in Class 34.

The Plaintiffs claimed that the exclusive statutory rights given to them by Section 12 of the Trade Marks Act 1963 had been infringed and secondly and alternatively that the Defendant had been in breach of a duty of care which it owed to all persons lawfully engaged in the trade of selling tobacco products not to so conduct its campaign as to damage the legitimate rights of property which such persons are entitled to enjoy.

The Defendants denied a breach of the Plaintiff's statutory rights as it had not used the Plaintiffs' mark in relation to cigarettes but in relation to a health education campaign. The Defendant also argued that the exclusive right given by Section12 is a right to use the mark in relation to goods in the course of trade, and that even if it had used the mark "in relation to" cigarettes it did not use it in the course of trade.

HELD: That by giving the words of Section 12 their ordinary and natural meaning and applying them to the facts, the Defendant had used the mark "in relation to" cigarettes. The Plaintiffs' mark, though little used by them, could never again be used by them in relation to cigarettes or tobacco products. The fact that goodwill in a mark has been injured lends considerable support to a claim that there has been a use of the mark "in relation to" the goods for which the mark was registered.

That furthermore following the English case of *Bismay v. Amblins (Chemists) Limited* 57. R.P.C. 209, Section 12 when enacted had extended the law relating to trade marks and that the exclusive statutory right was not confined to use to indicate the origin of the goods.

On the Defendants' submission that an infringement contrary to Section 12 only occurs if there is use of the mark by the alleged infringer "in the course of trade" (by reference to the definition of a trade mark contained in Section 2 of the Act), it was held that that would require the court to construe the section by adding words to it which it did not contain. As had been seen in the present case, a non trading unauthorised use of the mark could result in irreparable damage to the mark and there was no reason why the legislature did not intend to grant effective protection against such "non-trading" use.

As the mark could not be used further, a sum of £350 would be incurred in registering another mark — which was the sum awarded to the Plaintiffs by way of damages.

As the Plaintiffs were entitled to relief under the first part of their claim it was unnecessary to consider the alternative claim based on the allegation of breach of a common law duty of care.

Gallaher (Dublin) Limited, Hergall (1981) Limited, and Gallaher Limited v. The Health Education Bureau — High Court (per Costello J.) — 23 February 1982 — [1982] ILRM 240.

Daire Hogan

VALUATION

Rateability of Educational Institution under the Provisions of Section 63 of The Poor Relief (Ireland) Act, 1838.

The question at issue in this case was the rateability or otherwise of Wesley College. This question depended on whether or not Wesley College was an Institution altogether of a public nature and used exclusively for public purposes, and therefore, coming within the exemption provided by Section 63 of the Poor Relief (Ireland) Act, 1893.

The Constitution of Wesley College requires the Governors "to provide and afford for Methodist and other children and for so many of the children of Ministers in connection with the Methodist Church as may from time to time be elected or designated for such purpose by the Conference (of the Methodist Church in Ireland) subject to such charges or scale of charges as may from time to time be determined by the Governors for the time being".

Statistics were provided for the Court in respect of the year 1973 which showed that of the 622 boys and girls attending the College 19.3% were Methodist, 59.3% were members of the Church of Ireland and the remaining 12.54% were drawn from other Protestant sects, Roman Catholics, Jews and Muslims. The Court was of the opinion, therefore, that while the College was of unique benefit to the small scattered Methodist Community in Ireland it enured over-whelmingly for the benefit of non-Methodists. The school is essentially a private, fee-paying school with grants and subventions from the Department of Education which are available to recognized Secondary Schools. The Court held that because one of the conditions for the admittance for most of the pupils is the payment of a sizeable fee, it cannot be said that Wesley College is altogether of a Public nature, or altogether used for public purposes. It is a necessary pre-requisite for exemption from rateability that the College have an exclusively public nature or purpose.

In reaching this conclusion the Court referred to *Trustees of Magee College v. Commissioner of Valuation* IR 4CL 438 and *Guardians of Waterford Union v. Barton,* [1896] 21R 538. The Court distinguished the cases of *Pembroke UDC v. Commissioner of Valuation* [1904] 21R 427 as in that case, Pembroke Technical School was maintained by public money and derived no private profit, was open to all comers. The fee of 2/6d which each student had to pay was disregarded by the Court under the *de minimis* rule, because it was intended to ensure that only bona fide and serious students would enrol and that the circumstances of Wesley College were radically different. The Court also distinguished the instant case and that of *University College Cork v. Commissioner of Valuation,* [1911] 21R 593 in which case the University College was held exempt from rates as in that case the relevant provision of the Irish Universities Act, 1907 and of the Charter of the National University and that of the College itself marked the College as having in terms of its objects, user and financial accountability, characteristics which made it altogether of a public nature and used for public or exclusively charitable purposes. Similar characteristics were found wanting in the instant case. At one stage the College argued that in accordance with the opinion of the House of Lords in *The Governors of Campbell College Belfast v. Commissioner of Valuation for Northern Ireland* [1964] 1 WLR 912, that exemption is to be sought in Section 2 of the Valua-

tion (Ireland) Act, 1854, but ultimately that suggestion was withdrawn and the case solely rested on the exemption provided by Section 63 of the Poor Relief (Ireland) Act 1838. On the latter the Court **held** that the tenements and hereditaments of Wesley College are not used exclusively for charitable purposes and are not of a public nature and dedicated to or used exclusively for public purposes and accordingly should not be thus distinguished in the valuation lists.

Governors of Wesley College and the Trustees of the Methodist Church in Ireland v. Commissioner of Valuation. Supreme Court (per Henchy J. Nem Diss) 9 December 1982 — unreported.

Peter Connolly

CRIMINAL LAW

When sentencing a young person, the District Court or Circuit Court, which certifies that the unruly character of the young person prevents it from ordering that the offender be detained in a place of detention, may determine that a sentence of imprisonment be imposed.

L. was a young person within the meaning of the Children Act, 1908, who was sent forward to the Circuit Court for sentence, having signed pleas of guilty to over 80 offences. The Circuit Court Judge certified L. to be "of so unruly a character and of so depraved a character that he cannot be detained in and is not a fit person to be detained in a place of detention for young persons under the Children Act, 1908".Such a certificate enables a sentence of imprisonment to be imposed on a young person and a sentence of two years in Mountjoy Prison was passed.

L. obtained a conditional order and, in time, an absolute order of certiorari in the High Court on the ground that S.106 of the Children Act, 1908, prohibited a sentence of more than one month's imprisonment for a young person. The Respondent appealed to the Supreme Court.

HELD: S. 106 of the Children Act, 1908 is an enabling one which allows the District Justice or Circuit Judge, when he considers that none of the other methods with which the case may legally be dealt with is suitable, to commit a child or young person to a specified place of detention for a period not exceeding one month instead of imposing a term of imprisonment. In this case the Circuit Judge considered that the other methods of dealing with L. were not unsuitable. Instead, the Judge determined that a prison was the appropriate place to send the applicant. S. 106 has no application where such a determination is made and in the instant case the Respondent acted properly and within his jurisdiction.

The State (Laffey) v. Esmonde and Others. Supreme Court (per O'Higgins C. J., and Henchy J., Griffin J. concurring), 2 July, 1982 — unreported.

Ciaran A. O'Mara

ROAD TRAFFIC ACTS

Bye-Laws under Road Traffic Act, 1961, Sections 89, 90 and 92 — Control of Traffic and Parking on Specified Public Roads — Control of Traffic on the Occasion of Fairs and Markets

The Defendants in each of these two groups of cases are street traders and were prosecuted in the District Court, convicted and fined for breaches of Bye-Laws made under Sections 89 and 90 of the Road Traffic Act, 1961 relating to the regulation and control of traffic and the parking of vehicles. Cases having been stated, the High Court upheld all the convictions. A further Appeal was taken to the Supreme Court.

Bye-Laws made under Sections 89 and 90 of the Road Traffic Act, 1961, are not, and are not intended to be, effective to regulate traffic and parking in a lawful Market or Fair. The regulation of traffic through a public road where a Fair or Market is being lawfully held can be effected only by Bye-Laws made under Section 92 (1) and then only to the extent allowed by that sub-section. Where the evidence raises an inference that the conduct complained of may consist of trading in a lawful Market, the Prosecutor must rebut that inference if he is to secure a conviction for a breach of Bye-Laws made under Sections 89 and 90.

The Supreme Court allowed all the appeals and directed that the several summonses should stand dismissed.

Director of Public Prosecutions (Long) v. McDonald and Others; Same v. O'Mahony and Others; Same v. Biggs and Others. — Supreme Court (per Hency. nem. diss.) 22 July, 1982) — unreported.

William Dundon

PLANNING —

Local Government (Planning and Developments Acts) 1963/1976, Housing Act 1960 — Whether Decision to Refuse Decision Made and Communicated within Statutory Time Limits

The Plaintiff lodged an application with the Defendants for permission to carry out a development at Strand Road, Bray on or about 6 October 1978. As the proposed development would have entailed the demolition of an existing habitable house, a separate application was made to the Defendants for permission under the Housing Act 1969 for the demolition of the house. The Housing Act permission was refused and an appeal brought to the Minister for the Environment, who granted permission for the demolition on 20 August 1979. The Defendants were, under the provisions of Section 26(4)(a) and (b) of the Local Government (Planning and Development) Act 1963 as amended by Section 10 of the Housing Act 1969, required to make and give notice of their decision in relation to the Planning Application within a period of five weeks from the date of final determination of the application for the permission to demolish.

The Defendants made a decision on the application on 24 September 1979 and on that day sometime after 4.30 p.m. an official from the Planning Authority handed in a registered letter, containing the notice of decision to grant permission and addressed to the Plaintiff, at Bray Post Office. The latest time for posting registered post each day at Bray Post Office was 4.30 p.m. and a notice to this effect was prominently displayed in the post office. Any registered letters accepted after that time would not go out until the following morning.

The Plaintiff and Defendants both issued proceedings seeking certain declarations on the various issues. The Court considered that the issues to be determined could be resolved by considering what answer should be given to the following series of questions:

1. Is the day upon which the Minister's decision was given on the appeal of the Housing Act 1969 to be taken into account in calculating the "appropriate period" of five weeks within which a decision should have been given on the Planning application?
2. If it is and the five week period expired on 23 September 1979 is the situation affected by reason of fact that that date fell on a Sunday?
3. If 24 September 1979 is to be regarded as the last day of the statutory five week period, was notice "given" within the meaning of the Acts, when the registered packet was handed into the post office on that date and accepted for posting by the person in charge?
4. If the notice was not given within the requisite five week period is it now open to the Plaintiff to challenge the validity of the decision to refuse permission, having regard to the time limit for bringing proceedings imposed as a result of the amendment of Section 82 of the Local Government (Planning and Development) Act 1963 effected by Section 42 of the amending Act of 1976.

On the first question the Court accepted that under the provisions of Section 11 of the Interpretation Act 1937 the day upon which the Minister gave his decisions was to be included in the computation of the five week period and accordingly the last day of the period was 23 September 1979. The Defendants decision to refuse permission was not made until the following day 24 September 1979. In relation to the second question, 23 September 1979 fell on a Sunday and the Court held that express provision by statute or statutory instrument was needed if the time limited by statute for doing any ministerial or administrative act were to be extended because the last day for doing the Act happened to fall on a Sunday. There was no such express provision under the legislation before the court and accordingly the court held that as no notice had been given up to 23 September 1979 of a decision to refuse permission, a decision by the Defendant to grant the permission should be regarded as having been given on the last day of the five week period notwithstanding that that day happened to be on a Sunday.

Having regard to the court's conclusion on the second question it was not strictly necessary to consider the third question but the court expressed its view that it would not follow the decision of O'Keeffe P. in the case of *The State (Murphy) v. Dublin County Council* [1970] I.R. 253 having regard to the critical views which had been expressed in the cases of *Thomas Bishop Limited v. Helmville Limited* [1972] 1 All E.R. 365 and *Maltglade Limited v. St. Albans Rural District Council* [1972] 3 All E.R. 129 of the case of *Moody v. Goldstone R.D.C.* [1966] 1 W.L.R. 1085 on which some reliance had been placed by O'Keeffe P. in *The State (Murphy) v. Dublin County Council* when he stated at page 258 "it seems to me that one must consider in each case what the legislature intended. In the case of the Act of 1963 the legislature obviously intended that the planning authority should arrive at a decision without undue delay and should give notice of the decision to the applicant. The planning authority was to be required to do its part within the appropriate period by dispatching notice of its decision but the time of receipt of the notice seems not to be of importance. I think that the notice was given when it was sent by registered post in the manner prescribed by the Act ... There is no reference to 'service' of the notice in sub-section 4 of Section 26 of the Act of 1963 to bring into operation the second limb of Section 18 of the Interpretation Act 1937. For this reason I think that the prosecutor's submission is incorrect and that the cause shown should be allowed". The Court in taking a different view expressed the view that the provisions of the Act indicated an intention that Planning applications were to be dealt with as matters of some urgency and that there was to be an obligation on Planning Authorities to communicate their decisions to applicants within a strict limit of time and that it was intended that no similar decision should reach applicants either personally or at their premises within the period prescribed by the Act as "the appropriate period". The court noted that the utilisation of any of the other methods of giving notice under the Act, other than the use of registered post, involved either personal delivery of the notice to the applicant or delivery of it at the address where he normally resides, or at an address he had given for purposes of service, or by delivering it physically at the land to which the application relates or affixing it conspicuously at or near the said land. Under these provisions time continues to run against the Planning Authority until the notice has been physically delivered to or brought to the notice of the applicant or left at some premises where it may reasonably be regarded as having come into his possession and control. The court expressed the view that if an applicant could show that the notice given by the Planning Authority served by registered post did not reach him within "the appropriate period" the Planning Authority would have to suffer the consequences of resorting to this method of service rather than the more conclusive method of personal service or service at the premises to which the application relates or where the applicant resides or at the address for service which he has given. The court indicated that it inclined to the view that the registered letter should be regarded as having been "posted" when it was handed into the post office, properly stamped and accepted by the person in charge of the post office even though the time was later than the time given as the latest date for posting for that particular day. The court held however that the notice was not given for the purposes of the Act until 25 September 1979 at the earliest, a date clearly outside the prescribed five week period.

On the fourth question the court followed the decision of Barrington J. in the case of *The State (Pine Valley Development Limited) v. Dublin County Council* (27 May 1981 unreported). Having held that a decision by the Defendant to grant the permission was given on the last day of the appropriate period and the Defendant having subsequently made an order refusing permission there would exist two conflicting decisions of the same Planning Authority and the Plaintiff had correctly sought relief in the form of a Declaratory Order as to the legal position and it would have been inappropriate for him to seek relief by way of Mandamus against the authority to compel it to make or give a decision in favour of an applicant when it was already deemed to have done so by act and operation of law.

Myles Freeney v. Bray Urban District Council. The High Court, (per O'Hanlon J.) 16 July 1981 — [1982] ILRM 29.

John F. Buckley

PRACTICE

Order 22 (Rules 4(1) and 10(1) of the Rules of the Superior Courts — Court Order required to give infant Plaintiff entitlement to money lodged in Court — payment induced by fraud — whether Courts discretion to be exercised in favour of defrauded payer.

The Plaintiff was 19 years of age when he sustained a serious injury while working in June 1977. Suing by his father and next friend he instituted proceedings in the High Court against the first named Defendants ("Ryans"). They had arranged Employers Liability Insurance at Lloyds who were represented by the second named Defendants in the present proceedings ("The Underwriters"). Solicitors on the instructions of the Underwriters lodged in Court with their Defence the sum of £39,053 without admission of liability. Under Order 22, R.4. of the Rules of the Superior Courts a Plaintiff may within seven days of receipt of the Notice of Payment into Court serve a prescribed Notice of Acceptance. This was not done. The Court presumed that this was because 0.22, R.10 provides that no compromise or payment or acceptance of money paid into Court in the case of an infant Plaintiff can be given effect to without an Order of the Court. Meanwhile the Underwriters discovered that the Employers Liability Policy of insurance had been entered into by them as a result of fraudulent mis-statements made by Ryans as to the amount of wages and salaries paid or payable by them to their employees. The underwriters brought proceedings in the High Court and successfully obtained a declaration of nullity of the insurance contract. The Order which was made on 28 December 1978 was not appealed and the matter became *res judicata* binding on the Plaintiff and Ryans. The money paid into Court by the Underwriters was, therefore, paid by them under a mistaken assumption of liability which assumption was induced by Ryans' fraudulent misrepresentations.

On 2 January 1979 a Notice of Motion was issued on behalf of the Plaintiff (still an infant) seeking an Order extending the time for accepting the money lodged in Court. The Underwriters, on 11 January 1979, caused a Notice of Motion to be served seeking payment out of the money to them. These Motions were heard together on 31 January 1980. The

Plaintiff attained full age on 3 March 1979. The Court made an Order joining the Underwriters as defendants and in a reserved judgment gave liberty to the Plaintiff to proceed in his own name; extended the time fixed by the Rules for acceptance of the money lodged in Court with the Defence and dismissed the Underwriters Motion. The Underwriters appealed.

The Supreme Court **held** in allowing the appeal that the money paid into Court by the Underwriters never reached the Plaintiff and he never acquired title to it. It remained in Court standing to the credit of the Account specified by the title and serial number of the Action. As the Plaintiff was an infant he could not get any title to it without an Order of the Court (0.22,R.10 (1)). Approving the dictum of Lord Denning in *Kiriri Cotton Co. Ltd., v. Dewani* [1960] A.C. 192, 204: "The true proposition is that money paid under a mistake of law *by itself and without more*, cannot be recovered back." (Emphasis supplied); the Court **held** that in this case subsequent events rendered the lodgment nugatory. By the time an effort was made to establish the Plaintiff's entitlement to the money lodged the Underwriters had established by judicial Order that it was Ryans' fraud that had hoodwinked them into making the lodgment in the first place. The Plaintiff had become a man of full age and was now thoroughly aware of the fraud and of its implications. The money remained with the Accountant of the Courts of Justice in what was virtually a suspense account and the Court would be giving efficacy to a course of fraudulent conduct if it gave an Order sought by the Plaintiff. Appeal allowed to the extent of directing that the money in Court be paid out to the Underwriters and dismissing the Plaintiff's claim to it.

Considered: Rules of the Superior Courts

Cases considered: *Nelson v. Larholt* [1948] 1 K.B.339; *Goodman v. White* [1949] 89 Lr.L.T.R.159. *Cumper v. Pothecary* [1951] 2 K.B.58 and 70. *Kiriri Cotton Co. Ltd. v. Dewani* [1960] A.C. 192 and 204; *Patrick Carey v. W. H. Ryan Limited and Duncan Stephenson McMillan and John Jervois.* Supreme Court — 22 February 1982. (per Henchy, J. (Nem.Diss.)) — [1982]. ILRM 121.

Franklin J. O'Sullivan

Edited by Gary Byrne

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Recent Irish Cases

EXTRADITION — POLITICAL OFFENCE

Onus of proof that offence is a political offence not discharged by Plaintiff.

Dominic McGlinchey had been arrested in the State on foot of a Northern Ireland warrant alleging that he had committed murder in that jurisdiction. An Extradition Order was duly made in the District Court. McGlinchey then applied to the High Court under the provisions of Section 50 of the Extradition Act 1965 seeking a discharge of that Order. He claimed as follows:

1. That the offence was a political offence, or an offence connected with a political offence.
2. That if removed to Northern Ireland, he would be prosecuted or detained for a political offence or an offence connected with a political offence.

Either of these grounds, if accepted by the High Court, would have been sufficient to discharge the District Court Order.

McGlinchey claimed that at the time of the murder, he was engaged in activities in Northern Ireland on behalf of the Irish Republican Army, and that responsibility for the murder had been claimed by that organisation. His application was refused in the High Court, and he appealed to the Supreme Court against this refusal. In the Supreme Court, it was held as follows:

1. The Extradition Act 1965 does not define the term "political offence". The Court, therefore, must form an opinion on the facts of each particular case. In this case, the victim of the murder was an elderly grandmother, who was shot dead in her own home. In the Supreme Court, McGlinchey had conceded that the murder could not be regarded as a political offence, or an offence connected with a political offence. The Court therefore found it unnecessary to demarcate between an ordinary offence and a "political offence". O'Higgins C. J. in delivering the Judgement did state, however ... "... it should not be deduced that if the victim were someone other than a civilian who was killed or injured as a result of violent criminal conduct chosen in lieu of what would fall directly or indirectly within the ordinary scope of political activity, the offence would necessarily be classified as a political offence or an offence connected with a political offence. The judicial authorities on the scope of such offences have in many respects been rendered obsolete by the fact that modern terrorist violence, whether undertaken by military or paramilitary organisations, or by individuals or groups of individuals is often the antithesis of what could reasonably be regarded as political, either in itself or in its connections."

   In the present case, the Court **held** that the offence was not a political offence, or an offence connected with a political offence. The question depended "on whether (the) particular circumstances showed that the person charged was at the relevant time engaged either directly or indirectly, in what reasonable, civilised people would regard as political activity".
2. McGlinchey claimed that if he was removed to Northern Ireland, he would be prosecuted for political offences or offences connected therewith. He referred to the fact that charges had been brought against another man for refusal to give information concerning McGlinchey's activities and involvement in various firearms offences, and in another murder offence. The Court rejected this part of his claim. No evidence had been adduced in respect of these offences to show that they arose either directly or indirectly out of political activity. The Court was not prepared to assume that because of the existence of widespread violence organised by paramilitary groups in Northern Ireland that any charge associated with terrorist activities should be regarded as concerning a political offence. The Court continued "The excusing *per se* of murder, and, of offences involving violence and the infliction of human suffering done by, or at the behest of, self-ordained arbiters, is the very antithesis of the ordinances of Christianity and civilisation and of the basic requirements of political activity."
3. The appellant, therefore, failed to discharge the onus on him. The appeal was therefore dismissed.

McGlinchey v. Wren. Supreme Court (per O'Higgins C.J., Henchy J., Griffin J.) Judgement of O'Higgins C.J., Nem. Diss, 7th December 1982 — unreported.

Michael Staines

PLANNING —

Local Government (Planning and Development) Acts 1963-1976 — Failure of Planning Authority to give notice of decision — Liability of Planning Authority in negligence.

The Plaintiff lodged an application with the Defendants for planning permission for a development consisting of 18 dwellinghouses on a site at Rosleven, Co. Clare on 6 October 1978. On 13 October 1978 particulars of the proposed public lighting for the development were furnished to the Defendant. On 29 November 1978 the application was amended by excluding one site but this did not affect the application with regard to the remaining sites. The Defendants did not issue any notification of decision either to grant or to refuse permission until 28 February 1979 when they issued a notification of decision to grant permission.

The Court **held** that the date of the application was 6 October 1978 and that the two month period within which the Plaintiff should have been given notice by the planning authority of their decision, expired on 6 December 1978 and that the Plaintiff was entitled to a declaration for a decision to grant permission which should be regarded as having been given on the last day of the period of two months from 6 October 1978 and to a declaration that the purported notification of a decision to grant permission subject to certain conditions dated 28 February 1979 was null and void. The Court further held that the provisions of Sub Section 9 of Section 26 of the 1963 Act being mandatory, a right to damages accrued to the Plaintiff in respect of any loss which the Plaintiff suffered as a result of failure of the Defendant to make the decision on the application within the prescribed period. The Court considered that insufficient evidence of the amount of the loss had been adduced by the Plaintiff and awarded the nominal sum of £500 damages.

Thomas G. O'Neill v. Clare County Council. The High court (per McWilliam J.) 18 May 1982 — unreported.

John F. Buckley

ROAD TRAFFIC —

Validity of District Court Summonses following Submission by Defendant to Jurisdiction of Court.

On 13 July 1979 the Director of Public Prosecutions took out two Summonses in the District Court against the Defendant. The first charged him with refusing on 2 June 1979 to provide a specimen of his breath, contrary to Section 12(2) of the Road Traffic (Amendment) Act, 1978. The second charged him with failing or

the same date to allow a designated Medical Practitioner to take a specimen of his blood, or, at his option, to provide a specimen of his urine, contrary to Section 13(3) of the same Act. Both Summonses stated that the date of Hearing would be 25 September 1979, but were not served until 10 October 1979. The Summonses as served had been altered by the insertion in both, of the words "Redated 10/10/79" in place of the previous date of issue "13 July 1979", and the date for the Hearing "25 September 1979" was crossed out and was replaced by "27 November 1979". Both alterations had been initialled by the Peace Commissioner who had issued the Summonses.

When the Summonses thus altered came on for Hearing in the District Court on 27 November 1979 both Parties were represented and the Summonses were adjourned by Consent. Following a number of subsequent adjournments the Hearing eventually took place and was again adjourned to a later date at the end of the prosecution's evidence for legal argument. The only legal submission made on behalf of the Defendant was that the Summonses as served were invalid and that as a result each prosecution was rendered void.

Held by the Supreme Court on Appeal from the decision of the High Court on a consultative case stated per Gannon J. [1981] ILRM 465 that the procedure adopted in regard to the Summonses even if it could be said to be defective, could not be relied on as a grounds of Defence. The amended Summonses were clearly served within six months of the making of the complaint, and even if they had breached a procedural requirement of the District Court Rules, that breach would have been cured when the Defendant appeared in the District Court on the day specified in the Summonses for the Hearing.

The Court **held** further that a Summons is only a written command issued to a Defendant for the purpose of getting him to attend Court on a specified date to answer a specified complaint. If he responds to that command by appearing in Court on the specified date and by answering the Summons when it is called in Court, he cannot be heard to say that he was not properly summoned if the complaint set out in the Summons is a valid one.

This Case was distinguished from the decision of the Supreme Court in *D.P.P. v. Gill* (20 December 1979 unreported). In that case valid Summonses had been served on the Defendant. On the date specified for Hearing there was an appearance by the Defendant's Solicitor but no appearance on behalf of the D.P.P. In the absence of a District Court Clerk as a result of Industrial Action the District Justice held that he could make no Order on the Defendant's application to have the Summonses struck out. The Summonses subsequently lapsed for want of an alternative date for the Hearing thereof, and the fresh Summonses issued by the D.P.P. were held to be good.

Director of Public Prosecutions v. Stuart Clein. Supreme Court (per Henchy J. Nem. Diss.) 26 October 1982 — unreported.

Padraic Dillon

NATURAL JUSTICE —

Purported dismissal of Trade Union Official by Executive invalid as members of executive affected by dismissal and therefore not in accordance with Rules of Natural Justice.

On the merger of two unions in 1966, the Defendant was made assistant joint General Secretary (Financial) of the First Defendant. Provision was also made for the election, from the general membership, of three other full time positions. The Executive Council, made up of a General President, a Vice President and Elected Members together with full-time officials who were not entitled to vote, had over-all control of union affairs and power to remove all union officials. The ordinary administrative affairs of the union were delegated to a resident executive which met more frequently and was made up of the same personnel. The rules of the union also contained detailed provisions regarding election of officers and full-time officials and Rule 22 laid down procedure for discipline and subsequent dismissal of officers of the Executive Council or resident executive for neglect of duty or bringing the Union into disrepute.

The present action followed two previous unsuccessful attempts to remove the Defendant by the General President and some members of the Resident Executive and Executive Council. In the High Court in the original action of which this was an Appeal, it was held that the Defantant's dismissal had been unfair and contrary to the principals of natural justice.

In 1975 the Defandant and Mr. L. O'Neill were elected Joint General Secretaries of the Union. The Defendant had special responsibility for financial affairs. On re-election in 1979 the Defendant's position as General Secretary (Financial) became permanent as provided in the Rules. Mr. O'Neill failed to be re-elected, his Assistant Secretary, Mr. Moneley being elected in his place. Mr. Fullerton was re-elected General President. The Rules of the Union prevented Mr. O'Neill from taking up the post of Assistant General Secretary, vacated by the election of Mr. Moneley because of his age. In January 1980 the Executive Council appointed Mr.O'Neill "Acting Assistant General Secretary" an appointment opposed at that time, on technical grounds by the Defendant.

Subsequently the Defendant as General Secretary (Financial) failed to pay Mr. O'Neill the salary appropriate to the post of Assistant General Secretary as a result of which, a meeting of the Executive Council fined him and directed him to make the payment. The Defendant did not follow this direction and another meeting of the General Executive, not attended by the Defendant, suspended him and made twelve charges against him. The Defendant made written reply to the charges when notified of them and attended a subsequent meeting to discuss his possible dismissal. At this meeting he was allowed to make further explanation but was obliged to withdraw having done so and before a vote was taken on his dismissal. Despite the fact that Mr. O'Neill and Mr. Moneley were persons directly affected and responsible for some of the twelve charges made against the Defendant, they were allowed to remain. This meeting was resumed at a later date when the Defendant was again forced to withdraw and again Mr. O'Neill and Mr. Moneley remained for discussion prior to voting. On a vote, seven of the twelve charges were proven and in a secret ballot, a majority voted for the Defendant's dismissal, the subject matter of these proceedings.

HELD:

Having regard to the terms of his appointment by the rules of the union the Defendant was clearly an officer and as the Executive Council were exercising a quasi-judicial function they must therefore observe the Rules of natural justice, be impartial and not affected by their own decisions.

Clearly, these criteria were not met and this was demonstrated by reference to four of the twelve charges which led to the dismissal.

1. Failure to pay Mr. O'Neill's salary and expenses as Assistant General Secretary. Mr. O'Neill was not requested to leave the meeting at the same time as the Defendant and therefore, his contribution in the absence of the Defendant allowed him to unfairly influence the members of the Council.
2. Failure to pay larger affiliation fees to the Irish Congress of Trade Unions than Union membership warranted. Such larger payment would have entitled Mr. Fullerton, the General President and Chairman of the meeting to an ICTU Executive Council seat and was clearly motivated by this desire. Notwithstanding the Defendant's expulsion from the meeting, Mr. Fullerton should not have acted Prosecutor in a matter which affected his own personal position.
3. Failure to pay Mr. P. O'Neill, another member of the Executive Council, expenses, due to the fact that he had failed to discharge arrears due to the Union. Again Mr. P. O'Neill remained

at the meeting and voted in the absence of the Defendant.

4. Failure to pay expenses of Mr. Moneley for a trip to Cork, of which the Defendant did not receive proper notice. The complaint was made in this instance by Mr. Moneley who was affected by the outcome and should not have been allowed to remain at the meeting after the expulsion of the Defendant. The procedure followed did not accord to the Defendant natural justice and his purported dismissal was therefore null and void, and consequently the Defendant retained and had at all materials times retained his office. The Appeal was therefore dismissed.

The National Engineering and Electrical Trade Union, Eustace Connelly, Joseph Carter and Sylvester Sheridan v. Kevin M. P. McConnell. Supreme Court Nem. Diss. (per Griffin J) 17 December 1982 — unreported.

Michael J. Kennedy

TORT

Duty of Care — Damage on roadway due to works in progress by contractor engaged by property developers — Liability of Corporation as Planning Authority and Highway Authority.

The Plaintiff an elderly lady was crossing the road in the company of her husband at Marine Road, Dun Laoghaire, from Dun Laoghaire church towards the new shopping centre. As she neared the side to which she was proceeding she tripped and fell sustaining injury. Her fall was caused by a difference in road levels of approximately two inches along a line where a new lay-by for buses was being constructed. The roadway which was all tarmacadam appeared uniform and no warning of the difference in level was given.

Construction of the lay-by was carried out by a firm of contractors who were engaged by a development company who in turn had obtained planning permission from the Defendants for the development of the site in which the shopping centre now stood and which planning permission was granted subject to a condition that a bus lay-by be provided by the developers.

The layout of this bus lay-by (which involved considerable interference with the roadway) was agreed with the Defendant.

The High Court was satisfied that because the developers of the shopping centre obtained planning permission for the development including construction of a bus lay-by, the layout of which had in advance been agreed with the Defendants and because the Defendants were aware that work was being carried out by the contractors engaged by the developers the work being carried out had been "authorised" by the Defendants and that they were as such liable for any negligence of the contractors in carrying out the work and in particular in failing to warn of or guard against the danger on the highway on the occasion of the accident and the Court ruled accordingly.

The Defendants rested their appeal on two submissions:—

Firstly that the case ought to have been withdrawn from the jury because there was no evidence that the interference with the roadway was authorised or permitted by them and secondly that the case ought to have been withdrawn from the jury because there was no evidence of negligence.

Held (per O'Higgins C. J. Hederman J. concurring and Griffin J. dissenting) that on the facts surrounding the circumstances of the Plaintiff's accident it was proper that the case should have gone to the jury on the issue of negligence and the jury having found negligence, such finding could not be disturbed and so the grounds of the Defendants appeal on the evidence of negligence failed.

On the Defendants other ground of appeal it was held further that from the facts surrounding the obtaining of planning permission by the developers, the condition of provision of a bus lay-by by the Planning Authority, the construction of the bus lay-by by the contractors involving considerable interference with the roadway, the agreement of the layout of the bus lay-by with the Defendants and the fact that it was known to the Defendants that such works were being carried out, it could be fairly inferred that the provision of a bus lay-by had been required by the Defendants as Planning Authority. It could be inferred further that the work was carried out by the contractors on behalf of the developers and with the knowledge and approval of the Defendants as Planning Authority.

The Defendants contention that as Highway Authority under the Local Government Act of 1925 they are not to be fixed with knowledge or made liable in respect of any licence or approval which they might or may have given as Planning Authority was rejected and it was held that the Defendants must be held to have known and to have approved of the work undertaken by the contractors.

It was **held** further that even if the work was authorised originally by the Defendants solely as Planning Authority this in itself did not mean that as Highway Authority they could not be regarded as having knowledge thereof. Whatever was done was done clearly with the knowledge of the Defendants and they had a responsibility to look to the safety of those using the roadway.

It was **held** by Griffin J. in allowing the appeal that the work complained of was not carried out nor was the danger created by the Defendants. It is well settled that the highway authority are not liable to the user of a highway for injuries suffered or caused by want of repair (non-feasance) but are liable in damages for injuries suffered by such use if they or their servants or those for whose acts they are responsible have been negligent in doing repairs to or in interfering with the highway (misfeasance). In the instant case the Plaintiff sought to expand the liability of a highway authority to include responsibility for the acts of a contractor engaged by a developer in doing work for which the latter had obtained planning permission and to equate this liability with that of the authority for acts of a contractor engaged by them which — in his view was warranted neither by principle nor authority. All cases cited in the High Court were cases where work was carried out by the highway authority. Counsel were unable to refer to nor was Griffin J. able to find any case in which liability attached to a highway authority by reason of the granting of planning permission for the work being carried out and be accordingly allowed the appeal.

Weir v. Corporation of Dun Laoghaire. Supreme Court (per O'Higgins C. J., Hederman J. concurring and Griffin J. Dissenting) 20 December 1982 — unreported.

Maurice Leahy

COMPANY LAW

Companies — Winding up by Court — Application for Directions — Whether Capital Gains Tax an 'Expense' or a 'Necessary Disbursement' under Order 77, Rule 129, Rules of the Superior Court (S.I. No. 72 of 1962).

In the course of the liquidation of Van Hool McArdle Limited the Respondent, who was Official Liquidator of that Company, sold certain properties which were subject to incumbrances. A liability was thereby incurred for corporation tax on chargeable gains accrued on that sale under the Capital Gains Tax Act 1976. The Respondent thereupon brought a Motion in the High Court before Carroll J., seeking certain directions which included the following:—

(1) Whether or not capital gains tax payable in relation to the sale is an "expense" incurred in the realisation of an asset within the meaning Rule 129 of Order 77 of the Rules of the Superior Courts which relate to winding-up.

(2) If it is, can it be deducted from the proceeds of sale payable to the mortgagees?

(3) Is the tax "a necessary disbursement" of the liquidator under the

third heading listed in Rule 129?

Rule 129 of Order 77 appears under the heading:

"XXII

Costs and expenses payable out of the assets of the Company"

The Rule is in the following terms:

"129. (1) the assets of a company in the winding-up by the Court remaining after payment of the fees and expenses properly incurred in preserving, realising or getting in the assets, including where the company has previously commenced to be wound up voluntarily, such remuneration, costs and expenses as the Court may allow to a liquidator appointed in such voluntary winding-up, shall, subject to any order of the Court, be liable to the following payments which shall be made in the following order of priority, namely:

First,the costs of the Petition, including the costs of any person appearing on the Petition whose costs are allowed by the Court;

Next, the costs and expenses of any person who makes or concurs in making the company's Statement of Affairs;

Next, the necessary disbursements of the Official Liquidator, other than expenses properly incurred in preserving, realising, or getting in the assets hereinbefore provided for;

Next, the costs payable to the solicitor for the Official Liquidator;

Next, the out-of-pocket expenses necessarily incurred by the committee of inspection, if any.

(2) No payments in respect of bills of costs, charges or expense of solicitors, accountants, auctioneers, brokers or other persons, other than payments for costs, charges or expenses fixed or allowed by the Court, shall be allowed out of the assets of the company, unless they have been duly fixed and allowed by the Examiner or the Taxing Master, as the case may be."

The first question asked whether the tax could be regarded as covered by "expenses properly incurred in preserving, realising or getting in the assets", which are contained in the opening paragraph of the Rule. Carroll J., had answered this question in the negative. O'Higgins, C.J. noted that no appeal had been taken against this decision and added, *obiter,* that he did not think that any such appeal could succeed. By reason of this answer the second question did not arise.

The third question asked whether the tax was a necessary disbursement of the Official Liquidator within the meaning of the third paragraph. Carroll J. had answered this question in the negative. She did so because she was of the opinion that corporation tax was entitled to priority payment only in accordance with its given priority as an "assessed tax" under Section 285(2)(ii) of the Companies Act 1963 (being a priority it was given under the Capital Gains Tax Act). This priority was given, however, only in relation to assessed taxes which were "assessed on the company up to the 5th April next before "the winding-up". As this tax was not so assessed but arose after the winding-up, it did not qualify for priority payment under Section 285 (2)(ii). Accordingly, in the view of Carroll, J., to give it priority under Rule 129 would be to make the Rule dominate the Section. While feeling that Carroll J. might well have been correct in this view, O'Higgins, C.J. did not think it necessary to base his judgment on that reasoning.

In the view of O'Higgins, C.J., Rule 129, as its heading indicated, was intended to deal with costs and expenses, and not with the liabilities of the Company. Each of the paragraphs dealt with either costs or expenses incurred by persons involved in the liquidation. The third paragraph must have the same meaning since the "necessary disbursements" there referred to were expressed to be "other than expenses properly incurred in preserving, realising or getting in the assets hereinbefore provided for". Such must, therefore, be expenses of some other kind such as necessary maintenance on buildings or wages for caretaking or for other purposes. In the view of O'Higgins, C.J., such could not include a liability of the Company for corporation tax and he agreed, therefore, that the third question should be answered in the negative as it was so answered by Carroll J., but for the reasons indicated by him.

Appeal dismissed.

The Revenue Commissioners v. John Donnelly. Supreme Court (per O'Higgins, C.J., Henchy, Hederman JJ.) 24th February 1983. Judgment of O'Higgins, C. J. (nem. diss.) — unreported.

William Earley

Edited by Gary Byrne

Copies of judgments in the above cases are available to members on request from the Society's Library.

Recent Irish Cases

JOINT TENANCY

Agreement by Joint Tenants to sell property does not of itself sever the joint tenancy - there must be an intention to sever.

A Testator left a farm to two sons as joint tenants. They farmed jointly for five years with earnings being paid into a joint account until one brother became ill and they decided to sell. A contract for sale was signed by the personal representative of the Testator as no assent had been made in favour of the two sons. One of the joint tenants died before completion of sale. The sale was completed by the Testators personal representative. The Plaintiff, one of the next of kin of the deceased joint tenant claimed that the joint tenancy on which the lands were held by the deceased and the defendant (who was also personal representative of the deceased) was severed by the sale of the lands before the death of the deceased. The defendant claimed that the purchase money representing the sale of lands passed to him in his personal capacity as surviving joint tenant. The Plaintiff claimed that the monies accrued to the estate of the deceased. It was alleged that the agreement for sale severed the joint tenancy and the surviving joint tenant was not entitled to the entire proceeds by virtue of the right of survivorship.

Held: In order to affect a severance there must be an intention to do so. The dictum of O'Connor L. J. in *Hayes Estate* [1920] 1.I.R. 207 at p. 211 to the effect that "a *mere* agreement by persons entitled as Joint tenants to convert their property from one species to another does not operate to work a severance" was approved. The burden of proof lies on the person contending that there had been a severance. From the facts of the present case there was no evidence of an intention to sever.

(Eugene Byrne v. Patrick Byrne - The High Court (McWilliam J) - 18 January 1980 - unreported).

Rory McEntee

CRIMINAL LAW

Appeal to Court of Criminal Appeal on the grounds that two separate incidents should have not have been included on one Indictment. Visual Identification not adequately dealt with by the trial judge, and similar fact evidence should have not been admitted.

The Appellants, were convicted in a joint Trial in Dublin Circuit Court, for the larceny of, and the attempted larceny of, clothes from an outfitters shop in Thurles, Co. Tippearary on two separate occasions. A third brother, who was convicted at the same time, did not appeal. The facts of the case were that the Appellants entered an outfitters shop in Thurles on 26 February 1981 and 10 March 1981. On the first occasion, two men came into the shop, one of whom was carrying a cardboard box at his chest. A third man, who entered after them, approached a counter at the other end of the shop, where he received attention.

All three men left the shop without purchasing anything. A short time later, it was discovered that six leather jackets and two suits were missing. On 10 March 1981, an incident which was in all ways similar to the incident described above occured in the same shop. On this occasion the men at the back of the shop were attended and left the shop a short time later, followed by the third man. No purchases were made and there was nothing missing from the shop. The Proprietor of the shop watched them for a short time and then notified the Gardai. Meanwhile another member of the staff followed them and eventually pointed them out to the Gardai in another shop. A number of Submissions were made on behalf of the Appellants, all save one was rejected by the Court.

1. That both counts, the first of Larceny on 26 February 1981 and the second of attempted larceny on 10 March 1981, could be included on the same indictment. The charges formed part of a series of offences of the same or a similar character and their inclusion together on the Indictment was covered by the Statutory Provisions Section 5 and Section 6 (3) of The Criminal Justice (Administration) Act, 1924, Rule 3 of the First Schedule to the Act and Section 18 of the Criminal Procedure Act, 1967. Citing these provisions, the Court rejected the submission that the Prosecution was entitled to add only counts relating to the same incident and that the second count should not have been added, because this allowed evidence of a system and two episodes could not establish a system.

2. That the Trial Judge, in the exercise of his discretion under Section 5 of the Criminal Justice (Administration) Act, 1924, was correct in refusing to direct separate trials. The Court cited with approval the principle laid down in the cases of *Harris v. The Director of Public Prosecutions* [1952] 1AII E.R. 1044 and the case of *Mackin v. The Attorney General for New South Wales* [1894] A.C. 57. In the latter case, Lord Herschell stated at page 65.

> "It is undoubtedly not competent for the Prosecution to adduce evidence tending to show that the Accused has been guilty of Criminal Acts, other than those covered by the Indictment, for the purpose of leading to the conclusion that the Accused is a person likely from his Criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of another crime, does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the Indictment were designed or acidental or to rebutt a Defence which would otherwise be open to the Accused."

In the present case, the Court found that the evidence that was given of the first incident was relevant to the second count to show that such a box could be used for the purposes alleged in the second count.

3. That in respect of the first count, the larceny of clothing on 26 February 1981, the Appeal should be allowed on the ground that, whilst the Trial Judge dealt very fully with the dangers of visual identification, he did not specifically direct the attention of the Jury to the evidence relevant to the identification of the Accused on the first count. The Court cited the case of *The People (Attorney General) v. Casey (No. 2)* [1963] I.R. 33 and the case of *Harris v. The Director of Public Prosecutions* [1952] 1.AII E.R. 1044. In the present case, the Court held that the Jury did not get any assistance from the Trial Judge to guide them in the careful examination of the evidence of identification as required by the principles laid down in Casey and further the Trial Judge seemed to have treated the evidence as cumulative. In addition, the Trial Judge stated on two occasions that the case for the Prosecution did not rest on visual indentification alone, but failed to indicate what other aspects of the evicence supported the Visual Identification of the Accused in respect of the first count.

4. The Court rejected the submission that the Trial Judge did not direct the Jury to consider the evidence relevant to each count separately and did not, himself, when dealing with the evidence, indicate which proportions of

the evidence were relevant to each Count. The Court found that there was nothing in the evidence relating to the first count which was prejudicial to the accused on the second count, except that Count one was included in the first instance, and the Jury were quite entitled to come to the verdict they did come to on the second count.

Director of Public Prosecution v. Patrick Wallace and Gerard Wallace, Court of Criminal Appeal (Per McWilliam J. With O'Higgins C.J. and Ellis J.) - 22 November 1982 - unreported.

Felicity Hogan

PLANNING

Condition in permission requiring contribution to services — payable to more than one local authority — validity of condition — duty of local authority.

Application for Permission to develop land at Finglas County Dublin was submitted to the Defendants on behalf of the Developers (Finglas Industrial Estates Limited) in 1975. The Defendants refused the application giving five reasons, the most important being that facilities for the disposal of pipe sewage and service water were not available because the only sewer in the vicinity was in the functional area of Dublin Corporation and was already being used to full capacity.

The Developers appealed to the then Minister for Local Government against the refusal and on 17 February 1977 the Minister by Order granted the Permission sought subject to the following condition:—

> "The Developer shall pay a sum of money to the Dublin County Council and/or to Dublin Corporation, as may be appropriate as a contribution towards the provision of a public water supply and pipe sewage facilities in the area. The amount to be paid and the time and method shall be agreed between the Developers and the said Council and/or the said Corporation before the development is commenced or failing agreement shall be as determined by the Minister for Local Government".

The Court noted that the Permission had been granted to Developers who had no existence for they were not incorporated until April of 1981, and said that if that were the only issue in the Appeal it would hold the Ministerial Permission invalid for having been granted to a nonexistent person.

The Developers' offer to meet the financial requirements of the condition failed primarily because in the opinion of the Defendants the required facilities could not be made available within the legal lifetime of the Permission.

Under the Local Government (Planning & Development) Act 1976 most of the powers of the Minister exercisable under the 1963 Act had been transferred to An Bord Pleanala ("The Board") and the Developers asked the Board to carry out the assessment reserved to the Minister by the condition. The Board made an Order on 23 December 1980 determining the contribution at £1,500 per acre and that it was to be paid to the Defendants as the Sanitary Authority. On 19 January 1981 the Developers sent the Defendants a cheque for the amount payable in accordance with the Board's Order. The Defendants refused to accept the cheque or the accompanying letter. The Developers applied for and obtained an Order of Mandamus from the High Court which commanded the Defendants to accept the cheque. The Defendants appealed to the Supreme Court from that Order.

The Defendants argued that the Order of the Board could not be questioned having regard to Section 82 (3A) of the 1963 Act as inserted by Section 40 (2) of the 1970 Act which provides as follows:—

> "A person shall not by prohibition, *Certiorari* or in any other legal proceedings whatsoever question the validity of:—
>
> (a) a decision of a planning authority for permission or approval under Part IV of the Principal Act (i.e. the 1963 Act).
>
> (b) a decision of the Board on any appeal or on any reference.
>
> (c) a decision of the Minister on any appeal, unless the proceedings are instituted within the period of two months commencing on the date on which the decision was given".

The Court held that the Order of the Board did not come under:—

(a) because it was not a decision of a Planning Authority or;

(b) because it was not a decision of the Board on any Appeal or reference or;

(c) because it was not a decision of the Minister on Appeal but only a matter included in a condition attached to such decision and that the Defendants were therefore entitled to argue that the Order of the Board was a nullity.

The Court noted that the provision of the 1976 Act which affected the transfer to the Board of the Minister's powers to assess or arbitrate on the amount of contributions, only related to agreements between the Developers and the Planning Authority. The Minister had provided for payment to the Defendants and / or Dublin Corporation. If the Defendants had granted Permission subject to such condition they would have been acting *ultra vires,* for the statute did not provide for a condition as to payment to another Planning Authority either primarily or in the alternative. Since the Defendant as Planning Authority had no power to grant such a Permission the Minister in exercising Appellate jurisdiction was no less bereft of such a power.

The Court went on to say that even if the Board had the power to fix the amount, the time, and the method of payment it would have had to be held that the effect of their Order was merely to determine the nature and extent of the financial duties that fell on the Developers.

Mandamus could not issue to compel the Defendants to accept the amount tendered. The Developers might have had other remedies open to them, such as a declaratory action as to their rights, or a claim for a mandatory Injunction but no valid argument had been advanced to show that there was a public duty, at common law or under Statute on the Defendants to accept the cheque tendered by the Developers. A Public Authority cannot be compelled by Mandamus to accept money tendered to it unless there was a public duty to accept it. The duties and obligations of Sanitary Authorities to permit connections to their sewers are governed by Sections 23 and 24 of the Public Health (Ireland) Act 1878. These sections appear to deal with the right of the owner/occupier of premises to cause his drains to empty into the sewers of the Sanitary Authority and therefore presuppose the existence of these sewers at a point where a connection may be made from the premises in question to the sewers. They do not appear at first sight to deal with the more knotty problem of what is to be done where there are no sewers in the locality. If there be any legal obligation on the Sanitary Authority to provide a sewage system where none exists, or to permit a connection to an existing sewage system it is not to be found in the Planning Acts. In this case the Court was not called upon to make any comprehensive ruling on that question. It was sufficient to say that the condition as to financial contribution imposed by the Minister must be construed as referring to a contribution towards the cost of providing public water supply or pipe sewage facilities in the area only if the Council were either willing or legally bound to make such provision.

The State (Finglas Industrial Estates Ltd.) v. Dublin County Council - Supreme Court (per Henchy J.) 17 February 1983. — unreported.

John F. Buckley

ROAD TRAFFIC ACT

Defendant convicted of driving with an excess alcohol blood appealed to Circuit Court where he raised a multitude of points which resulted in a consultative case stated under s.16 of the Courts of Justice Act 1947.

The first issue related to the prescribed form to be filled by the medical practitioner under Section 21 (1) of the Road Traffic Amendment Act 1978. Though the doctor signed the form in the appropriate place he did not put his name in the body of the statement where it was alleged a blank line existed for this purpose. Also an alternative section of the form relating to a urine specimen was not entirely deleted.

Held that the entry of the name in the blank section was optional and its absence did not detract from the syntax, clarity of meaning and verification of conduct for which the form was designed. The failure to delete the entire of the alternate section was obviously a slip but it did not affect the form as it stood making abundantly clear that it was a specimen of blood rather than of urine that was taken by the doctor.

In the second issue it was agrued that if the prosecution omitted to produce a copy of Iris Oifigiuil or a copy of the regulations under the 1978 Act that it had failed in its proof. It was argued that s.4 (1) of the Documentary Evidence Act 1925 required this. Precedent for this contention was to be found in *The People (A.G.) v. Kennedy* [1946] I.R. 517.

Held that the 1925 Act enables *prima facie* evidence of rules, orders, regulations, or bye-laws to be given with almost the same facility as if they were statutes. The production of the relevant copy in court merely enables the court to treat it as *prima facie* evidence of the document though it should be pointed out that in criminal cases where a piece of delegated legislation actually creates the offence involved then the production of a copy of this legislation will be necessary. In the case in point here the offence was created under statute. Since the provisions of the 1925 Act are no more than enabling they do not alter the powers of the court to treat matters as worthy of judicial notice. Thus where a statutory instrument has become well known and familiar the court is entitled to accord it judicial notice and precedent for this contention is to be found in *The State (Taylor) v. Circuit Judge of Wicklow and Others* [1951] I.R. 311. In the latter case a defendant had argued that it was incumbent on the prosecution to prove that the relevant Minister had made the requisite order which brought the statute creating the offence into force. The Circuit Judge held that he was entitled to take judicial notice of the fact that the Minister had made the order. In subsequent *certiorari* and *habeus corpus* proceedings Davitt J. held that the Circuit Judge was correct in that through his experience in administering justice he had become perfectly well aware that the order in question had been made. In the case in point here the various regulations were also well known to be in force and not to take judicial notice of this would be a case of self induced judicial blindness which would bring the administration of the law into disrepute.

Issue number three related to the presence of an unspecified white substance in the containers for the specimen. It was agreed that when the containers were received at the garda station initially that they held this white substance and that this substance was sealed into the containers along with the blood sample when the sample was sent to the Bureau for analysis. The defence argued that this substance could have distorted the analysis and the suggestion was made that the prosecution would need to rebut this possibility.

Held that the prosecutions' burden is discharged when they adduce sufficient evidence to raise a *prima facie* case against the accused. This they had done. Under the 1978 Act the Bureau's certificate is declared to be sufficient evidence of the facts certified in it until the contrary is shown and one of these facts is that the specimen of blood had the certified alcohol concentration as appears in the certificate. Therefore the burden had shifted to the defence. If it was required to show that the analysis was false it was up to the defence to adduce evidence showing the possibility of fraud or mistake. A mere suggestion of this is not evidence and since the defence did not adduce any evidence that the white substance might have falsified the analysis then the prosecutions evidence must stand.

The fourth issue was based on the contention that there was a patent delay by the Bureau in analysing the specimen and that therefore the Bureau had not complied with the "as soon as practicable" requirement under s.22(1) of the 1978 Act. The specimen was sent to the Bureau on 4 November 1978, the signature of the analyst on the certificate was made on 22 November 1978, the Bureau's seal was affixed to the certificate on 23 November, 1978 and the certificate was received at the garda station on 5 December 1978.

Held that the unexplained failure of the Bureau to carry out the analysis between a few days after the 4 November and 22 November did not amount to a failure to do the analysis as soon as practicable. The obligation on the Bureau is elaborated in *Hobbs v. Hurley* (10 June, 1980) and this is amplified in *D.P.P. v. Corrigan* (2 July, 1980). Two topics need to be proved in this regard; on the one hand the practical difficulties and surrounding circumstances attendant on the receipt of the sample and analysis of it by the Bureau and on the other hand the effect and consequnces of any delay. The burden of establishing the facts in this regard rests on the defendant because of the presumptions raised by the relevant sections of the 1978 Act. In the instant case the defendant called no evidence regarding the lapse of time.

The fifth and last issue rested on the contention that one of the signatures on the certificate was illegible and the capacity of the persons who attested the affixing of the seal was not precisely stated.

Held that legibility is not a hallmark of an effective signature and if its authenticity is not in question and if it is not shown to be other than the accustomed mode of signature of the alleged signatory then it will not be rejected. Again the burden of proof is expressly placed on the defendant by the statute if he wishes to challenge the signature on it or that the signatory was not the proper person to sign it he must show that the signatory had not any of the alternate capacities adverted to in the certificate. In this case there had been no such evidence adduced. The signatory does not have to precisely specify which of the alternate capacities under which he is signing.

Director of Public Prosecutions v. Collins, Supreme Court (per Henchy J. nem. diss.) — [1981] 1LRM 447.

Brendan Garvan

Edited by Gary Byrne

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Recent Irish Cases

SALE OF LAND

Payment of booking deposits - priority of depositors against Equitable Mortgagee.

Barrett Apartments Limited ("The Company") owned a site at Clontarf Dublin on which it proposed to build a block of flats. It was intended that the sales of the flats be carried out by means of a contract for sale and an agreement for lease. Fourteen persons paid deposits ranging from £3,000 to £10,000 to the Company. Each of the depositors paid "booking deposits" of at least £3,000 and a further £7,000 was to be paid on the execution of the building agreement. Building Agreements were signed in only 2 cases.

In respect of some of the deposits a receipt was issued which included the following statement "the sum referred to above is a booking deposit only. It is returnable upon notification by either party. Any agreement regarding the proposed purchase will be the subject of a written contract, and it is agreed that this receipt does not constitute a note or memo of any agreement. It is further agreed that no right of action at law arises out of this receipt".

In a number of cases the Solicitors for the Company wrote to the Solicitors for the proposed purchasers a letter including the following statement "we wish to confirm that we act for Messrs. Barrett Apartments Limited who have instructed us that your client(s) has/have agreed to purchase the above premises". In some cases the initial letter from the Company's Solicitor included the following statement "Although your client(s) has paid a booking deposit direct to our clients there is not in existence any contractual obligation on our clients to complete a binding agreement with your client(s) and this letter and the enclosures are not intended to constitute an offer to sell the above mentioned apartment to your client(s). Accordingly until such time as the contracts which are enclosed herewith, together with the other documents enclosed, have been executed by our clients, and all payments have been made in accordance with the first schedule to the contract, our clients will not be contractually bound to your client(s)".

The Company created a Floating Charge over all its assets in favour of the Northern Bank Limited ("the Bank") on 20 December 1979. On 26 September 1980 the Company created an Equitable Mortgage by deposit of their deeds to the site in favour of the Bank. On 1 October 1980 a Receiver was appointed by the Bank under the powers contained in the Floating Charge.

All the depositors had paid their deposits to the Company before the Equitable Mortgage was created.

It was submitted on behalf of one of the depositors, Michael Cummins, who had entered into a building agreement, that his deposit was in part payment of the purchase money, that the Company was a trustee for him to that extent of the legal estate in the property and that he was therefore entitled to a lien on the property in respect of the deposit in accordance with the decision in *Tempany* -v- *Hynes* [1976] I.R.101 and was entitled to rank as a secured creditor. It was argued on behalf of the Bank that such a lien only arose in the case of a contract of which the court would grant specific performance and that this was not such a contract.

The Court held that where there was a contract in existence the payment of a deposit entitled the purchaser to a lien on the property in respect of the money so paid and the existence of an equitable lien could not depend on the availability of the remedy of specific performance referring to *Rose* -v- *Watson* 10 H.L.C.672 and *Tempany* -v- *Hynes*.

In the case of the other depositors who had not entered into agreements it was argued on behalf of the bank that where no contract at all existed, or at best, a contract which could not be enforced either by an action for specific performance or in any other way, no lien arose in favour of the depositors.

The Court rejected this argument relying on the decision in *Whitbread & Co. Ltd.* -v- *Watt* [1902] 1Ch835 and *Rose* -v- *Watson*. The Court noted that it was conceded that the Company had not been for some time in a position to implement the transaction in respect of which the deposits were paid. It was clear that if the Company were not in liquidation the depositors would have an uncontestable right in every case to recover their deposits. If the lien relied on depended on that right and need not be the result of any express contract it followed that the fact that in a number of cases there was no enforceable contract was not material. The court therefore held that the depositors were entitled to a lien on the site in respect of the money so paid and were entitled to rank as secured creditors in the liquidation.

As the deposits had been paid before the Equitable Mortgage was created, the equitable interests created by the payment of the deposits had priority over the subsequent equitable interests created by the deposit of the title deeds and the appointment of the Receiver. The court noted that the position might well have been different if the bank had stipulated for a legal mortgage of the property as a condition of making their advance.

In the Matter of Barrett Apartments Limited, High Court per Keane J. 15 July 1983 unreported.

John F. Buckley.

CRIMINAL LAW

Section 7 Offences against the State Act 1939 - Obstruction of Government.

Patrick Kehoe had been convicted in the Special Criminal Court of the offence of obstruction of government under Section 7 of the Offences against the State Act 1939, and sentenced to three years in prison. The Court had accepted evidence that Kehoe was one of a large number of people who had marched to the British Embassy protesting at conditions in the H Blocks in Northern Ireland. Some of these marchers had carried various implements. The Gardai had erected barriers at some distance from the British Embassy, and organised themselves behind the barriers in order to prevent the advance of the marchers towards the British Embassy. The Gardai were then attacked by some of the marchers, and an attempt was made to breach the barriers. Kehoe was in possession of a large pole, with which he attacked the officer in charge of the Gardai.

On the basis of the evidence, the Special Criminial Court convicted Kehoe under Section 7. The Court held that the Gardai, in setting up the cordon and resisting the further progress of the march, were manifestly performing the duty imposed on the Government to discharge its obligations under the provisions of the Diplomatic Relations and Immunity Act 1967, and in particular protecting the premises of a foreign mission.

On appeal, the Court of Criminal Appeal held as follows:

1. There was sufficient evidence of identification to allow the Special Criminal Court to convict Kehoe.
2. The word "government" in Section 7 denotes more than the word "cabinetx". It includes the

legislature, the judiciary and the executive. The Section accordingly prohibits actions which prevent or obstruct the wide range of activities legislative, judicial or executive which are involved in the government or the governing of the State. Further it applies to the prevention or obstruction (by some violent means) of the exercise or performence of any individual legislator, Judge, member of the executive or officer or employee of the State of his functions, powers or duties. It is not even expressly required that such individual should have been so prevented or obstructed in the course of those duties, or indeed that the obstruction should have taken place with that or any other particular intent. However, the act complained of must constitute an attack on the State through one of its constitutional organs. As Kehoe had attacked an officer who was leading a substantial force of Gardai in the clear performance of a duty imposed by law on the Government to protect a foreign mission, he was guilty of an offence under Section 7.

The appeal was accordingly dismissed.

D. P. P. -v- Patrick J. Kehoe Court of Criminal Appeal (per McCarthy J. Nem. Diss.) 7 February 1983 — Unreported.

Michael Staines

CONVEYANCING

Contrast - Misdescription of Property - Effect of General Condition 21 of 1978 Edition of General Conditions of Sale of the Incorporated Law Society - Vendor could not compel Purchaser to complete purchase until amount of compensation was determined in accordance with sub-section (2) of General Condition 21 of Contract.

The Plaintiffs (the Purchasers) contracted to purchase certain land for £306,000 from the Defendants (the Vendors). The Plaintiffs instituted proceedings against the Defendants alleging that they entered into the sale on the faith of certain representations made to them by the Defendants or their agents which they claimed were false and misleading. They claimed that they were entitled to relief under condition 21 of the Contract for Sale being a claim for compensation for the mis-description. They also claimed specific performance of the contract with an abatement of £100,000 of the purchase price as compensation. The Defendants denied all allegations of mis-representation and counterclaimed for specific performance of the Contract. The parties had agreed to go to arbitration on the question of whether Condition 21 applied to the case and, if so, what amount of compensation, if any, the Plaintiffs were entitled to.

The matter before the Court was to determine:

(a) Whether, if the Plaintiffs were successful in making a claim for compensation under Condition 21, they were entitled to receive such compensation by way of an abatement of the purchase price.

(b) Whether, the Defendants were entitled to insist upon the closing of the sale before determination by arbitration of the dispute as to compensation and the amount of same and

(c) Whether, if the answer to (b) was in the negative, the Defendants were entitled to insist upon closing the sale prior to the arbitration, with the Defendants agreeing to hold on joint deposit the amount claimed by the Plaintiffs pending the outcome of the arbitration. On these points the Court held:

(a) that if the Plaintiffs were entitled to compensation at all they were entitled to it out of the purchase money

(b) that the Plaintiffs could not be forced to close until such time as the amount of compensation, if any, and therefore the amount of the balance of the purchase price had been ascertained

(c) while in many cases it would be sensible for the parties to enter into a supplementary agreement and to close the sale retaining the amount of the compensation on joint deposit, the Court could not compel the Plaintiffs to close the sale before the question of compensation had been determined.

Valentine Keating, Arthur Molloy, George Roe -v- The Governor and Company of the Bank of Ireland Reginald Brentland and Heather King - High Court (per Barrington J.) 30 July 1982. - Unreported.

Colin Keane

CONVEYANCING

Assignment of Family Home - No consent form Spouse - entitlement of Spouse - Rights of Purchaser.

The Plaintiff (Margaret Weir) married Terence Weir the legal owner of the house the subject matter of these proceedings on 5 July, 1961. In October 1973 Mrs. Weir left the house with her four children to reside in a Dublin Corporation dwelling. All expenses including rent were borne by Mrs Weir. On 20 November, 1974 Mr. & Mrs. Weir entered into a Seperation Agreement which was silent as to the Family Home.

On 2 August, 1976 Terence Weir entered into a written agreement to sell his leasehold interest in the premises to the defendant, Mrs. Sandra Somers. The sale was closed relying on a faulty declaration under the Family Home Protection Act prepared by the purchaser's solicitor without any real enquiry as to the facts or without any inspection of the separation agreement. Terence Weir executed the statutory declaration thus prepared and the sale was closed on 17 August, 1976.

In April, 1977 Mrs. Somers agreed to sell the premises. The Purchaser required proof that the provisions of Section 3 of the Family Home Protection Act, 1976 had not been breached and accordingly Mrs. Weir's retrospective consent in writing to the Assignment to Mrs Somers was required. This was refused by Mrs. Weir who claimed she was entitled to a proprietary interest in the contract premises. Mrs. Somers instituted High Court proceedings seeking an order under Section 4 of the 1976 Act dispensing with the Defendant's consent to the Assignment and such Order was granted by the High Court . Mrs Weir appealed to the Supreme Court and the decision of the High Court was reversed. The Supreme Court declared the purported conveyance of the Family Home to Mrs Somers to be void. Further proceedings were brought in the High Court by Mrs. Weir against her husband and on foot of that claim it was declared:

(a) that the premises 111, Maryfield Cresent, Artane, in the County of Dublin was a Family Home as between the Mr and Mrs Weir and

(b) that the Mrs Weir was entitled to a half share in the leasehold interest in the premises.

This order did not purport to vest any legal estate in Mrs. Weir who by ordinary civil bill initiated the present proceedings claiming an injunction to restrain Mrs. Somers or any other occupiers of the relevant premises from remaining on or continuing in occupation of them as a dwelling. These Proceedings came before the Circuit Court Judge on 12 February 1982 who stated a case for the High Court. The case stated was signed by the Judge on the 2nd of April, 1982 but for no apparent reason was not lodged in the Supreme Court office until 4 October, 1982. It was argued in the High Court on 21 February, 1983..

The Family Home Protection Act, 1976 was reviewed and it was noted that the Act came into force on 12 July, 1976 five weeks before the execution of the void Assignement on 17 of August, 1976. Sections 3, 4 and 5 were quoted in particular with reference to the present case and related proceedings and it was concluded that in the view of the court

the Act of 1976 must "primarily be used to secure the protection of the Family in the Family Home and all other claims to the premises that constitute such home must remain secondary to it".

The Court **held** that by seeking the case stated Mrs. Somers had already obtained a reprieve of twelve months on top of the years of delay resulting from protracted legal proceedings during which time she had the use of Mrs. Weir's home, and that the defence sought to be made in the present proceedings was a delaying tactic, simply to allow further time during which proceedings, (on their face appearing to be statute barred) could be commenced. The possibility of expediting such proceedings was declared to be minimal and accordingly the required injunction was granted to Mrs. Weir who had done nothing save suffer the loss of her house and the unconscionable delays of the law.

It was noted that Mrs. Somers who was also an entirely innocent party may have some equity in relation to the premises, certainly an equity against Terence Weir and undoubtedly an unanswerable claim against her solicitor; she did not, however, have any equity against Mrs. Weir.

The questions in the case stated were answered as follows:-

1. Q. Did the order of the Supreme Court vest the leasehold interest in the family home in Mrs Weir?
   A. No, but the proper inference from the Order is that the premises are the family home within the meaning of the Act, of 1976.
2. Q. In the proceedings by Mrs Weir against her husband did the High Court vest the leasehold interest in the Family Home in Mrs Weir?
   A. Not as such but since it is declared that she is entitled to a half share in the leasehold interest in the premises she was thereby entitled to have the legal estate in such half share conveyed to her and is to be treated as a person having such legal estate.
3. Q. Does the Order of the Supreme court entitle Mrs Weir to the relief sought in these proceedings.
   A. Not as such.
4. Q. Does the estate or interest dealt with in the proceedings referred to at 2 above entitle Mrs Weir to the relief sought in these proceedings.
   A. Yes, as indicated above.
5. (a)
   Q. Does the purported assignment by Terence Weir to Mrs Somers create any estate or interest in the Mrs Somers in the premises.
   A. No, save that the Mrs Somers may have an equity against Terence Weir and not otherwise.
   (b)
   Q. Did payment by Mrs Somers to Terence Weir as a purported purchase price create any estate or interest in Mrs Weir in the Premises.
   A. No.
6. Q. If the Answer to 5 (a) or (b) is Yes does any such estate or interest provide Mrs Somers with a defence to Mrs Weir's proceedings herein.
   A. No.

Margaret Weir v. Sandra Somers. Supreme Court. (per McCarthy J. Nem. Diss.) 18th March, 1983. Unreported.

Attracta Campbell

BANKING

Constitutionality of Section 5(2) Industrial and Provident Societies (Amendment) Act, 1978 - restrictions on the conduct of the business of banking by a Society - Constitution of Ireland, Article 40(3), (6)1.iii.

The first named Plaintiff (the Society) is engaged in the business of banking in accordance with its powers as a Society registered under the Industrial and Provident Societies Act, 1893. This business which consists in the acceptance and holding of deposits from members of the Society and the making of loans to members expanded steadily since the registration of the Society in 1958, with deposits amounting to £13,700,000 and advances amounting to £11,700,000 at the date of the commencement of the proceedings.

Under subsection 4 of Section 7 of the Central Bank Act, 1971 Industrial and Provident Societies were exempted from the provisions under that Act providing for the requirement of a banking licence from the Central Bank and for the supervision of banks by the Central Bank. Section 5(2) of the Industrial and Provident Societies (Amendment) Act, 1978 (the Act) prohibiting such Societies from accepting or holding deposits after the end of a period of five years commencing at the date of the passing of the Act, if taking effect, would render it practically impossible for the Society to carry on a banking business profitably, the Act also prohibiting the raising of loans by Societies other than a loan made by a bank.

The Society and the second named Plaintiff, a shareholder in and a member of the Management Committee of the Society sought a declaration in the High Court that the Act was invalid having regard to the provisions of the Constitution. Despite the wide terms of the Declaration sought it is clear that the invalidity alleged arose only in respect of Part II of the Act dealing with Industrial and Provident Societies, in particular in relation to Section 5(2).

Both Plaintiffs contended:

1. The Act and in particular Section 5(2) thereof constitutes an unjust attack on property rights contravening Article 40(3) of the Constitution in that any attack on the business and profitability of the Society is an indirect attack on the property rights of the Second Plaintiff in his investment as a shareholder in the Society. The legislation in effect wholly eliminated without compensation the banking business of the Society as it could not profitably use bank loans as a source of funds. There was no guarantee that if the Society changed into a company in accordance with the provisions of the 1893 Act that a licence to engage in banking would be issued to it.
2. That the legislation is an interference with the personal right to freedom of association guaranteed to citizens by Article 40(6)1. iii. of the Constitution as it prohibits the accomplishment of the purpose for which the second Plaintiff and his associates had joined together to achieve.

The claim of the Plaintiff was rejected by the High Court. The Supreme Court **held** in rejecting the appeal that:

1. As the second Plaintiff is a citizen with *locus standi* if his personal rights are infringed it is unnecessary to consider the argument that the Society being a creature of Statute Law does not enjoy that constitutional protection.

The Court rejected the submission made on behalf of the Attorney General that a shareholder in an incorporated body such as the Society whilst paving various contractual rights in its relations with such a body has no property rights in its assets or business, stating that the Second Plaintiff has to the extent of his investment on interest in and contractual rights arising from the Society and property rights capable of being harmed by injury done to the Society relying on *East Donegal Co-operative* v *Attorney General*, [1970] IR 317, and the judgment of Kenny J. in *Central Dublin Development Association* v *Attorney General*, 109 ILTR 69.

The Court noted the conclusions of the Trial Judge on the evidence: the reason why Societies such as the Society had been exampted by Section 7 (4) of the 1971 Act was that there were at that time only two societies carrying on a small business without an appreciable risk to the public at large. None of the Societies taking deposits in 1976 and 1977 were operating their businesses in accordance with the criteria applied

by the Central Bank (in addition to the statutory requirements under the 1971 Act) when deciding whether or not to grant a banking licence, which criteria are required for sound banking practice and are reasonable. As those members of the general public who placed money on deposit with the Societies were thus at risk the legislative intervention was in the common good and not invalid.

2. The law impugned does not interfere with the right of association, merely regulating the activities in which the Society sought to engage.

Private Motorists Provident Society Limited and Joseph Moore v. The Attorney General- Supreme Court (per O'Higgins C.J. Nem. Diss.) 6 May, 1983 —Unreported.

Peter Byrne

Edited by Gary Byrne

Copies of judgments in the above cases are available to members on request from the Society's Library.

Recent Irish Cases

CONTRACT

Breach of Contract — Damages — Loss of Profits — Mitigation of Loss — Remoteness of Damage.

The Plaintiff lived with his wife in a large guesthouse which was owned and run by his father assisted by his stepmother (the Defendant). The Plaintiff helped to run the guesthouse until his father's death in 1976. Relations between himself and the Defendant became very strained and in October 1976 he left to reside elsewhere with his wife and found work as a painter. In July, 1978 the Defendant agreed, as executrix of her husband's estate, to sell the guesthouse to the Plaintiff for £35,000. Shortly after the contract was signed and after the purchase price had been paid over she repudiated her agreement. The sale was closed, following an order for specific performance, in January, 1981. The Plaintiff claimed compensation of £73,830.46 for the loss sustained as a result of the Defendant's breach of contract, made up of:—

(i) loss of trading profits between the contractual completion date (August, 1978) and the date of actual completion,

(ii) additional interest payable to the Plaintiff's Bank arising from the Defendant's breach of contract. The Plaintiff drew down a loan shortly before August, 1978 and his solicitor thereupon sent a cheque to the Defendant's solicitor. Notwithstanding the Defendant's repudiation of the contract, the purchase price was not returned to the Plaintiff's solicitors until November, 1979. The Plaintiff's solicitor refused to accept its return and it was agreed, on a without-prejudice basis, that the monies would be placed on deposit receipt in the joint names of the parties' solicitors. As a result of being deprived of the profits which would have been made from the guesthouse business no repayments were made to the bank and much greater interest became payable. In addition, a bridging term loan was opened and interst on this sum was also due, and

(iii) miscellaneous items of damage — the Defendant auctioned the guesthouse contents for £1500. The Plaintiff claimed the sale was of the guesthouse as a going concern and its contents were his. £662.29 was claimed arising from damage to the central heating plant. £1280 was claimed for the storage of furniture which the Plaintiff had purchased for the guesthouse and which he was required to leave with the vendor of the furniture.

The Court held:

(i) Loss of Trading Profits — On the evidence only a rough calculation could be made of the trading profits which the Plaintiff would have made had the sale gone through. This task could be approached best by (1) taking into account the market value of the guesthouse at the date of sale, that is £35,000 and (2) taking into account the fact that an experienced bank manager had concluded that the guesthouse was capable of generating an income of at least £393 per month. It would have been reasonable to assume that the Plaintiff would have obtained an after tax trading profit of about £800 per month. However, the Plaintiff would have had to repay the bank approximately £400 per month and so his actual net loss would have been in the region of £400 per month — £11,600 over the 29 month period. But there must be deducted from the lost profits the Plaintiff's after tax earnings during that period, namely £11,979.25, which meant he suffered no loss of profits.

(ii) Interest — The claim for interest on the bridging loan could not be sustained as it arose primarily because of extra borrowing for the renovation of the guesthouse. The claim if sustainable would have been limited to the difference between the interest payable had all repayments been made and the interest which actually accrued because no repayments were made.

There were two objections to the claim The first of these was that when the Vendor's solicitors returned the purchase price in November, 1979 the Plaintiff could have repaid the loan in full and thus could have stopped interest running on it — the loss could therefore have been mitigated by the Plaintiff.

The second arose from the rule relating to remoteness of damage as stated in *Hadley* -v- *Baxendale* (1854) 9 EX. 341 which states that a plaintiff is entitled to such damages for breach of contract—

> "as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the Plaintiffs to the Defendants and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated."

The claim for additional bank interest could not be regarded as a loss which arose naturally from the Defendant's breach of contract. The Defendant could not know, and was not told, the amount the Plaintiff was required to borrow and there was no evidence to show that she could have been aware that the Plaintiff was not in a position to pay interest if she failed to complete the sale. The Plaintiff's special circumstances were not known by or communicated to the Defendant; thus the damages claimed were not reasonably in the contemplation of the parties when the breach occurred.

(iii) Miscellaneous Items of Damage—

(a) As the contract made no reference to the guesthouse contents the claim for £1500 failed.

(b) The Defendant, as Vendor, had a duty to take reasonable care of the property pending completion of the sale; she was in breach of that duty and should pay damages which arose out of it. The claim for £662.29 was allowed.

(c) The claim for £1280 was not sustainable as (1) the Plaintiff was not under a contractual obligation, either expressed or implied, to pay storage charges. On the evidence the vendor did not require the Plaintiff to agree to pay him for the storage, and (2) the claim did not fall within either of the limbs of the rule in *Hadley* -v- *Baxendale*. The loss did not arise naturally from the Defendant's breach of contract and the Defendant did not know of the special circumstances which gave rise to it.

Seamus Malone -v- Mary Malone. High Court (per Costello J.). Unreported. 9 June, 1982.

William Johnston

PLANNING

Declaration sought that Permission be deemed to have been obtained by default — exercise of Court's discretion to refuse.

Section 4 (5) of the Housing Act, 1969 ("the 1969 Act") provides that a decision by a Housing Authority to grant Permission under the Act is to be regarded as having been given in circumstances where it has not issued notice to the applicant of

its decision within "the appropriate period" (as technically defined, but basically five weeks from receipt of the application).

Section 10 of the 1969 Act covers the situation where Permissions are required under that Act and under the Local Government (Planning & Development) Act, 1963 ("the 1963 Act") and provides that, in such circumstances, "the appropriate period" for the purposes of Section 26 (4) of the 1963 Act is, in effect, to be construed (in unappealed cases) as being the later to expire of (a) the period of two months stipulated in Section 26 (4) aforesaid or (b) the period of five weeks beginning on the date on which the decision under the 1969 Act is given or is regarded as having been given.

On 3 June, 1975 the Plaintiff applied to the Defendant for Permission under Section 4 of the 1969 Act, to use premises other than for human habitation in a submission providing for the construction of a building with residential accommodation within the property. Permission was refused on 4 July, 1975 "for the reason that such change of use could result in a reduction in the supply of housing in the functional area of the Corporation".

An application had already been made for a Permission under the 1963 Act at the time at which the Defendant had considered the foregoing submission. There was, accordingly, the prospect that, if the refusal of 4 July, 1975 were found to be invalid, the inter-action of the various provisions mentioned would be such that the Plaintiff would be regarded as having been awarded by default Permissions under the 1969 Act and the 1963 Act (without conditions).

The Plaintiff could have appealed to the Minister against the refusal, but chose to pursue the matter by way of plenary summons claiming:—

(a) a Declaration that the refusal was in conflict with the facts upon which it purported to have been based, was unreasonable, and contrary to natural justice.
(b) an Order setting aside the refusal and declaring that the Plaintiff be deemed to have obtained a Permission by default on the expiration of five weeks from 3 June, 1975.

The Plaintiff's claim failed in the High Court, and her appeal against that decision was dismissed by the Supreme Court which HELD that, although the Defendant had reached an invalid decision in refusing the application under the 1969 Act, the equitable jurisdiction of the Courts should not be exercised to defeat the manifest purpose of the legislation, where there has been no allegation of impropriety or the like (save a mistake in law), and where a statutory remedy had not been availed of. In so deciding the Court followed the principles of its own findings in *The State (Abenglen Properties Limited)* -v- *Dublin Corporation* (5 February, 1982). In the instant case, the Court determined that the refusal was an invalid decision, but stated that "it was never the intention of the legislature that mistakes by Planning or Housing Authorities ... would be used as a basis for abandoning the statutory procedures and seeking to use the Courts as some form of licensing or enabling Authority in a field in which the legislative and executive organs of government have prime responsibility".

Creedon -v- The Lord Mayor Aldermen and Burgesses of the City of Dublin. Supreme Court (per McCarthy J. Nem. Diss.) 11 February 1983 - Unreported.

Patrick Fagan

PROBATE

Purported bequest of a farm by a Testatrix, who in fact held the entire shareholding in a private limited company which owned the property, should be regarded as a gift of the testatrix's shareholding in that company.

This case involved the construction of a will, made in Germany and written in German, of a German national domiciled in Germany and, in particular, of a clause purporting to bequeath a farm in Ireland to the Protestant Church in Ireland.

Before dealing with the problem of construction, the Court dealing with the proper law to be applied in construing the will decided that there was no necessity to choose between German and Irish law since, on the evidence of experts in German law, the primary principle of construction of Irish law that, whether or not the case contains a foreign element a will is to be construed in accordance with the intention of the testator to be gathered from the will, is also incorporated in the German legal system.

The main problem of construction arose by reason of the fact that the Testatrix was not the legal owner of the farm in Ireland, but that she or her nominees held the entire shareholding in a private limited company that owned three parcels of land in Co. Laois comprising in all 175 acres, together with buildings, livestock and farm machinery. The company's only other liquid assets at the date of the Testatrix's death were a small holding of bank stock and cash. The company had been formed or acquired by the Testatrix and her husband and its whole purpose was the acquisition, holding and running of the farm in question.

The Court stated that the will appeared to have been prepared in haste and that the notary who drafted it could not have discussed with the Testatrix how she acquired the beneficial interest in the lands in Ireland, and neither could he have been conscious of the fact that the legal owner of the lands was a limited company and not the Testatrix in her personal capacity. The Court also had regard to the fact that the expression "farm" was used in the German text of the will, which the German legal experts in evidence agreed was one generally used in German only when referring to lands held abroad.

It was *HELD*:—

1) That the text of the will was loosely drawn and loosely expressed by the Testatrix and should be construed as referring to her property in Ireland;
2) That the intention of the Testatrix was to hand over the entire farming enterprise to the beneficiary named in the will (the identity of whom was originally required to be construed by the Court but was subsequently agreed by the parties to be the Lutheran Church, of which the Testatrix was a member);
3) That the gift of the farm in Ireland should be regarded as comprising a gift of the farming business which the Testatrix and her husband, and ultimately the Testatrix on her own, operated in Ireland through the medium of a limited company and that this gift would capture the entire shareholding of the Testatrix in the company of which she was the beneficial owner or over which she exercised a power of disposition at the date of her death.

In the matter of the will of Antonie Marie Bonnet, deceased, Robert William Roche Johnston -v- Heinz H. Langheld & Ors. - High Court (per O'Hanlon, J.) 18 November, 1982. - Unreported.

Sarah Cox

RELATOR ACTION — COSTS

No Liability on the Attorney General for costs because he gave his fiat for the institution of legal proceedings.

Dublin Corporation (the first named Defendants) sought to have the Attorney General held liable to pay damages on an undertaking in the High Court. The Attorney General denied that he gave any such undertaking or had authorised any such undertaking.

The proceedings arose from Dublin Corporation's decision to build municipal offices on the site of the early Viking settlement at Wood Quay, Dublin. Fr. Francis X. Martin sought an injunction restraining the Corporation from building on the site. Fr. Martin required the fiat of the Attorney General to institute proceedings. The fiat was given on the basis that Fr. Martin would defray the Attorney General's costs and expenses and on the understanding that the Attorney General expressed no opinion on the legal issues involved.

The action proceeded with the Attorney General as Plaintiff "at the relation of Francis X. Martin". Interim and interlocutory injunctions were granted to Fr. Martin in the High Court. The interlocutory injunction was discharged by the Supreme Court. The Supreme Court also dismissed the action as being unsustainable.

Dublin Corporation claimed in these proceedings that the Attorney General should be held liable for the damage and loss sustained by the Corporation as a result of the grant of the interim and interlocutory injunctions. The orders of the High Court on the granting of the interim injunction on 10 January, 1979 referred to the usual undertaking as to costs in terms "as the plaintiff by his Counsel undertaking . . . ." This was repeated in subsequent orders. This undertaking related to the ordinary undertaking which a plaintiff seeking interim or interlocutory relief is expected to give in return for the exercise of the Court's discretion.

The High Court dismissed the Corporation's claim against the Attorney General. The Corporation appealed to the Supreme Court. The Supreme Court held in dismissing the appeal that:

1. The relevant undertaking was not given by the Attorney General but by Fr. Martin, mistakenly described in the Orders in question as "the Plaintiff".
2. The giving of consent or fiat by the Attorney General to the institution of proceedings did not indicate any approval of the proceedings by the Attorney General. In the circumstances there was no liability on the Attorney General.

The Attorney General at the relation of Francis X. Martin -v- The Right Honourable the Lord Mayor, Aldermen and Burgesses of Dublin and the Commissioners of Public Works in Ireland. Supreme Court (per O'Higgins C.J. Nem. diss). 16 February 1983. - Unreported.

Eamonn G. Hall

SALE OF LAND

Registered lands — Registration of Transfer delayed — Registration of Lis Pendens — Registration of Title Act 1964.

The Plaintiffs agreed on 8 November 1979 to purchase from Patrick Broughan certain registered lands for the sum of £340,000. The full purchase money was in due course paid to Mr. Broughan and on 7 December, 1979 he executed a transfer in favour of the Plaintiffs. For various reasons registration of the transfer was delayed until 25 February, 1981. Earlier, on 9 May, 1980, the Defendants commenced proceedings against Mr. Broughan in the High Court seeking a declaration that he held the lands as trustee for them. The proceedings were on the same day registered in the Land Registry as a Lis Pendens. Although informed of the purchase and transfer of the lands to the Plaintiffs the Defendants declined to vacate the Lis Pendens and proceedings were brought by the Plaintiffs in the High Court seeking an Order of the Court vacating same. The Plaintiffs were successful in the High Court and the Defendants appealed to the Supreme Court where it was HELD, upholding the decision of the High Court, that although the provisions of Section 51(2) of the Registration of Title Act 1964 expressly provide, in relation to transfers, that "until the transferee is registered as owner of the land transferred, that instrument shall not operate to transfer the land", that section of the Act deals only with the effect of the instrument of transfer as such. In the present case the Plaintiffs had not to rely merely on this instrument. They had purchased the lands pursuant to a contract and had paid over the full purchase money. On the execution of the transfer upon payment of the purchase money, the entire beneficial estate and interest in the lands passed to the Plaintiffs and the registered owner became a bare trustee for them. This had the effect of vesting in the Plaintiffs a right over the registered land such as was contemplated by Section 68 (2) of the Act. The Plaintiffs' right arising from their contract and payment of purchase money would not survive against a registered transferee of the lands or against a chargee for valuable consideration, but the Defendants were not such.

A Lis Pendens is a burden registered on the folio under Section 69 of the Act. Section 74 of the Act gives priority to the burden registered first in time. This priority applies, however, only between burdens as such. The right of the Plaintiffs arising from the contract and the payment of the full purchase money could not have been registered as a burden under Section 69, and is therefore not affected by any priority given to such burdens under Section 74. The interest of the Plaintiffs was not subject to the Lis Pendens, which was ordered to be vacated.

Bryan Coffey and Richard Moylan -v- Brunel Construction Company Limited (In Voluntary Liquidation) - (Supreme Court) (per O'Higgins C.J., Hederman J. concurring, and per Griffin J., Hederman J. concurring). 13 May, 1983.-Unreported.

D. Seymour Cresswell

Edited by Gary Byrne

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Recent Irish Cases

Constitution — Article 34 — Legislative Interference with Judicial Power — Distribution of Powers — Statute Validity — Street and House to House Collections Act, 1962 — Section 13 (4) — Certiorari.

The Prosecutor on behalf of the North Cork Branch of the H Block Armagh Committee applied on 12 March, 1981 under the Street and House to House Collections Act 1962 for a permit to hold a collection in aid of the H Block Campaign. On 18 March, 1983 this Application was refused under Section 9(b). The Prosecutor appealed the decision to the District Court under the terms of the Act. At the hearing of the appeal the prosecutor gave evidence seeking to rebut the opinion expressed by the Chief Superintendent to the effect that the proceeds of the collection would be used wholly or in part "(a) for the benefit of an object which was unlawful or contrary to public morality or for the benefit of an organisation, membership of which is unlawful, or (b) in such a manner as to encourage either directly or indirectly the commission of an unlawful act". Two other witnesses called on behalf of the prosecutor also gave similar evidence. The Chief Superintendent in question and another witness gave evidence in support of the Chief Superintendent's opinion that the collection would be for a purpose excluded under Section 9(b). The District Juctice averted to Section 13(4) which provides "without prejudice to the jurisdiction of the District Court to disallow on other grounds an appeal under this Section, an appeal under this Section shall be disallowed, if, on the hearing thereof, a member of the Garda Siochana not below the rank of Inspector states on Oath that he has reasonable grounds for believing that the proceeds or any portion of the proceeds of the collection, to which the collection permit the subject of such appeal relates, will be used . . . . (for an unlawful purpose)".

The District Justice having heard the evidence of the Chief Superintendent stated he had no alternative but to disallow the appeal. The effect of the procedure followed was that the District Justice did not purport to make any adjudication upon the merits of the case nor did he indicate what, if any, opinion he had formed upon the facts as given in evidence before him by the Prosecutor and his Witnesses and by the Chief Superintendent and his Witness. He stated his reason for disallowing the appeal was that he was obliged to do so by the Sub-section in question. The Prosecutor was granted a conditional Order of Certiorari in the High Court and claimed that the procedure set out under the Act was an invasion of judicial power and therefore unconstitutional. Cause was shown and the High Court ruled that Section 13(4) was not invalid having regard to the provisions of the Constitution on the grounds that the procedure set forth in the Act was simply to limit the appellate jurisdiction of the District Court rather than an interference with the exercise of the jurisdiction of the said Court. On appeal to the Supreme Court it was:—

HELD

1. A challenge to the constitutionality of provisions of an Act of the Oireachtais may be raised on an application of Certiorari.
2. The effect of the sub-section is that notwithstanding lodging the appeal and the commencement of the hearing of the appeal a District Justice is compelled, if evidence of a certain opinion is given, to disallow the appeal and all discretion to do otherwise is removed.
3. Where the effect of a statutory provision is that the dispute is determined by the Oireachtas and not by the Court and where the Court is required or directed by the Oireachtas to dismiss the Appellent's appeal without forming any opinion as to the rights of the respective parties the provision is clearly invalid having regard to the provisions of the constitution.
   Buckley and Others -v- The Attorney General and Others [1950] I.R. Applied, *Maher -v- The Attorney General* [1973] I.R. Applied, *The State -v- O'Rourke* (District Justice Kelly) Supreme Court, 28 July 1980 (unreported) explained.
4. Section 13(4) of the Street House to House Collections Act, 1962 is invalid having regard to the provisions of the Constitution and the order of the District Justice must be quashed.

The State (at the Prosecution of Michael McEldowney -v- District Justice Humphrey Kelleher and The Attorney General) – Supreme Court (per Walsh, J. Nem. Diss.) 26 July 1983 – Unreported.

Eugene F. O'Sullivan

FAMILY HOME PROTECTION ACT, 1976

In February, 1978, the Defendant agreed to purchase a dwellinghouse at Jordanstown, Co. Meath. The purchase was subsequently taken in the name of P. J. Carrigan Ltd., a company incorporated on 21 July 1978, whose directors were, in November 1978, the Defendants' brother and sister-in-law Owen and Kathleen Carrigan. A special resolution of the company was passed on 24 November 1978 to include in the Objects Clause a provision entitling it to purchase lands and premises including dwellinghouses for the use of the Directors, Officers or Employees of the company. Owen and Kathleen Carrigan were described in the Resolution as holders of all the shares then issued.

The Defendant gave evidence that the purchase price of the house was in the region of £25,000/£26,000 of which £5,000/£6,000 was provided by Owen Carrigan and the balance of £20,000 by way of a mortgage to the Lombard & Ulster Bank. The company was registered as owner of the house in the Land Registry on 5 May 1979, the Mortgage being registered as a charge on the folio.

A fire insurance proposal was made in the name of P. J. Carrigan and a policy issued in the name of P. J. Carrigan & Ors., the interest of the Lombard & Ulster Bank being noted on the policy. The house was used as a family home by the Plaintiff and Defendant from the time of purchase to March 1979 when the Plaintiff left claiming that the Defendant had made it impossible for her to continue to live with him. The house was destroyed by fire on 22 May 1981.

In proceedings brought by the Plaintiff she claimed *inter alia*:—

(1) a declaration that the house constituted a Family Home within the meaning of the Family Home Protection Act, 1976;
(2) that the Defendant should be restrained from disposing of the property by way of a sale or mortgage or otherwise; and
(3) a declaration that she was entitled to the entire beneficial interest in the property.

Subsequently the Plaintiff caused a *lis pendens* to be registered against the property and also a notice pursuant to Section 12 (1) of the Family Home Protection Act.

The Lombard & Ulster Banking Company which had obtained an order for possession against the lands had been unable to exercise the power of sale it claimed to possess and the Defendant applied to the Court to deal with the above claims.

The Court was satisfied that the Plaintiff had made no financial contribution to the purchase of the house either in respect of the deposit or in contributing to the payment of the mortgage liability

and dismissed the claim to be entitled to the property or some share in the beneficial interest in the property.

The Court noted that the Plaintiff was rightly suspicious concerning the transaction in which the dwellinghouse was purchased in the name of a company in which the Defendant was neither a director or shareholder and believed that this was a device to ensure that the provisions of the Family Home Protection Act would have no application in the event of the property being sold and commented that her suspicions might be well founded. The hearing of the case had been adjourned to enable Owen and Kathleen Carrigan to attend Court and give evidence but they elected not to come to Court and being resident in Northern Ireland could not be compelled to do so.

The Court held that mere suspicion was not enough to support a finding that the property was purchased in trust for the Defendant. Even if it could be shown that the transaction was a mere subterfuge and that the Defendant should be regarded as having acquired the entire beneficial interest or some share and interest therein the Court could not see how that could benefit the Plaintiff since the property was no longer habitable and the proceeds of sale would not suffice to meet the claims of the mortgagee.

The Court held that the Defendant had not been shown to have an interest in the property within the meaning of Section 1 of the Family Home Protection Act and that the Plaintiff was not entitled to register the notice referred to in Section 12 of the Act nor have the registration of the *lis pendens* continued on the folio.

B. M. Carrigan -v- P. J. Carrigan - The High Court (per O. Hanlon, J.) 12 May 1983 - Unreported.

J. F. Buckley

INJUNCTION

Correct criteria to be applied in considering an application for an interlocutory injunction — test is whether a fair bona fide question has been raised by the person seeking relief — Act of the Oireachtas to be regarded as valid until invalidity established.

Under the provisions of the Fuels (Control of Supplies) Act 1971-1982 the Plaintiffs together with all other traders in imported fuel oils were required by Statutory Instrument to purchase 33% of their requirements from Whitegate at prices and subject to terms fixed by one of the Defendants. Proceedings brought by the Plaintiffs challenging the validity of the statutory instrument were stayed to allow an application for a preliminary ruling under Article 177 of the EEC Treaty to be made in relation to the interpretation of Articles 30, 31, and 36 of the Treaty in respect of the system established by the Statutory Instrument.

Pending such application the Defendants sought to enforce observance of the provisions of the Instrument but the Plaintiffs refused to comply. The Defendants feared that the Plaintiffs' action might persuade other oil companies to follow suit and therefore amended their Defence by adding a Counterclaim seeking an interlocutory injunction compelling the Plaintiffs to comply with the Order. The injunction was granted in the High Court and appealed by the Plaintiffs.

The Plaintiffs alleged that the High Court Judge had not had proper regard to the correct criteria to be applied in considering such an application for an interlocutory injunction particularly one seeking mandatory relief and suggested that the Court should have required of the Defendants that they establish a substantial question to be tried *and* a probability that the Plaintiffs would fail at the trial in relation to such a question. The Supreme Court considered the manner in which a Court should act in considering the granting of interlocutory relief.

HELD. Interlocutory relief is granted where what is complained of is continuing and is causing harm or injury which may be irreparable in the sense that it may not fairly or properly be compensated for in damages. It is designed to keep matters in **statu quo** during the period before the action comes to trial and is a discretionary relief. In disputed cases the Court must not only consider the action complained of but also what inconvenience, loss and damage might be caused to the other party and see where the balance of convenience lies between the two. The Plaintiffs have to establish that there is a fair question raised to be decided at the trial. It is not necessary to establish a probability that the party seeking relief would succeed in its claim at the trial as that would amount to a determination at the interlocutory stage of an issue which properly arises for determination at the trial of the action.

HELD also that the giving of mandatory relief by the High Court was correct in that the Plaintiffs' actions constituted a challenge to an Order made under the provision of an Act of the Oireachtas which is on its face valid and to be regarded as part of the law of the land unless and until invalidity is established. Cases considered were: *Educational Company of Ireland Limited -v- Fitzpatrick and others* [1961] IR 323, *Smyth and Another -v- Beirne and Another (unreported), Esso Petroleum Company Ireland Ltd. -v- Fogarty* [1965] IR 531, *American Cyanamid -v- Ethicon Ltd.* [1975] AC 396; *Rex Pet Foods Ltd. and Another -v- Lamb Brothers Dublin Ltd. and Others*, unreported, 26th August, 1982, and *TMG Group Ltd. -v- Al-Babtain Trading and Contracting Co. and Another.* Unreported. 28th March, 1980.

Campus Oil Limited and Others -v- The Minister for Energy and Others - Supreme Court (per O'Higgins C.J. and Griffin J.; Herderman J. concurring) 17 June 1983 - Unreported.

Helen Collins

JURISDICTION

Circuit Court decision held on appeal to exceed Jurisdiction — remit to Circuit Court — Judge within Jurisdiction in reaching same result on different grounds without further evidence.

Hoping to acquire 315 acres at Nohoval as a possible location for a toxic waste dump, Cork County Council in its capacity as a Sanitary Authority applied under Section 271 of the Public Health (Ireland) Act, 1878, to the District Court for an Order authorising them to enter, examine and lay open the said lands for the purposes specified in the Act. The land in question was owned by ten farmers. The District Court, exercising its Jurisdiction under the Act, made the Order against each landowner concerned. The landowners appealed to the Circuit Court on the basis that the area in question was so plainly unsuitable as a waste disposal site, that it was not necessary for the County Council to enter on the lands for the specified purposes and therefore the Orders made in the District Court could not be upheld. Conflicting expert evidence was given at the Circuit Court hearing as to whether that necessity existed. The Circuit Court Judge allowed the appeals on the grounds that the evidenc was such that he was not sure that the lands would be suitable for a dump for toxic waste. On Appeal by the County Council the High Court found that the Judge in the lower Court had no jurisdiction to reach his decision on those grounds, as the County Council had never made the case that the lands were suitable. The Council had alleged in responding to the Appeal that it was necessary for them to enter on the lands and carry out tests which would indicate the suitability or otherwise of these lands. The case was then remitted to the same Circuit Judge with a direction that he proceed with the hearing on the basis of the evidence already heard and of such further evidence as he might decide to admit. The parties, however, decided to adduce no further evidence and solely on the evidence which was before him at the initial hearing the Circuit Judge decided without giving reasons, that he was allowing the Appeal. On enquiry by the Council whether he was finding as a fact that the lands were manifestly unsuitable for acuisition as a dump he replied in the

affirmative. The Council thereupon applied unsuccessfully to the High Court for an Order of Certiorari. The basis of this application was that the Circuit Judge, having no further evidence before him, had no jurisdiction at the second hearing to decide the Appeal in favour of the landowners on different grounds. On appeal to the Supreme Court it was held that the Circuit Judge was entitled to uphold the Appeal on different grounds. It was assumed that he would have due regard to the judgment of the High Court, and would approach the case, notwithstanding that there was no further evidence adduced, from a different standpoint. The fact that he reached the same conclusion but for a different — and this time valid — reason could not be said to indicate any wrongful exercise of jurisdiction. He was entitled to change his mind either as to the result or as to the reason for the result. The Court affirmed its decision in *Dolan -v- Corn Exchange* [1975] I.R. 315 where it was stated on page 330 "The decisions of the Courts be they verdicts of juries or judgments of judges must yield to the overriding requirement that they truly accord with the law and the facts as they appear at the time of the decision.

The State (Cork County Council) -v- Judge Fawsitt and Others – Supreme Court – (per Hency J. Nem. Diss.) – 27th July, 1983. Unreported.

George Bruen

PLANNING

The keeping of ice-cream vans in the driveway of a private residence while not in use for the sale of goods is not development within the meaning of Section 3 of the Planning and Development Acts, 1963.

The Appellants who have lived at 144, New Cabra Road, Dublin, since June, 1980, carried on business as retailers of ice-cream from two ice-cream vans which they parked in the driveway of their home. The vans were normally only parked there at night and if stock was not fully sold in the course of the daily business, a freezer installed in one or both vans was connected to the electricity supply in the house for the night.

As a result of complaints from residents in the area, an Inspector from the Planning Authority, on 14 August, 1980, saw the two vans in the driveway. Subsequently, Section 26 proceedings under the Planning and Development Acts, 1963, were served on the Appellants but were not proceeded with and were subsequently withdrawn. On 18 January, 1982, a Section 27 Notice under the Planning and Development Acts, 1976, was served on the Appellants to prevent them from causing, permitting or authorising the parking of commercial vehicles within the curtilage of the premises. A hearing took place in the High Court on 20 April, 1982, and in addition to the evidence on Affidavit the Judge heard oral evidence adduced on behalf of both parties. The Appellants had sought to make a case that the driveway of their home had been used for parking commercial vehicles for many years before their purchase of the property but the Judge rejected this and accepted the evidence on behalf of Dublin Corporation that the driveway was not used to park commercial vehicles before the Appellants had occupied the house. The Judge further held that the use of the front driveway for keeping vans was a development within the meaning of Section 3 of the Local Government (Planning and Development) Act, 1963, was not an exempted development under Section 4 (1) (h) as it was not used for a purpose incidental to the enjoyment of the dwellinghouse as such. Accordingly, the Judge ordered that the Appellants be prevented from causing, permitting or authorising the parking of commercial vehicles within the curtilage of the premises 144, New Cabra Road, Phibsboro, Dublin 7. The order was made pursuant to Section 3 (2) (b) (i) of the 1963 Act.

Section 3 (1) states;

"Development" in this Act means, save where the context otherwise requires, the carrying out of any works on, in, or under land or the making of any material change in the use of any structures or other land."

Section 3 (2) (b) (i) states;

"For the purpose of subsection (1) of this Section and without prejudice to the generality thereof—

(b) where land becomes used for any of the following purposes;—

(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or the sale of goods, ... the use of the land shall be taken as having materially changed."

The Appellants appealed on the grounds that the High Court decision was wrong in law in holding that the parking of the vehicles within the curtilage of their grounds was a breach of Section 3 (2) (b) (i) of the Planning and Dvelopment Acts, 1963.

The Supreme Court HELD that the use of the premises was not a development within the meaning of Section 2 of the Planning and Development Acts, 1963, as there was no evidence that the keeping of vans overnight on the premises was for the purpose of the sale of goods on the premises or that at any time ice-cream was sold from the vans while parked at the premises 144, New Cabra Road, Phibsboro, Dublin 7. The Court agreed that the keeping of vans at the premises did not constitute exempted development pursuant to Section 4 (1) (h) of the Planning and Development Acts, 1963.

The Right Honourable, the Lord Mayor Aldermen and Burgesses of Dublin -v- Laurence Moore and Carmel Moore – Supreme Court (per McCarthy and Hederman, JJ.), 29 July, 1983. Unreported. Unreported.

Daniel F. Murphy

Edited by Gary Byrne

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Recent Irish Cases

HOUSING — Duty of Housing Authority under Housing Act, 1966, to allocate the houses which they have provided in accordance with a statutory scheme of priorities to suitable Applicants who fit within designated categories and who reside within such Authority's functional area.

Buncrana Urban District Council as a Housing Authority under the Housing Act, 1966, has provided and made available for allocation and letting 28 houses. In accordance with Section 60 of the Act they had a statutory scheme of priorities under which preference in the allocation of houses was to be given to suitable Applicants in accordance with the category into which each Applicant fitted. First preference was given to Applicants living in dangerous and unfit houses, last being given to those in need of houses on medical or compassionate grounds. Up to September 1978, the scheme contained a residential clause, which provided that before an Applicant could qualify for a house, he or she must have been resident within the town or functional area of the Urban District Council for a specified period of time. On 18 September 1978, the Council resolved to remove the residence clause from its scheme and this was subsequently approved by the Minister for the Environment.

In July 1980, in the case of *McDonald -v- Feely and Dublin County Council*, the Council appealed to the Supreme Court against an injunction restraining the Council from removing an itinerant family from land occupied by them as an encampment. The Chief Justice in delivering the unanimous decision of the Court made the following reference to the residence clause in that Council's scheme of letting priorities:—

"It does not seem to me to matter whether in fact the Plaintiff's husband had been born in the County of Dublin and thereby qualified his family for housing by the County Council, or whether the family had been four years resident somewhere in the County or whether in fact they were not qualified — at least their housing needs deserve consideration and attention if a scheme of priorities, paying due regard to the primary objectives laid down in Section 60(3) were effectively to be operated".

In August 1981, the Department of the Environment sent a circular letter to all housing authorities which contained the foregoing extract from the judgment of the Chief Justice and requested Local Authorities, which had a scheme of letting priorities containing a residence clause, to review such schemes. This circular was considered by the Chief Justice in the instant case.

He stated he did not wish to refer to the particular facts of the *McDonald* case except to say that they were particular and unique. However, the circular letter appeared to attribute to the quoted portion of his judgment a meaning which it did not bear, and which was never intended by him. What he had in mind, and what he hoped to convey in his judgment was that irrespective of whatever schemes of priorities were from time to time in operation, each Housing Authority must have regard to those who at any particular time were in their functional area and were in need of housing, even if such people could not be housed under an existing programme and in accordance with current priorities their existence and needs must be borne in mind for the future. It was not intended to suggest that a housing authority need not have regard, as a matter of priority, to those in their functional area who had been resident or domiciled there for a particular period of time. They had to have regard, however, to the fact that the housing needs in their area were continuing to grow, if that be the case, or to change, and accordingly, could not ignore the fact that there were people without houses, even though at a particular period of time they did not qualify under an existing scheme. He was surprised to learn that the *McDonald* case had been regarded as a decision to the effect that the Housing Act and, in particular Section 60, is to be interpreted as relieving a housing authority of a primary responsibility to satisfy the housing needs of those in its functional area. In his view, this decision had no such effect, on the contrary a housing authority's obligation is to have regard to the housing needs which exist or are likely to exist within its functional area. A housing authority under the Housing Act of 1966 could not lawfully have regard to other than the housing needs which exist or are likely to exist within its functional area.

HELD — The High Court had come to the correct view in deciding this case. The Buncrana Urban District Council are not entitled to house people who are not resident in its functional area. The duty of the Council is to allocate the houses which they had provided in accordance with a scheme of priorities which enable them to house suitable Applicants who fit within the designated categories and who reside or are domiciled within the functional area of the Council.

The appeal was therefore dismissed.

McNamee and Anor. -v- Buncrana Urban District Council – Supreme Court (per O'Higgins C.J. Nem. diss.), 30 June, 1983 – unreported.

Daniel Brilley

CERTIORARI — prisoner on temporary release from St. Patrick's Institution arrested, further charged and remanded to St. Patrick's where the Governor treated the arrest on the latter charges as terminating the temporary release. Revocation of the temporary release was held to have been made in accordance with Law.

On 12 January, 1981 Michael Murphy, then between the ages of 17 and 21 years, was convicted of an offence for which he was ordered to be detained in St. Patrick's Institution for a period of 12 months. Allowing for remission, that sentence could have expired on 22 October, 1981, but on 18 May, 1981, pursuant to the provisions of the Criminal Justice Act, 1960, the Governor of St. Patrick's pursuant to the Prisoners (Temporary Release) Rules 1960 (S.I. No. 167 of 1960) informed Murphy that he was being released from 19 May, 1981 to the expiration of the sentence on 22 October, 1981 "for the purpose of re-entering into the community under Intensive Supervision" and that his release was subject to certain conditions including, in particular, keeping the peace and being of good behaviour during the period of release.

On 15 June, 1981, whilst on temporary release, Murphy was arrested under Section 30 of the Offences Against the State Act, 1939, and charged with attempted murder and possession of a firearm with intent to endanger life. He was remanded in custody to St. Patrick's Institution and on admission there was treated as a prisoner on remand and required to wear appropriate clothing. On the following day, two officers of the Institution gave him clothing to wear appropriate to a person who had been sentenced. He was told that since the Gardai had brought him back this was the clothing he would have to wear.

On 19 June, 1981, the Governor informed Murphy that he was being kept in custody because of the seriousness of the offences alleged against him and with which he had been charged.

Murphy applied in the High Court on 26 June, 1981 for bail but was refused on the grounds that he was serving a custodial sentence. A further application for bail was made in the High Court on 9

October, 1981 and it also failed but, since the original sentence had expired on 22 October, 1981, an application was successful when made on the following day.

A conditional Order of Certiorari was granted by the President of the High Court on September 23, 1981, on the grounds "that the decisionof the said Respondent (the Governor) to terminate the temporary release was reached otherwise than in accordance with natural justice". Cause having been shown on behalf of the Respondent, the conditional Order of Certiorari was made absolute by Barron J. on 21 May, 1982, holding that there was no basis upon which the Governor could fairly hold in favour of the accusation made against Murphy at that time.

The Respondent appealed the decision to the Supreme Court.

The question arising in the appeal was whether, on the facts, the temporary release of Murphy has been at any time validly terminated. Barron J. had held that it had not, although the question was, by the time the matter came before him, essentially moot, as Murphy had by then already been released from custody.

O'Higgins C.J. said "The facts of this case show that the Governor treated the arrest on these serious charges as terminating the temporary release. In so doing he was probably acting in a common sense manner.

"I doubt, however, whether he could lawfully do so without it being clearly established that a breach of the peace had occurred. This was a matter which in the circumstances of this case fell to be decided by the courts. An assumption of guilt on the charges preferred could not be made."

Griffin J. stated "The Governor did not consider any factor other than that the Prosecutor had been charged with these serious offences. The fact that he had been charged with an offence is in my opinion an insufficient reason for the revocation of temporary release. Charges are frequently dropped or not proceeded with, and if the temporary release can be revoked merely or solely because the person was charged with an offence, what of the apparent injustice done to such person who, in the time intervening between the charge and the dropping of the charges, has lost the liberty to which he would otherwise have been entitled under the Act and the Rules?"

Finding that the situation in the instant case was not analogous to that in *The State (Duffy) -v- The Minister for Defence* 9 May 1979 — Supreme Court — unreported) McCarthy J. said that here the Prosecutor was merely notified of the action of the Governor based, not upon an established static position "but, rather, upon the bringing of certain charges against the Prosecutor, charges of which he was and is presumed by law to be innocent, and using that wholly innocent circumstance as a ground for re-imposing prison conditions upon him and for the Director of Public Prosecutions successfully to oppose an application for bail made on two occasions in the High Court. On any view, justice was neither done or seen to be done".

The Court dismissed the appeal.

The State (Murphy) -v- The Governor of St. Patrick's Institution –Supreme Court (per O'Higgins C.J., Griffin J., McCarthy J.), 30 June, 1983 – unreported.

Damien McHugh

BANKRUPTCY

Charge on Bankrupt's Licensed premises did not secure priority over the Intoxicating Liquor Licence an apportionment of the proceeds of sale ought not be taken.

The bankrupt was the Registered Owner of a small plot of ground on which a Licensed premises stood and was the holder of the intoxicating liquor licence in respect thereof. After the Bankrupt's adjudication permission was given by the Judge to sell the Licensed premises as a going concern and assent to this was given by the Official Assignee and by the interested parties who appeared in the proceedings, without prejudice to any claim they might subsequently make against the purchase money. The premises were sold and the Bankrupt endorsed over the Licence to the Purchaser.

The Official Assignee asked the High Court for directions as to the correct distribution of the proceeds of sale and contended that four Burdens registered against the property did not capture the excise Licence as none of the charges expressly professed to affect it. The Court held that as the Assignee had agreed to the sale of the Licensed premises as a going concern, he was estopped from questioning its validity or propriety. From that decision the Assignee appealed.

The Supreme Court held that in this case the Licensed premises with the benefit of the licence had been validly sold to the Purchaser. It is well established that the premises could not have been sold for a particular figure to the Purchaser and the licence for a further figure to another person.

The Court in *Macklin -v- Greacen* [1982] I.L.R.M. 182, held that an intoxicating liquor licence could not be sold as an item of property with a viable existence separate from the premises. If the point had been taken before the sale was completed then the decision may have been different. In *Irish Industrial Building Society -v- O'Brien* [1941] I.R. 1, it was held that in the absence of any statutory or contractual duty on the part of the Judgment Mortgagor to endorse or to hand over the Licence on a sale by the Court, the sale would have to be confined to the premises without the Licence. However, since all interested parties agreed to the sale, the Court would not now overthrow the basis of that sale and replace it with a hypothetical and unreal sale which would assume a Purchaser of the premises and a separate Purchaser of the licence.

In the matter of Brendan J. Sherry -v- Brennan, Bankrupt – Supreme Court (per Henchy J., 26th July 1983 – unreported.

Donal O'Sullivan

PLANNING

Rule 11 of the Fourth Schedule to the Local Government (Planning & Development) Act, 1963 is inserted into Section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, by Section 69 of the 1963 Act. The rule provides that "Regard shall not be had to any depreciation or increase in the value attributable to (a) the land or any land in the vicinity thereof being reserved for any particular purpose in a development plan; (b) inclusion of the land in a Special Amenity Area Order.

This case arose from a case stated by the Property Arbitrator concerning 18 acres of land lying between the Dodder River on the north and Firhouse Road on the south in County Dublin. The land was zoned under the County Dublin Development Plan 1972 to preserve an area of "high amenity" and the permitted use of the land was "primarily agricultural". A small portion of the land was zoned under the Development Plan, "to provide for recreational open space and ancillary structures" and the permitted use was stated as "solely recreational use". The case stated to the High Court had asked the question as to whether these designations amounted to a reservation for a particular purpose within the meaning of Rule 11.

Dublin County Council argued that the objectives "to preserve an area of high amenity" and "to provide for recreational open space and ancillary structures" were not particular purposes but general objections and that particular purposes referred to specific uses such as burial grounds set out at paragraphs 2, 3 and 4 of Part IV of the 3rd Schedule to the 1963 Act.

Mrs. Shortt argued that a designation for a public purpose is a reservation for a particular purpose and that the limitation of the use to the uses for purposes compatible with the preservation of high amenity or use as a recreational open space, destroyed any market for the land and the Arbitrator must therefore be entitled to ignore the particular purpose and ascertain what the value would be if there was no reservation.

O'Higgins C.J. accepted Mr. Justice McMahon's interpretation of Rule 11 where the learned High Court Judge had referred to the meaning given through the

words "particular purpose" in Section 19 of the 1963 Act. In that section the words are used to mean purposes which are residential, commercial, industrial, agricultural or otherwise. Mr. Justice McMahon felt that the same words used in Rule 11 must be given a different meaning for if they were not the Arbitrator would have to disregard all zoning with the result that his valuation would exceed the market value which is largely based on zoning. The learned High Court Judge had ruled that in the context of Rule 11 the words "reserved" means set apart and "particular purpose" means a purpose distinct from the purpose for which the land in the area is zoned.

HELD: that designations "to preserve an area of high amenity" and "to provide for recreational open space and ancillary structures" amounts to a reservation for a particular purpose within the meaning of Rule 11.

The Arbitrator had raised two further questions in his case stated namely:

1. Whether the County Council as Sanitary Authority could in the event of housing development taking place on the subject land, refuse a connection to its main sewer, such sewer then being capable of absorbing such sewerage.
2. Whether Section 56(1) (b) (i) of the 1963 Act would debar Mrs. Shortt from recovering compensation under Section 55 of that Act if Planning Permission were refused on the grounds that the capacity of the Dodder Valley main sewer was pre-empted to provide capacity for schemes of development on the lands some of which might be undertaken by the Local Authority. Section 56(1) (b) (i) refers to a refusal of a planning application on the basis that it is premature in that there is an existing deficiency in the provision of water supplies or sewerage facilities.

If a refusal is properly made on such grounds, compensation under the provisions of Section 55 is not payable. The Property Arbitrator's questions raised a hypothetical problem in Mrs. Shortt's case because of course the 1972 Development Plan had precluded the possibility of building on her lands.

HELD: as to (1) that the County Council cold not refuse a connection for sewerage and that Section 23 of the Public Health (Ireland) Act 1878 obliges the Sanitary Authority to receive into its sewers the sewerage of all premises within its district provided proper notice is given and the appropriate regulations observed. The Chief Justice agreed with the learned High Court Judge that the provisions of Section 23 are not repealed by implication by the provisions of the 1962 Act.

As to (2) the Chief Justice found on the evidence before him that an existing deficiency could not be established in that the main sewer would have been capable without difficulty of taking the hypothetical sewerage from Mrs. Shortt's development so that in the event of a refusal issuing from Dublin County Council such refusal would not be within the provisions of Section 56(1) (b) (i) of the 1963 Act.

The County Council of the County of Dublin -v- Nora Teresa Shortt – The Supreme Court (O'Higgins, C.J., Henchy J., Henderman J.) per O'Higgins C.J.(nem. diss.). [1983] ILRM 377.

John Gore-Grimes

NATURAL JUSTICE

Reports of the Army Pensions Board and decisions as a consequence made by the Minister for Defence are invalid as being in breach of natural justice where the reports are based on evidence which the applicant had no opportunity of examining, or rebutting.

Mrs. Bernadette Williams, on her own behalf and that of her family, applied under the Army Pensions Acts, 1923 and 1958, for several allowance and gratuities arising out of the death of her husband, an army officer, Sergeant Williams. S.11 of the Army Pensions Act, 1968, specifies the conditions for entitlement. The first two requirements were met: Sergeant Williams died while serving in the forces and was a soldier in receipt of marriage allowance. The factual issue for determination by the Army Pensions Board was whether his death was due to disease aggravated, accelerated or excited by — (1) a wound or desease attributable to service with a United Nations force, or (2) service with a United Nations force. Mrs. Williams, in her claim form, said that he had been admitted to hospital in Cyprus while on U.N. duties suffering from a suspected tropical virus. She could also give the place of death and the cause of same as recorded in the Death Certificate.

Sergeant Williams was flown home from Cyprus for medical attention. From then until his death, eleven years later, he was in receipt of regular medical treatment. The army authorities provided hospital treatment in Dublin at different times for him. As a result, the army authorities had considerable medical evidence available for presentation to the court in reporting on the application of Mrs. Williams. This evidence was not however made available to her. When her claim was turned down, Mrs. Williams applied for re-consideration by the Board under Article 10 of the Army Pensions (Investigations of Applications) Regulations, 1928, which empowered the Board to re-consider the application in the light of "any additional evidence" submitted to it. Mrs. Williams sought access to the medical evidence, presented by the army authorities. This was rejected by the Army Pensions Board because it was not its practice to make such evidence available. Again, the Board made a report adverse to her claim, on the grounds that no additional evidence had been received on her behalf.

HELD: The reports of the Army Pensions Board and the decisions made as a result by the Minister for Defence would have to be quashed because Mrs. Williams was unfairly and unjustifiably prevented from rebutting, if that was possible the conclusion reached by the Board. This one-sideness amounted to a breach of natural justice. The functions of the Army Pensions Board are judicial in nature because it makes an adjudication after consideration of evidence tendered in relation to an application.

The terms of Section 11 of the 1968 Act are that the Minister "may" grant certain allowances and gratuities on satisfying the conditions specified. The Minister's function is administrative and is confined to acting in accordance with the findings of the Board. If the findings are favourable to an applicant, the Minister has no option but to grant the allowances and gratuities provided. Dictum cited by Walsh J. in application of *Dunne* [1968] I.R. 105, at p. 116 approved.

The original application to the High Court for relief by way of certiorari (which was refused) was on notice to the respondants and because of that, and the appeal being allowed, an Order of Certiorari would issue in absolute form.

State (Williams) -v- Army Pensions Board and Minister for Defence – Supreme Court (per Hency J. and McCarthy J. per Hederman J. concurring). [1981] ILRM 379.

Joseph P. Mannix

Edited by Gary Byrne

Copies of judgments in the above cases are available to members on request from the Society's Library.