# GAZETTE

THE INCORPORATED
LAW SOCIETY
OF IRELAND

JANUARY/FEBRUARY 1974

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THE GAZETTE OF THE INCORPORATED LAW SOCIETY OF IRELAND

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# EDITORIAL

### LEGAL AID

It is satisfactory to note that the Minister for Justice, Mr. Cooney, proposes to establish a Committee to advise him on the introduction of legal aid in civil cases. What is even more important is that this Committee will be fully representative of the Legal profession as a whole, including judges, barristers, solicitors and a member of the Free Legal Advice Centre (FLAC). The Minister rightly praised the tremendous work which up to now, had been undertaken by FLAC, and expressed the hope that the Committee would evolve a scheme of Legal Aid, which would aid financially the free services heretofore provided by FLAC. The 80 law students of this organisation, supported by 40 barristers and 60 solicitors, would have been physically unable to carry on without financial assistance. Let us hope, that, pending the completion of the Report, this will be provided rapidly as an interim measure.

### LAND DEVELOPMENT

The Committee under the chairmanship of Mr. Justice Kenny, issued some radical proposals about land development, in the Report which it presented in March 1973, but which has only just been published. Its main controversial proposal is to control the price of building land in the public interest. Local authorities would be given power to apply to the High Court to designate areas, in which, in its opinion, the lands would be used during the following ten years for the purposes (i) of providing sites for houses on factories, and (ii) for expansion and development.

The Judge sitting with two assessors would determine the price if no agreement could be reached. Compensation would be limited to existing use value, plus 25%. Although this scheme is primarily aimed against developers who have amassed fortunes, the amount appears rather low. Two dissentients to the majority report claim that there is no justification for this radical departure, on the ground that, even construing the Constitution liberally, it would not be possible to offer an owner selling land less than its proper market value. They considered that such a compensation scheme would be hard to operate equitably, and might cause injustice. Whatever view is ultimately taken, any legislation proposed is certain to arouse controversy.

# ANNUAL GENERAL MEETING

The President (Mr. T. V. O'Connor) took the chair at 2.30 p.m. on Thursday, 29 November 1973.

The notice convening the meeting and the minutes of the ordinary general meeting held in Killarney in May 1973 were read, and they were subsequently signed.

**Presentation to Mr. Plunkett**

The President then made a presentation to Mr. Eric Plunkett upon his retirement as Secretary of the Society. This consisted in a cheque from all the members, as well as a magnificent parchment, which it is hoped to publish in the Gazette subsequently.

Mr. Plunkett, in thanking the members for their munificent gift, referred to the fact that, while it was the duty of the Secretariat to co-operate, there were occasions when it had to be unpopular. Having referred to some personalities in the Society such as George Wakely and Arthur Cox, he was glad to leave the Society in such a prosperous state after 30 years. Miss Thelma King, President of the Dublin Solicitors' Bar Association, wished Mr. Plunkett many years of happiness in his retirement on behalf of the members of her Association.

### BALLOT FOR THE COUNCIL 1973/74— REPORT OF THE SCRUTINEERS

A meeting of the scrutineers appointed at the Ordinary General Meeting of the Society held on 12th May 1973 together with the ex-officio scrutineers was held on 23 October 1973 at 1 o'clock. Nominations for ordinary membership of the Council were received from 31 candidates all of which were declared valid and the scrutineers directed that their names be placed on the ballot paper.

The following candidates were duly nominated as provincial delegates in accordance with bye-law 29 (a) of the Society and were returned unopposed.

Ulster—John C. O'Carroll
Munster—Dermot G. O'Donovan
Leinster—Christopher Hogan
Connaught—Patrick J. McEllin

A meeting of the scrutineers was held on Thursday 22nd November, 1973 at 11 o'clock. The pool was conducted from 11 a.m. until 1 p.m. and the scrutiny was subsequently held. The result of the ballot was as follows:

581 envelopes containing ballot papers were received from members.

The valid poll was 569.

The following candidates received the number of votes placed after their name and were elected:

John Carrigan 420, Mrs. Moya Quinlan 416, Patrick Noonan 415, John Maher 395, Anthony Collins 392, Patrick C. Moore 389, William A. Osborne 388, Thomas V. O'Connor 386, Brendan A. McGrath 385, Joseph L. Dundon 382, Robert McD. Taylor 375, Bruce St. J. Blake 375, Peter E. O'Connell 369, James W. O'Donovan 367, Francis J. Lanigan 366, Ralph J. Walker 364, Walter Beatty 358, Michael P. Houlihan 351, Gerald Hickey 351, William B. Allen 349, Peter D. M. Prentice 347, Laurence Cullen 347, James R. C. Green 345, John B. Jermyn 338, George A. Nolan 335, Gerard M. Doyle 333, David R. Pigot 323, Patrick McEntee 318, Patrick F. O'Donnell 303, Ernest J. Margestson 298.

The foregoing candidates were returned as ordinary members of the Council for the year 1973/1974. The President declared the result of the ballot in accordance with the Scrutineer's Report. On the motion of Mr. Mr. John Maher seconded by Mr. P. C. Moore, the audited accounts and balance sheet for the year ended 30 April 1973 circulated with the Agenda were adopted.

On the motion of Mr. John Maher, seconded by Mr. Peter Prentice, Messrs. Cooper Brothers & Co. were re-appointed as auditors to the Society.

## President's Speech at Annual General Meeting, 29 November, 1973

Ladies and Gentlemen,

You have received the report of the Council for the year ended 30 September, last, which covers part of the term of office of my predecessor, Mr. James O'Donovan, and most of my period of office now drawing to a close. In two respects perhaps these periods have made minor contributions to the long history of the Incorporated Law Society. James O'Donovan was the first President from Cork City—in itself perhaps something of a miracle when we think of the importance of Cork and the part it has taken in the national and legal affairs of the Country—while I am the first President from County Mayo, I feel as gratified by the honour which you have conferred on me as I am sure James O'Donovan and his colleagues felt when you elected him as the first President from the second metropolis of the Republic. I am and always will be most grateful to my professional colleagues for having conferred on me the greatest honour in their giving.

### Changes in Legal Practice

As I have said, you have received and no doubt diligently read the report of the Society's work during the year recently ended. I need not, therefore, go through it in detail, although it does contain some matters which call for comment. In my address at the last general meeting in Killarney I said that the profession stands at a watershed. Events will not stand still. The work of the practitioner changes from year to year with legal and economic developments affecting not only ourselves but the whole community. The demand for legal services increases with the increase of the level of general education; the prosperity of the people which raises both the standard and the cost of living and the complexity and kaleidoscopic changes in our legal system. The ordinary citizen is unable to cope with these changes and looks in the first instance to the Solicitor as his general professional advisor to help him in his difficulties. The nature of legal service has changed beyond recognition during the period which has elapsed since the professional lifetime of the fathers of the older members now listening to me and indeed during the professional lives of many of us. In the past the Solicitor tended to become identified with the property-owning-classes many of them owners of large landed estates tied up in settlement to keep the property intact and in the family. In the country districts, during the period of land agitation he was probably the Solicitor for either the landed proprietor or the tenant, and many a legal reputation, including if I may revert for a moment to legal history, the legal fame of Sir, then Mr. Edward Carson was made by representing the tenants in the Courts established under the Land Act 1881. Today the profession has a far wider clientele drawn from all ranks of the community. The motor car, the reforms of the law, relating to landlord and tenant, planning legislation, tax law, housing legislation and the spread of private ownership both of agricultural and urban property have all contributed to these changes. The Solicitor is required not alone to be a Lawyer but to have at least a general knowledge of business legislation and affairs unknown to his forefathers. The business element tends to predominate because in the pressures of running an office and the diversity of legal business the Solicitor relies to a greater extent on members of the Bar, for advice on matters of pure law.

### The Role of the Society

The Law Society must to an ever increasing extent, participate in these changing conditions and aid its members in adjusting themselves to the changes already upon us and those which are to come. We are a profession governed largely by statute and statutory regulations. Unlike the Hon. Society of King's Inns and the professions of architecture, medicine, and engineering, we are not completely autonomous. We have a measure of autonomy in certain fields in that the Solicitors' Act 1954-1960, which are the Statutory basis of our profession confer a fairly wide regulation-making power on the Council. The Council is the governing body of the profession elected by ballot of the members now approaching 1,500 numerically. In my view the duty of a governing body is to govern in the interests of the profession, not any sections of it and of course with regard to the interests of the administration of Justice and the public. The Council represents fairly, the various sections of the profession both city and country, and there is in fact, a slight numerical preponderance of country over city members. I have sometimes heard it said by a few members, who have not troubled to inform themselves of the facts, that the profession is governed from Dublin. This is true perhaps in the geographical sense that the Council meets in Dublin once in each month. I can assure you that at these meetings the views of country practitioners are amply expressed and represented and may I take this opportunity of paying a tribute to the regularity with which country members, some of whom travel considerable distances, attend meetings of the Council and of the various committees which you will find in the report.

### The Societys' Functions

What are the main functions and work of our Society? It is unique among professional organisations in that it has an amalgamation of duties partly under its Charters and partly under Statute, to represent and forward the professional interests of Solicitors in the daily conduct of practice, which may broadly, if somewhat inaccurately, call trade union functions, and at the same time to protect the interests of the public in their relations as clients of Solicitors which may be described as regularity or disciplinary functions. Furthermore, it regulates admission to apprenticeship, the education and training of apprentices and their examinations before admission to practice. It keeps the Roll of Solicitors, issues annual practicing certificates, receives and checks annual Accountants' certificates lodged by Solicitors, and administers the Compensation Fund.

### Services to Members

The Society promotes a fairly wide range of services to members and indirectly to their clients. The Company Formation Service is now running at the rate of about 1,000 new private companies each year. The service is conducted by professionally qualified personnel on the Society's staff who deal not with the client direct but with the Solicitor-member. I think it is

important to state that the overall responsibility for advising the client, both as to the advisability of incorporation at all and the type of company to be formed rests on the private practitioner. That is what he is retained for and that is what he is paid for. This Society assists by supplying standard printed forms of memorandum and articles, clearance and communication with the Companies' Offices, supplying draft precedents of principal objects clauses and attending generally to the routine mechanical details. The service has been extensively used by members and while we receive a small quota of complaints about delay I think this is inevitable in any large-scale operation and we can generally remedy the situation fairly quickly. We have to deal not only with the Companies' offices but with printers, seal-engravers and other suppliers. Last July, Mr. Plunkett and I and a delegate from the profession met here in Dublin representatives of the Revenue Commissioners following which the Estate Duty Office agreed to assist a system whereby assessments of Estate Duty (including cases in which the assets include private limited companies) will be made immediately on the facts appearing from the Inland Revenue Affidavit subject to a number of safeguards including the acceptance by Solicitors availing of the concession of personal responsibility for complying with requirements as to corrective affidavits, transfer of stock tendered in payment of death duties and other matters and an undertaking by the Society to enforce by appropriate action observance of such undertakings in case of default. Members were notified of the concession and of the conditions attaching to it by circular in August 1973. The successful operation of the system and its continuance depends upon cooperation from members and the Council strongly recommend it to the profession.

**Regulation of the Profession**

It is right to point out that the regularity and disciplinary functions of the Society are necessary in the interests both of the public and of the profession itself; necessary because we enjoy an exclusive privilege by statute in certain fields of practice, and every right implies a corresponding obligation. A citizen who wants to make or take a lease, sell or purchase property or have a legal document drafted, or institute proceedings in the Court, must in the first instance retain a Solicitor. He may have his Will drawn, if he wishes, by himself or by the local school master, but this practice is usually followed by disaster. An eminent English judge, Lord St. Leonards, drew up his own Will. Litigation after his death occupied the English Courts and Lawyers for a decade. I doubt if the intention of that noble lord was simply to create work for his brethren at the Bar! Furthermore, this profession is entrusted annually with many millions of pounds of Clients' money. This is necessary for the conduct of the business affairs of the community because many conveyances and other transactions conducted between strangers, who have no knowledge of their mutual financial standing and indeed integrity, depend on undertakings exchanged between their respective Solicitors. Solicitors earn their living largely by handling other people's money. It is therefore in the public interest, and indeed essential, that there should exist a body such as the Law Society equipped with the necessary statutory powers to ensure that the duties arising from this privileged position will be faithfully and honestly performed and that any person who suffers through defalcation or dishonesty of a member of our professions will be protected.

I say that the existence of these powers is for the benefit of our profession for this reason. The Common Law countries by which I mean Ireland, England, India, Australia, the U.S.A. and Canada are the countries in which the legal profession enjoys the greatest degree of freedom from State control. In these countries, the profession is largely selfgoverning in that it retains control over admission, education, the right to practice and the disciplinary power either directly as in England, or through the Disciplinary Committee and the High Court as here. In many European countries, to go no further, the legal profession is largely under state control, through a Department of Justice or some other arm of Government. If our Society were to fail in the exercise of the regulatory and disciplinary power, while seeking to retain its exclusive professional privileges, which I firmly believe are for the protection of the public, there would inevitably be a public demand for a substitute followed by State intervention.

**Professional Independence and the Public**

For the preservation of the liberty of the citizen and the rule of Law it is essential that the legal profession should, above all, preserve its independence. From this it follows that the profession should have the right to regulate its own affairs, have adequate economic resources to enable it to act fearlessly, and that it should not have to perform its duties in preserving the rights of its clients under conditions calculated to make it subservient to external pressure. If the independence of the profession, in either of its branches, were ever significantly curtailed, the freedom of every citizen would be curtailed with it.

**Professional Status**

The terms "profession" and "professional" have acquired different meanings in different contexts. The word profess can mean pretend in the sense of making an insincere profession of friendship. It can mean teach in the sense of lecturers and professors in Schools, Universities, and learned Societies. In the Churches it is used in the context of taking religious vows. In sport professionalism is the counterpart of the amateur status and was formerly used in a disparaging sense, as it was thought that the Status of a person who carried on an activity without reward was superior to that of the man who made his living from his occupation. The advocate in the time of Cicero was an amateur in this sense, and the Barrister at the present day still, in theory, preserves his amateur Status, having no legal right or remedy to recover fees not paid with the brief or instructions. He relies on the discretion and integrity of the Solicitor by whom he is instructed. In the sense in which it is used today as applying to the legal and other recognised professions it is defined in the Shorter Oxford Dictionary as an occupation in which one professes to be skilled in and to follow; a vocation in which a professed knowledge of some department of learning is used in its application to the affairs of others or in the practise of an art founded upon it applied particularly to the three learned professions of divinity, law, and medicine and later to the military profession. In the wider sense, it is used as descriptive of any calling or occupation by which a person habitually earns his living. A profession came to be regarded as the title of a body of persons engaged in such a calling.

It is a recognisable characteristic of a learned profession of which ours is one of the most ancient. Ad-

mission to a profession is invariably dependent on a minimum standard of general education. This must be followed by a prescribed period of professional education and training laid down either by Statute or by the rules of the professional body to which the Student submits. In order to conform, a university degree is in many cases a necessary condition of admission to the profession. Admission also depends on passing prescribed examinations and tests. Members admitted to the profession are identifiable from a roll or register. Lastly, in all professions worthy of the name, there are recognised standards of conduct and ethics designed to ensure that professional service will be maintained at a proper recognised standard, and that the interests of the client will take precedence over the material interests of the practitioner. It is a recognised mark of a profession that where there is any likelihood of a conflict of interest between the practitioner and the client, the professional relationship must be terminated.

**Criticism of the Profession**

If my preceding remarks seem to some of you to resemble the annual statement made in addressing students about to enter our profession, rather than a body of mature practitioners to whom these principles are already familiar, it is not without reason. Anyone who reads the daily press and periodicals and indeed the work of more serious authors must be aware of the growing attitude of criticism towards all professions including our own. In one sense it is natural that professional men should not be popular or at least that they should be expected to justify their existence as a privileged élite. George Bernard Shaw was only the successor of Dickens and other popular writers when he described the professions as a conspiracy against the public. Shaw's particular "bête noire" was the medical profession. Possibly the fact that he was a vegetarian was symptomatic of this attitude!

This attitude of critical scrutiny of professional status and practice has been shown in this country by the Restrictive Practices Act 1972 which for the first time brought professional services within the scope of the Fair Trades Commission and subject to the same examination as the practices of trade and industry in the field of monopoly and what are regarded as restrictive practices. We must be prepared to meet this challenge whenever it comes. Representatives of the Council were received by the Minister and officials of the Department of Industry and Commerce when the legislation was being drafted. It was clearly stated for the Department that the fact that a professional practice is restrictive does not necessarily mean that it is unfair. We hope to show that the long standing practices of our profession, some sanctioned by statute or statutory regulation, others by long-standing usage and opinions of the Council, and often confirmed by Judicial decisions of the Courts, are necessary to preserve professional standards and the interests of our clients.

**Solicitors 'Fees Central Costs Committee**

The Prices (Amendment) Act 1972 introduces an entirely new concept into the existing systems of regulating Solicitors' fees. As far as I know our profession shares with taxi-cab drivers the distinction of being the only occupations whose charges are not self-controlled. We are in the rather invidious position of having our fees controlled by five or six different committees acting independently without any communication or means of calculating the economics of professional practice as a whole. Accountants, Auctioneers, Medical practitioners, to name only a few vocations, fix their own fees to meet the exigencies of the moment. On top of this complex system of fixing Solicitors' fees, the Government in the latest Prices Act has provided that no Order made by any of the committees which I have referred to shall be effective, if it proposes to increase fees, unless sanctioned by the Minister for Industry and Commerce. His functions may in turn be delegated to any other Minister—probably, in the case of our profession, to the Minister for Justice.

The Council have had discussions with the Minister for Justice and his officials about the methods of fixing Solicitors' fees as far back as 1969 when their representatives were then received by Mr. O'Morain, the last predecessor but one of the present Ministers. The Society's representatives pointed out the time-wasting and complex systems of dealing with applications for increases under the present system. No fair-minded person can maintain that in a climate of continuing inflation of prices—now in the region of 10% per annum—Solicitors' charges should be subject to a standstill order while all other costs and fees, including the overhead expenses of running offices, of which salaries and wages are a major factor, rise with the annual wage rounds or national wage agreements. Other professions, Medicine, Accountancy, Consulting Engineers, Motor Assessors, Surveyors, and others with whom our profession is in constant contact and on which it depends for consultancy and co-operation adjust their fees to meet the circumstances of the day.

It is the experience of the Council that Solicitors' charges for Court business and non-contentious business under Schedule 2 are dealt with only after arduous preparations, prolonged consideration and, where Ministerial consent is necessary, long delay. The Council have not made any application for an increase in the mortgages since the present scales were fixed in 1947 taking this view that where a charge is calculated as a commission on the value of the property passing the increase in the value of the property provides an automatic increase in the fees received. However, in the case of Solicitors' fees this is qualified by the over-riding consideration that the commission scale, unlike that of many other professions and occupations is regressive, falling steeply to a maximum of 19% and as low as 0.35p per £100 of value on the part of the consideration increasing more than £10,000. Other professions I need not go into detail, charge a flat commission scale which does not decline with the value of the property. As property values increase and with the increase, the responsibility and risk of the Solicitor, the average rate of his remuneration falls. One should also have regard to the fact that the continual changes in our legal system, which is apparent from the volume of legislation with which the profession has to deal, impose great demands on Solicitors' time, and with it the work involved in attending to clients' affairs and the expenses of running a Solicitor's practice.

The Council therefore, proposed to the then Minister for Justice, Mr. O'Morain that a Central Costs Committee should be set up which would include members of the Judiciary, representatives of the profession, and experts such as Chartered Accountants which would be empowered to renew Solicitors' fees and expenses at frequent intervals having regard to the current index of prices and other relevant factors.

It was suggested that such a high-powered committee should have executive and not merely advisory powers and the Society for the first time in history of

any profession were agreeable, on these conditions, that public representatives of the necessary authority and calibre should be included on the committee. The Minister at the time appeared to be sympathetic towards the Society's proposals.

Unfortunately since then events have taken a different course. There is no Central Costs Committee; applications for increases in fees must still be made to five or six committees, acting independently; reviews of fees after authorisation by the appropriate committee in some cases must await concurrance of the Minister for Justice, and a further barrier has now been created in the requirement in prices legislation of the consent of the Minister for Industry and Commerce, generally after consulting the National Prices Advisory Committee. The tribunal set up under the recent Prices (Amendment) Act is not the type of Central Costs Committee envisaged in the Society's representations to the Minister for Justice. It includes no representation from the Judiciary or the professional experts such as Accountants who from their daily practice are familiar with Solicitors' earnings and the conditions under which they work. One of the main tasks of the incoming Council will be to approach the Minister for Justice with proposals for a speedy system of reviewing applications in relation to Solicitors' fee at regular intervals to keep pace with inflation and to review the whole field of fees in the light of the principles of cross subsidisation. There are some fields of practice which could not be accepted or continued unless subsidised by earning, from probate, conveyances and other non-contentious work.

**The "New" Schedule 2**

In the "typescript" of my notes the word "new" appears in inverted commas. Originally all Solicitors fees had to be set out in a document resembling a surveyors bill of quantities, each item such as letters, attendances, and copying being priced in a prescribed scale. This is still the position in theory if not in practice. A patient who would pay his Medical Practitioner or Dentist a fee of 100 Guineas on a sheet of professional stationery with the specification "Professional Services rendered" might request his Solicitor to furnish a bill of costs running to 30 or 40 pages. The cost of preparing such bills is exorbitant, apart from the delay involved and sometimes the impossibility of having such bills prepared. One argument for the commission scale fee on sales and purchases is that it is simple, acceptable to the public and avoids the delay and expense of detailed bills. A new and simplified Schedule 2 system was introduced in England in 1953 and in Northern Ireland within the past two years. A bill of fees in a non-contentious matter is now one item being a discretionary fee calculated in accordance with seven specific factors described in the Order. The considerations are the skill, time necessarily involved in the transaction, the number of documents read and examined, the amount of any property involved, the responsibility of the Solicitor and all other relevant circumstances of the case. In England and Northern Ireland the client reviewing such a bill is entitled to ask for a certificate of reasonableness from the Law Society. In my opinion, the time has arrived for the adoption of a similar system in the Republic for all non-contentious work not included in the commission fees. Pending the introduction of such a system my advice to members is that agreements on reasonable fees should be made with clients, and gross sum bills should be delivered bearing a proper relation to the current financial and economic conditions. Such agreements and gross sum bills are authorised by the Solicitors' Remuneration General Orders.

**Solicitors and the E.E.C.**

A Standing Committee of the Council has been set up to help practitioners who find themselves confronted with legal problems involving the law of the Community advising clients with business transactions with European connotations. Meetings have been held with representatives of the University Law faculties, the National Library and the Departments of Foreign Affairs and Justice. At present, the immediate problems fall under two main heads: *first,* the establishment of an information service for members allied with a central depositary library in Dublin for all E.E.C. legal material, and *second* the effect on Irish practitioners of the proposed directives removing the restrictions on freedom of movement and practice by Lawyers in the Member-States. The first of the problems which I have mentioned is ultimately financial. Very large sums of money will be required to equip a depository library with the vast amount of legal documents and text books coming from and concerning the E.E.C. A working party has been set up to explore and report back to the main committee. The financial difficulties are so formidable that without Government assistance they may well be insuperable. The Committee has been in constant liaison with the representatives of the Department who deal with negotiations in Brussels on the directives of freedom of movement. I do not propose to enlarge further on this subject at present as it could in itself form the whole subject of my address, beyond indicating that it engages the constant attention of the Council.

**Legal Education**

Here again I touch on a vast subject and I must refer you to the current and previous reports of the Council and the Gazette for detailed information. It also formed a major part of my address at the ordinary General Meeting last May in Killarney. I, therefore, do not propose to enlarge on it except to say that in July representatives of the Council were received by the new Minister for Justice. They supplied him with a dossier of the Society's proposals from 1961 to the present date. He expressed agreement in principle with them and suggested that we should enter into discussions with the Universities and then resubmit the matter to him. I am informed that it took 12 years negotiation with the Department of Justice to achieve the passing of the Solicitors' Act 1954. If the present negotiations about education take the same time we may expect to have them in operation in 1981. I hope I am not being cynical and I do not intend to be. The Minister has expressed goodwill and you may rest assured that the Society for its part will leave nothing undone to bring about the reform of our educational system which everybody concerned agrees is in the public interest.

**Retirement of Mr. Plunkett**

A most important event in the history of the Society has taken place during my year of office. I refer to the retirement from the post of Secretary of Mr. Eric Plunkett which post he had filled with such remarkable distinction since the year 1942. His retirement rather saddens us Solicitors and indeed all who had the pleasure and privilege of knowing him. Mr. Plunkett was at all times an inspiration and a shining example of all that is good and worth while in our profession. On behalf of the Law Society and all its members I

thank most sincerely and most profoundly Mr. Plunkett for his wonderful services to all of us and indeed to this country as a whole. He was known and beloved internationally and in my trips abroad during the past year to hear so many distinguished people speak with such esteem and indeed affection of Eric. We will all be in his debt forever. Happily, he continues in the capacity of part-time consultant. I wish him and Mrs. Plunkett many years of happy retirement. The Society has been lucky to obtain Mr. James J. Ivers to succeed him, who is now Director-General, Secretary, and Registrar in this Society. He has had a wonderful record in the national and other services and though his is as yet only a short time with us he has already dispalyed such remakarble ability, industry, kindness and consideration that I have not the slightest doubt but that under Mr. Ivers' Direction, our Profession will progress and achieve a place and a greatness that it deserves. We wish him every possible success and co-operation in what is by no means an easy job.

I am hoping that in the not too far distant future important Judges and Officials of the E.E.C. will be invited to Ireland and that our Society will provide for them all that is desirable in the way of entertainment and welcome.

I have had many kind and helpful things done me by all of the Society's Staff and I am most grateful to them. Permit me to mention particularly (though by no means exclusively) Mr. Patrick Cafferkey who since his appointment during the year as an Assistant Secretary has done his work most thoroughly, Mr. Colum Gavan-Duffy the Librarian, Miss Patricia McNamara also Miss Rosemary Dunne, Mr. and Mrs. Willie O'Reilly and Mr. Jack Fitzpatrick. I thank them and all who did so much to make my year of office the success I trust it has been.

I refer with deep regret to the following members who have died since this time last year and in each case I offer deep sympathy to their relatives:

John R. Lawson, Dublin; Henry V. Lynam, Dublin; Thomas M .A. Lynch, Ennis; Peter J .Flynn, Dublin; Mrs. Dorothea M. O'Reilly, Dublin; Thomas Reilly, Clonmel; Patrick T. J. Mulligan, Ballina; William McFerran, Dublin; John J. Hannan, Dublin; Francis J. Gannon, Mohill; Thomas E. O'Donnell, Limerick; John F. Goold, Macroom.

In conclusion I am indebted to my colleagues on the Council many of whom represented me, often at short notice, at gatherings which I could not attend personally, and in a special way my thanks are due to the Past Presidents on the Council whose advice was always forthcoming and in this regard I owe particular thanks to my friend and immediate predecessor, James O'Donovan, whom I could almost call my "Mentor" all through the year.

**Payment in Land Bonds**

I should like to take this opportunity of referring to a grievance of both the public and solicitors and that is the practice of paying for land taken by the Land Commission in Land Bonds. This to my mind is contrary to natural justice. Surely if we are to preserve the right of private property in Ireland the State should give a lead and pay in cash for any lands they acquire. I have seen people being deprived of their holdings of land and on realising the Land Bonds (a slow process usually) receive only three-fourths of the purchase money which is a situation that is intolerable in any civilized community. I trust those brief remarks of mine will perhaps influence the powers that be to see about having the State pay in cash whenever they take over lands and we all know the vast powers they enjoy in acquiring properties compulsorily.

I cannot close this address without offering thanks and to so many. First of all as I have already said I thank the Society for electing me as President and I shall always cherish and value more than I can say the fact that I have occupied the Chair of my own Profession thereby following in the steps of so many illustrious Irishmen of the past.

In a special way I thank my two Vice-Presidents, Mr. Peter Prentice and Mr. P. C. Moore for their help and kindness all through my year of office. Indeed without them I do not know what I would have done. They "stood in" for me many times—they are great members of a good profession and I will be pardoned (I hope) if I say openly what I often said to myself, especially during the Office Reorganisation that took place this year, "Thank God for Peter".

Mr. Martin Healy did such wonderful work in really running the Killarney meeting and functions that he deserves special mention. That the Killarney weekend was such a success last May was due very largely to Martin Healy and his wife, Collette.

The adoption of the Report was proposed by Mr. Gerard Doyle and seconded by Mr. John Nash.

A discussion followed in which the following matters were raised:

*Full disclosure of assets in balance sheet*—Mr. Quentin Crivon objected that this had not been done and Mr. Prentice assured him this would be done in future.

*Four Courts Hotel*—It was suggested that this could be taken over as additional accommodation for the Society, but Mr. Prentice explained the difficulties involved.

*The King's Hospital*—Mrs. Virginia Doyle-Rochford asked what was happening to this building, and criticised the Council for not giving more information. Mr. P. C. Moore, replying, stated that the King's Hospital was a most valuable asset, and that there were great educational opportunities in the premises. Mr. Colm Price stated that members should be given an opportunity of discussing the matter, and that members should be circularised about the developments occurring. Mr. Crivon suggested that the Council should submit a Report to the members at the next Ordinary General Meeting. Mr. Prentice, replying stated that the original estimate to effect repairs to make the place habitable was £450,000. Even as it was, the premises were now worth £50,000 more than when they had bought it.

*New assistant solicitors*—Mr. Crivon expressed alarm at the fact that the average newly qualified solicitor had no practical experience though expecting a high salary, and the President promised that this matter would be looked into.

The President replied to the various points raised. The motion for the adoption of the Report was put to the meeting and carried unanimously.

Thursday, 28 November 1974 was appointed as the date of the next Annual General Meeting.

Mr. T. D. McLoughlin then moved that the Senior Vice-President take the chair. Mr. Peter Prentice took the chair and Mr. T. D. McLoughlin proposed a vote of thanks to the President for his distinguished services to the Society during his year of office. Mr. Prentice, Vice-President, associated himself with the motion, which was then put to the meeting, and carried unanimously. The meeting then terminated.

# THE SOCIETY

# Proceedings of the Council

**MEETING HELD 27th NOVEMBER 1973**

The President in the Chair, also present: Messrs. W. B. Allen, Walter Beatty, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony Collins, Laurence Cullen, Gerard M. Doyle, Joseph L. Dundon, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, Nicholas S. Hughes, John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. Margetson, Patrick C. Moore, Patrick J. McEllin, Patrick McEntee, Brendan A. McGrath, John J. Nash, Peter E. O'Connell, Patrick F. O'Donnell, Dermot G. O'Donovan, James W. O'Donovan, Rory O'Connor, William A. Osborne, David R. Pigot, Peter D. M. Prentice, Moya Quinlan and Ralph J. Walker.

**Election of Council**

There were 31 candidates for the 31 places available for ordinary members of the Council and the following members received the votes as recorded in the Scrutineer's Ballot, page 2.

In effect the Council was the same as last year except that Messrs P. F. O'Donnell and E. J. Margetson replaced Messrs Eunan McCarron and Thomas J. Fitzpatrick.

The extraordinary members of the Council for the year 1973/'74 elected were as follows:

From the Dublin Solicitors' Bar Association, Rory O'Connor, John F. Buckley and Thomas Jackson, Jnr.

From the Southern Law Association, Bryan Russell, Gerald J. Moloney, Nicholas S. Hughes, Mrs. Felicity Foley and John A. O'Meara.

The following candidates were duly nominated as provincial delegates in accordance with bye-law 29 (a) of the Society and were returned unopposed.

Ulster: John C. O'Carroll
Munster: Dermot G. O'Donovan
Leinster: Christopher Hogan
Connaught: Patrick J. McEllin

**Subjects for Preliminary Examination**

The Council decided on a motion that Rule 10 of the Apprenticeship and Education Regulations made under the Solicitors' Act 1954 should be amended by the deletion of the existing Rule and the substitution therefor of the following:

Subjects at the preliminary examination.

The subjects at the Preliminary Examination shall be as follows:

(a) English and Mathematics.

(b) One of the following subjects that is to say Latin, French or German.

(c) Any two of the following subjects, History, Geography, Greek, Latin, French or German (if not taken as a compulsory subject under (b) above, a modern language (other than Irish) approved by the Court of Examiners, Physics, Chemistry, Biology, Commerce (which is composed of four sections namely, Economics, Business Organisation, Accountancy and Economic History of which the candidate will take one section only).

**13th DECEMBER 1973**

Mr. T. V. O'Connor and afterwards Mr. Peter D. M. Prentice in the Chair, also present: Messrs W. B. Allen, Walter Beatty, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony E. Collins, Laurence Cullen, Gerard M. Doyle, Joseph L. Dundon, Felicity Foley, James R. C. Green, Gerald Hickey, Michael P. Houlihan, Nicholas S. Hughes, Thomas Jackson, Jnr., John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. Margetson, Gerald J. Moloney, Patrick C. Moore, Patrick J. McEllin, Patrick McEntee, Brendan A. McGrath, John J. Nash, Patrick Noonan, John C. O'Carroll, Peter E. O'Connell, Patrick F. O'Donnell, Dermot G. O'Donovan, James W. O'Donovan, Rory O'Connor, William A. Osborne, Moya Quinlan, Robert McD. Taylor, and Ralph J. Walker.

**Election of President and Vice-Presidents**

Mr. Peter D. M. Prentice was elected President and took the Chair at the meeting. Mr. William A. Osborne was elected Senior Vice-President and Mr. Bruce St. J. Blake was elected Junior Vice-President.

**International Union of Latin Notaries**

It was decided on a motion that the Incorporated Law Society of Ireland should become a corresponding member of the Common Market Section of the International Union of Latin Notaries.

**Retainer in Criminal Cases**

Members wrote stating that they represented an accused person in criminal proceedings in the District Court. The accused was convicted and without taking advice or without having his solicitors take any steps lodged a notice of appeal in his own name. Members wanted to know whether a solicitor taking a District Court criminal case must follow same through t othe Circuit Court irrespective of whether their fees are paid or not. The Council felt that in the circumstances outlined the solicitor was not necessarily bound to appear on the appeal.

**Mortgagee's Solicitor's costs in cases of equitable mortgages by deposit**

Members wrote to the Society stating they acted for clients who were borrowing from a bank sums up to £10,000 maximum to be secured by equitable mortgage of deposit of title deeds and they wanted to know hwat was the correct basis for charging. The Council on a report of a committee decided to inform members as follows:

(1) The question of costs is primarily a legal question.

(2) An equitable deposit of title documents can secure either (a) a specific sum borrowed or (b) any future sums being borrowed up to a maximum figure agreed either verbally or in writing between the parties.

(3) It seems that a solicitor can charge the scale fee under Schedule 1 where the transaction involves

the passing of certain specified sums of money. Of course there would have to be a full perusal and investigation of title and of other work contemplated by the schedule. The schedule mentions that the transaction must be "completed". It is clear from the authority of *re/Baker,* 1912 2, Chancery 405 that an equitable deposit is completed merely by the handing over of title documents.

(4) In cases where the equitable deposit is in return for an advance of sums uncertain in the future, it is quite clear that schedule 2 charges must be the basis of the bill of costs. The authority for this is *Barton's* case (1899), Irish Reports, page 515. The basic reasoning here seems to be that it would be unfair to the solicitor to curtail his charges to amounts actually passing either at the time of the transaction or immediately following thereto. Likewise itwould be unfair to the parties for the solicitor to charge on the maximum figure allowed should it transpire that no money subsequently passes hands. In short the entire transaction would be too uncertain for anything other than Schedule 2 charges to operate.

**District Justices acting in criminal and civil side of motor accident cases**

Members wrote to the Society stating that with the advent of the new jurisdiction in the District Court on the civil side there arises a problem which is becoming increasingly common. Certain District Justices who have already heard cases on the Criminal side such as prosecutions for dangerous driving are later presented with the civil claim and are expected to adjudicate thereon. Members felt that it was not correct for a District Justice to hear a civil claim having disposed of the Criminal hearing. The Council felt that the practice of District Justices to hear both criminal prosecutions and civil claims arising out of the same circumstances was undesirable.

**Society's conditions of sale**

In view of the Auctioneers' and House Agents Act 1973 which provides that auctioneers' fees cannot be passed on to the purchaser, the Society's conditions of sale were considered by the Council and it was decided that the same should be altered only by the deletion of reference to auction fees.

**Society's requisitions on title**

The Council decided to publish a letter received from Patrick Noonan, Solicitor, Athboy, concerning the Society's requisitions on title and to invite comment from practitioners concerning the Society's standard requisitions. (See page 41.)

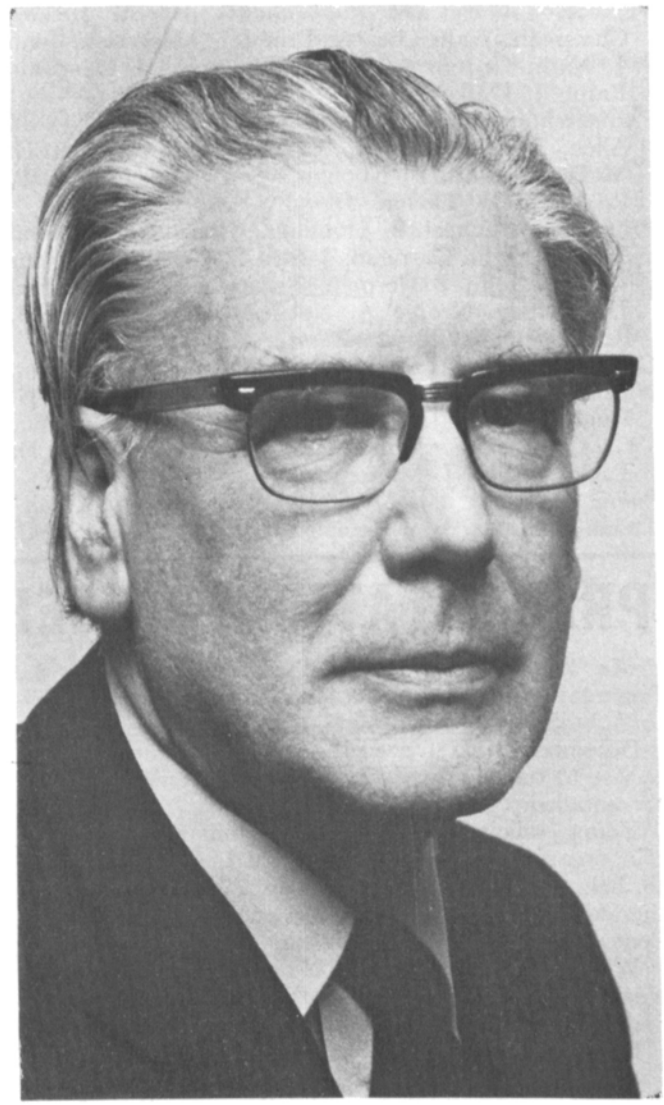
**Delay in the Valuation Office**

Members wrote complaining of delay in the Valuation Office. The Council decided that member's letter should be published in the correspondence section of the Gazette and the comments of practitioners sought. (See page 42.)

**Consideration of the Twelfth Interim Report of the Committee on Court Practice and Procedure**

Short details of this report was published in the November issue of the Society's Gazette page 225. The Society has asked Bar Associations for their comments. This matter is to be considered by the Council a ttheir February meeting and Secretaries of Bar Associations or any other practitioners who wish to make a submission to the Society concerning this report should write immediately to the Director General of the Society.

## The President and Vice-Presidents



**Mr. Peter D. M. Prentice,** Senior Partner of the firm of Messrs. Matheson, Ormsby and Prentice, 20 Upper Merrion Street, Dublin 2, was elected President on 13 December 1973 and will hold office until December 1974.

**Mr. William Anthony Osborne** of the firm of Messrs. Brown & McCann, Naas, Co. Kildare, was elected Senior Vice-President for the same period.

**Mr. Bruce St. John Blake, B.A., LL.B.,** who practises at 93 Lower Baggot Street, Dublin 2, was elected Junior Vice-President for the same period.

# COMMITTEES OF THE COUNCIL 1974

*Registrars and Compensation Fund*: Gerard M. Doyle, Chairman, Walter Beatty, John F. Buckley, Anthony E. Collins, Laurence Cullen, James R. C. Green, Brendan A. McGrath, Patrick F. O'Donnell, David R. Pigot, Mrs. Moya Quinlan.

*Finance, Library and Publications*: Gerald Hickey, Chairman, Walter Beatty, Ernest J. Margetson, John J. Nash, George A. Nolan, James W. O'Donovan, Ralph J. Walker.

*Parliamentary*: John J. Nash, Chairman, William B. Allen, John B. Jermyn, Francis J. Lanigan, Patrick McEntee, Patrick Noonan, Peter E. O'Connell, Robert McD. Taylor.

*Privileges*: Michael P. Houlihan, Chairman, William B. Allen, John Carrigan, Joseph L. Dundon, Thomas Jackson, John B. Jermyn, Francis Lanigan, Gerald J. Moloney, George A. Nolan, John C. O'Carroll, Rory O'Connor, Bryan Russell.

*Court Offices and Costs*: Peter E. O'Connell, Chairman, Felicity Foley, Christopher Hogan, Nicholas S. Hughes, Patrick J. McEllin, Patrick McEntee, Dermot G. O'Donovan, John A. O'Meara, Robert McD. Taylor, Ernest J. Margetson.

*Public Relations and Services*: Walter Beatty, Chairman, John Carrigan, Joseph L. Dundon, James R. C. Green, Michael P. Houlihan, Brendan A. McGrath, Patrick F. O'Donnell.

*Blackhall Place*: Moya Quinlan, Chairman, Thomas Jackson, Ernest J. Margetson, Patrick C. Moore, Patrick Noonan, Rory O'Connor, Patrick F. O'Donnell, Ralph J. Walker.

*E.E.C.*: John B. Jermyn, Chairman, John Buckley, Anthony E. Collins, Brendan A. McGrath, John S. Fish.

*Court of Examiners*: Joseph L. Dundon, Chairman, John F. Buckley, James R. C. Green, John Maher, James W. O'Donovan and David R. Pigot.

*Policy*: Walter Beatty, John Carrigan, Gerard M. Doyle, J. L. Dundon, James R. C. Green, Gerald Hickey, Michael P. Houlihan, John B. Jermyn, Francis Lanigan, John Maher, Brendan A. McGrath, John J. Nash, Patrick Noonan, Peter E. O'Connell, James W. O'Donovan, Robert McD. Taylor, Ralph J. Walker, Moya Quinlan.

The President, Vice Presidents and immediate Past President are members ex-officio of the above committees except The Registrars and Compensation Fund Committees.

# PRESENTATION OF CERTIFICATES

Mr. Thomas V. O'Connor, President, speaking at the Presentation of Parchments to young solicitors at Solicitors' Buildings, Four Courts, Dublin 7, on Thursday 6 December 1973, stressed the qualities of integrity and service to the community which the profession of solicitor entailed.

Young solicitors were, as is customary, advised to join organisations such as the Free Legal Aid Centres to help people in less fortunate circumstances than themselves, as well as the Law Society, the Solicitors' Benevolent Association, and their local Bar Association.

While much remains to be done in the matter of legal aid for poor people in Ireland, he said, a start had been made on a voluntary basis in Dublin.

He also recommended new members of the profession to join the staff of an established office rather than set up on their own. In this way they would acquire a knowledge of handling routine work and the "know how" of getting along with clients and colleagues.

Mr. O'Connor, stressing the need to continue the study of Law, said that to keep abreast of the pace of output of all present-day legislation might at times seem an insuperable task, particularly now that European Community Law had become part of Irish Law.

**Presentation of Parchments**

The following 54 new solicitors were then presented with parchments as follows:

Denis J. Barror, B.C.L. (N.U.I.), 87 Lindsay Road, Glasnevin, Dublin 9.

James Finbar Cahill, B.C.L. (N.U.I.), 29 Ailesbury Road, Dublin 4.

Patrick F. Clyne, B.A., LL.B. (N.U.I.), Beechwood, Trees Road, Mt. Merrion, Co. Dublin.

Robert John Coffey, B.C.L. (N.U.I.), 17 Brookville Park, Blackrock, Co. Dublin.

Edward A. Coonan, Luggadowden, Ballymore Eustace, Co. Kildare.

Angela E. Crowley, Market Road, Killorglin, Co. Kerry.

Patrick J. Daly, B.C.L. (N.U.I.), 92 Marlborough Road, Donnybrook, Dublin 4.

Gerard J. Doherty, B.C.L. (N.U.I.), Altamont Street, Westport, Co. Mayo.

Gerard A. Doyle, B.C.L. (N.U.I.), 148 Seafield Road, Clontarf, Dublin 3.

William M. J. Earley, B.A. (N.U.I.), 33 Callary Road, Mt. Merrion, Dublin.

Michael Enright, B.C.L. (N.U.I.), "Mervue", Cobh, Co. Cork.

David Ensor, B.A., 13 Argyle Road, Donnybrook, Dublin 4.

Mary Finlay, B.A. (Hons.) (N.U.I.), 109 Anglesea Road, Dublin 4.

John W. T. Finn, King's Sq., Mitchelstown, Co. Cork.

Nessa Fitzsimons, B.C.L. (N.U.I.), Clonenagh, Greenfield Road, Sutton, Co. Dublin.

John P. Flanagan, 100 Beechpark, Lucan, Co. Dublin.

Eamon P .D. Gallagher, 25 Maryfield Drive, Artane, Dublin 5.

George J. Gill, B.C.L. (N.U.I.), 2 Ardrum, Victoria Road, Dalkey, Co. Dublin.

Brian Glen, 11 Gracepark Estate, Drumcondra, Dublin 9.

William G. J. Hamill, Belmont, Palmerston Road, Dublin.

Mrs. Rosalind Elizabeth Hanna, B.A. (T.C.D.), 38 Bayside Walk, Sutton, Co. Dublin.

Jane F. Hayes, B.A., Athlumney, Navan, Co. Meath.

Peter C. Hayes, B.A. (Mod.) (T.C.D.), 40 Bellevue Road, Dunlaoghaire, Co. Dublin.

Louis A. Healy, B.A., 44 Louvain, Ardilea, Dublin 14.

Geraldine Hickey, B.C.L. (N.U.I.), 37 South Street, New Ross, Co. Wexford.
Daire Hogan, B.A., 7 Temple Villas, Rathmines, Dublin 6.
Michael J. Horan, "Portelet", Fatima Avenue, Sligo.
Anne Hughes, B.C.L. (N.U.I.), "Ardloy", Powerstown Road, Clonmel, Co. Tipperary.
Barbara Hussey, 22 Alma Road, Monkstown, Co. Dublin.
Michael J. Keane, Brookhill, Claremorris, Co. Mayo.
Catriona Kelly, B.C.L. (N.U.I.), Grange Lodge, Raheny, Dublin 5.
Damien J. Kelly, 31 Cowper Road, Rathmines, Dublin 6.
Edward A. Kelly, Auburn Road, Mullingar, Co. Westmeath.
Raymonde Denise Kelly, B.C.L. (N.U.I.), Garnacanty, Cashel Road, Tipperary.
Rosalind Kiely, B.C.L. (N.U.I.), "Ashfield", Co. Kilkenny.
Agnes Sarah Kirwan, B.C.L. (N.U.I.), 1 Skreen Road, Navan Road, Dublin 7.
Brian D. Matthews, B.A. (N.U.I.), 17 South Mall, Cork.
David A. Molony, B.C.L. (N.U.I.), The Racecourse, Thurles, Co. Tipperary.
Patrick Moriarty, B.C.L. (N.U.I.), "Woodside", Racecourse Road, Tralee, Co. Kerry.
Elizabeth Mullan, B.C.L. (N.U.I.), Thornhill House, Strandhill Road, Sligo.
Thomas M. J. Mullins, B.C.L. (N.U.I.), 47, St. Alban's Park, Ballsbridge, Dublin 4.
Thomas J. E. McDwyer, B.A. (N.U.I.), Main Street, Belturbet, Co. Cavan.
Joan E. Nagle, B.C.L. (N.U.I.), Cooleens, Douglas Road, Cork.
Kieran E. J. O'Brien, B.C.L. (N.U.I.), 11 Cypress Lawn, Templeogue, Dublin.
Kieran O'Gorman, B.C.L. (N.U.I.), Station Road, Bundoran, Co. Donegal.
Thomas O'Halloran, B.C.L. (N.U.I.), "St. Joseph's", 40 Lohercannon, Tralee, Co. Kerry.
Dermot O'Neill, B.A., 19 Errigal Road, Drimnagh, Dublin 12.
Mary Ruth O'Sullivan, B.C.L. (N.U.I.), Countess Road, Killarney, Co. Kerry.
Michael C. Powell, B.C.L. (N.U.I.), "Woodfield", Shanakiel, Co. Cork.
Alvin F. M. Price, B.C.L. (N.U.I.), St. Judes, 28 Terenure Park, Terenure, Dublin 6.
John B. Quinn, B.C.L. (N.U.I.), 42 Mt. Prospect Drive, Clontarf, Dublin 3.
Noel M. Smyth, 5 Monaloe Avenue, Blackrock, Co. Dublin.
Patrick J. Twomey, "Kinvara". Little Island, Co. Cork.
Patrick White, B.C.L. (N.U.I.), "Roebuch", The Coppins, Foxrock, Co. Dublin.

SPECIAL AWARDS

**Allied Irish Banks Prize for Company Law and Silver Medal**

Alvin, F. M. Price, B.C.L. (N.U.I.), St. Judes, 28 Terenure Park, Terenure, Dublin 6.

**Patrick O'Connor Memorial Prize for Equity**

Charles, Kelly, "Jalna", Auburn Road, Mullingar, Co. Westmeath.

# DECISION OF PROFESSIONAL INTEREST

## LAW v. JONES NOT FOLLOWED: SOLICITORS' CLIENTS STILL PROTECTED

**Tiverton Estates Ltd. v. Wearwell Ltd.** (1974) 1 All E.R. 209.

Before Lord Denning, Master of the Rolls, Lord Justice Stamp and Lord Justice Scarman.

A solicitor's letter setting out the terms of an oral agreement made in respect of the sale of land "subject to contract" was not sufficient to satisfy the requirements of section 40 of the Law of Property Act, 1925.

Section 40 provides: "No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some note or memorandum thereof, is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorided."

The Court of Appeal dismissed an appeal by Wearwell Ltd., of Commercial Road, East London, from an interlocutory order by which Mr. Justice Goulding on October 3 directed that a caution registered by them in respect of Empire House, Stepney, should be cancelled and the entry on the register vacated.

The Master of the Rolls said that on April 10 a differently constituted Court of Appeal decided *Law v. Jones;* [1973] 2 WLR 994). It caused consternation among solicitors. They had always understood that, on a sale of land, they could protect their clients by writing their letters "subject to contract". *Law v. Jones* shattered that belief. To the minds of solicitors, it virtually repealed the Statute of Frauds. It exposed their clients to liability even though there was nothing in writing which acknowledged the existence of a contract. Their Lordships were called on to reconsider that decision.

**Facts of Case**

Tiverton Estates Ltd. owned a leasehold property, Empire House, registered as a lease for 80 years from 1934, with Tiverton as proprietors. On July 4 there was a meeting between Mr. Israel, a director of Tiverton, and Mr. Nadir, a director of a public company, Wearwell. Mr. Nadir, in an affidavit, said that at that meeting they orally agreed on the sale of the property by Tiverton to Wearwell for £190,000 and made arrangements about the time when possession should be given of various parts. They shook hands on the deal and agreed to instruct their solicitors to confirm the sale.

On that very day the solicitor for the purchasers wrote to the solicitor for the vendors: "Empire House: We understand that you act for the vendor in respect of the proposed sale of the above-mentioned property to our client, Wearwell Ltd., at £190,000 leasehold subject to contract. We look forward to receiving the draft contract for approval, together with copy of the lease at an early date." The next day Mr. Israel telephoned to Mr. Nadir about completion and also wrote confirming that "you agreed that the completion of the purchase of the property can take place as soon as possible". On July 9 the vendors' solicitor wrote to the purchasers' solicitor sending a "draft contract for approval".

The vendors, however, decided not to go on with the sale, and on July 19 their solicitor wrote to the purchasers' solicitor saying "We understand that the matter is not now proceeding, and shall be grateful if you would kindly return the papers." The purchasers' solicitor replied on July 20 that "We are most surprised to learn that your instructions are that the matter is not proceeding. There is ample evidence that a contract was concluded between our clients. . . ."

On August 28 he registered a caution at the Land Registy in favour of Wearwell. The vendors' solicitor applied by motion for an order that the entry of the caution be vacated. On October 3 Mr. Justice Goulding ordered that the caution be cancelled; the purchasers appealed. The appeal was expedited especially because of the importance of the case to the parties and to the profession.

His Lordship rejected the procedural point taken by Mr. Francis for the purchasers, that the court could not, or at any rate should not, use a motion so as summarily to vacate an entry before trial. The entry of a caution cast a dark shadow on the property. It paralysed dealings in it. No one would buy the property under such a cloud. The courts were masters of their own procedure and could do what was right, and if it was drawn to the court's attention that a caution had been entered when it ought not to be then the court could order it to be vacated forthwith.

**Did writing satisfy Statute of Frauds?**

The point of substance was whether there was any writing sufficient to satisfy the Statute of Frauds, now section 40 of the Law of Property Act, 1925. There were two lines of authority to be considered. According to the one line, in order to satisfy the Statute, the writing must contain, not only the terms of the contract, but also an express or implied recognition that a contract was actually entered into. According to the other, it was not necessary that the writing should acknowledge the existence of a contract. It was sufficient if the contract was by word of mouth and that the terms could be found set out in writing without any recognition whatsoever that any contract was ever made.

The first line of authority was derived from a problem which arose under section 17 of the Statute of Frauds which required a writing in the case of the sale of goods over £10. It was plain from the decision of the Court of Appeal in *Thirkell v. Cambi* ([1919] 2 KB 590) that it was essential that the writing should contain an admission of the existence of the contract and of all its terms, and it was not sufficient to satisfy the Statute if it failed to do so. The cases on sale of goods were of good authority in relation to the sale of land.

**Written offer accepted orally**

The other line was derived from a problem which arose when one party made an offer in writing which was accepted by the other party by word of mouth or by conduct. It had always been held that the party who signed the offer was bound by it; the contract could be enforced against him, but he could not enforce it against the other. His Lordship could well understand the reason why the courts established that doctrine about a written offer. As the common law knew nothing of the doctrine of part performance the decisions about the acceptance of a written offer were very necessary to meet the justice of the case.

In *Reus v. Picksley* ([1866] LR 1 Ex 343) Mr.

Justice Willes said: "The only question is whether it is sufficient to satisfy the Statute that the party charged should sign what he proposes as an agreement, and that the other party should afterwards assent without writing to the proposal? As to this, it is clear, both on reason and authority, that the proposal so signed and assented to, does become a memorandum or note of agreement within the fourth section of the Statute." Lord Justice Bowen said *In re New Eberhardt Company* ([1889] 43 ChD 118, 129): "We are bound by *Reuss v. Picksley*."

During the past three years the "offer cases" had been extended far beyond the limit thus set by Lord Justice Bowen. They had been stretched so as to cover correspondence which was expressly stated to be "subject to contract". That was done because the "offer cases" were thought to support a wide principle which was stated by Lord Justice Buckley in *Law v. Jones* (p. 1003) "It is not, in my judgment, necessary that the note or memorandum should acknowledge the existence of a contract. It is not the fact of agreement but the terms agreed upon that must be found recorded in writing". In accordance with that principle, the court held that a solicitor's letter setting out terms "subject to contract" was a sufficient writing to satisfy the Statute. The court said that the words "subject to contract" were a suspensive condition which could be waived by subsequent oral agreement between the parties. They could be removed from the document by oral evidence (*Griffiths v. Young* ([1970] 1 Ch 671, 685, 686, 687; and *Law v. Jones*, p. 1004). The court acknowledged that a letter which denied the very existence of a contract would not satisfy the Statute (per Lord Justice Buckley), but held that the words "subject to contract" were not to be treated as a denial of the contract, but only as imposing a suspensive condition, the subsequent waiver of which could be established by oral evidence (per Lord Justice Orr).

### Law v. Jones alarming

*Law v. Jones* had sounded an alarm bell in the offices of every solicitor in the land. And no wonder. It was the everyday practice for a solicitor who was instructed in a sale of land to start the correspondence with a letter "subject to contract" setting out the terms or enclosing a draft. He did it in the confidence that it protected his client, who was not bound by what had taken place in conversation. The reason was that for over 100 years the courts had held that the effect of the words "subject to contract" was that the matter remained in negotiation until a formal contract was executed (*Eccles v. Bryant* [1948] 1 Ch 93). But *Law v. Jones* had taken away all protection from the client, and meant that the client was exposed to the full blast of "frauds and perjuryes" attendant on oral testimony. Even without fraud or perjury, he was exposed to honest difference of recollections leading to law suits, from which it was the very object of the Statute to save him.

The decision in *Griffiths v. Young* could be justified on other grounds, but not the decision in *Law v. Jones*. Was it correctly decided? His Lordship did not think it was. Lord Justice Russell dissented from the majority, and his reasoning was convincing. His Lordship could not see any difference between a writing which (i) denied there was any contract; (ii) did not admit there was any contract; (iii) said that the parties were in negotiation; or (iv) said that there was an agreement "subject to contract", for all that came to the same thing. The reason why none of those writings satisfied the Statute was because none of them contained any recognition or admission of the existence of a contract.

In *Gallie v. Lee* ([1969] 2 Ch 17, 37) his Lordship said, "We are, of course, bound by the decisions of the House, but I do not think we are bound by prior decisions of our own; or, at any rate, not absolutely bound. . . .

It is very, very rarely that we will go against a previous decision of our own, but, if it is clearly shown to be erroneous, we should be able to put it right." However, his Lordship had not yet persuaded all his brethren to agree with this view.

### Circumstances in which Court of Appeal not bound by another Court of Appeal

In *Young v. Bristol Aeroplane Co.* ([1944] KB 718) Lord Greene, Master of the Rolls, set down the circumstance in which the Court of Appeal would not be bound by a previous decision of its own. The relevant one here was that "The court is entitled and bound to decide which of two conflicting decisions of its own it will follow". Applying that in the present case his Lordship thought that the principle contained in the recent "subject to contract" cases was an illegitimate extension of the "offer in writing" cases. It was in conflict with the principle laid down by the Exchequer Chamber in *Buxton v. Rust* ([1872] LR 7 Ex 1) and the Court of Appeal in *Thirkell v. Cambi* that "in order to be a sufficient memorandum, there must be a signed admission that there was a contract and a signed admission of what that contract was".

In his Lordship's opinion, therefore, their Lordships were not bound to follow *Law v. Jones*. The legal profession should be freed from the anxieties which beset them and that should be done without delay. His Lordship would hold that *Law v. Jones* was wrongly decided and should be overruled. The writing here, being expressly "subject to contract", was not sufficient to satisfy the Statute. There was no enforceable contract between the parties. There was not sufficient reason for entering a caution on the register and it should be vacated at once.

Lord Justice Stamp, concurring, said that he could not reconcile the reasoning in *Reuss v. Picksley* with Lord Justice Buckley's reasoning in *Law v. Jones* that because the writing containing the offer could not record or acknowledge an existing contract the line of cases, of which *Reuss v. Picksley* was one, supported the proposition that the note or memorandum did not need to do so.

Faced with a conflict between *Law v. Jones* and earlier cases of equal authority, the court should, as it was entitled to do in accordance with *Young v. Bristol Aeroplane Co.* prefer the earlier authorities.

Lord Justice Scarman, also concurring, said that he agreed in believing that *Griffiths v. Young* and *Law v. Jones* were in conflict with previous decisions of equal authority. For the reasons given in the preceding judgements his Lordship was convinced that *Law v. Jones* was wrongly decided and that the reasoning in *Griffiths v. Young* was erroneous in so far as it proceeded on the principle that the note or memorandum required by the section did not need to recognize the fact of agreement, provided it contained the terms.

Leave to appeal to the House of Lords was conditionally given, but was not pursued.

# LEGAL EUROPE

# DEVELOPMENTS IN EUROPEAN COMMUNITY LAW—IRISH REPORTS

## FIRST IRISH REPORTS—MAY 1973

**Right of establishment and right to supply services**

6.7. During the period since the signing of the Accession Treaty the Community has continued to give consideration to proposals for the implementation of the provisions of the EEC Treaty in relation to the right of establishment by professions and their right to supply services and to the mutual recognition of degrees, diplomas and other qualifications in order to facilitate self-emp'oyed persons in taking up and practising their occupations within the area of the Community. These proposals raise problems for us which are under consideration in consultation with the Irish professional organisations concerned.

6.8. In regard to lawyers the proposals in a draft directive would apply to the following activities:

(a) providing legal advice and

(b) arguing a case without restriction before the courts, access to the documents in a case, visits to the prisoner and presence at the preparatory inquiry.

The proposals are confined to the temporary provision of services in these fields by qualified lawyers in one member State to clients in another where the person providing the service has no establishment in the host country such as to constitute a new practice in that country and the services are provided under a contract concluded in the course of the lawyers' professional activities. In relation to the activities covered by the draft directive member States will be required to eliminate any restrictions:

(a) which would prevent beneficiaries under the directive from providing services under the same conditions and with the same rights and obligations as nationals and

(b) which arise from administrative or professional practices resulting in treatment being applied to beneficiaries that is discriminatory in comparison with that applied to nationals.

The European Parliament and the Economic and Social Committee were consulted on the draft directive and they suggested some amendments. It is now beiny considered by a working group of Government representatives on which this country is represented. Continuing consultation is taking place with both branches of the legal profession in Ireland in regard to developments on the proposals.

6.9. Draft directives providing for the right of establishment and freedom of movement of doctors and with the mutual recognition of medical degrees and diplomas and the training of doctors are still at discussion stage. Discussions are, in fact, about to be reopened after an interruption of about six months. The relevant Irish professional interests have been consulted on all developments which have taken place to date.

## JOINT COMMITTEE ON THE SECONDARY LEGISLATION OF THE EUROPEAN COMMUNITIES

**Thursday, 1 November 1973**

The Committee sat at 3.30 p.m. Deputy Charles J. Haughey in the Chair.

*Chairman*: Senator Robinson has indicated that she would like to bring along some students of European Law from Trinity College, Dublin, to observe our proceedings and I am very happy on behalf of the committee to welcome them.

## SECOND IRISH REPORT—NOVEMBER 1973

**Lawyers**

6.11. A working group of officials of the member States is continuing the examination of the draft directive on the provision of professional services by lawyers (OJ No. C78, 20 June 1969). Meetings of the working group were held in June and October 1973. The discussions were centred around the provisions dealing with the services that a foreign lawyer may provide and the conditions under which he may provide such services. The legal profession is being consulted on developments as they arise.

**The Real Estate Sector**

6.12. The right of establishment and the right to provide services in all member States of the Community was extended to persons in occupations in the real estate sector by Directive 67/43 of 12 January 1967 (OJ No. 10, 19 January 1967). This Directive became applicable in the three new member States from the date of Accession and the Accession Treaty listed the occupations in each of those States to which the Directive applies. In the case of Ireland, these occupations were listed as: auctioneers; estate agents; house agents; property developers; estate consultants; estate managers and estate valuers.

A working group of officials of the member States has been constituted and is considering the question of co-ordinating national provisions regarding access to and practice of occupations in the real estate sector. One of the problems encountered in this work is the wide variety of such occupations in the member States and the varying nature of the conditions governing access to them. A meeting of the working group was held in Brussels on 24 May 1973.

**Proof of Good Repute and Proof of non-Bankruptcy**

6.13. In some member States persons proposing to take up certain occupations are required to produce proof that they are of good character and/or that they have not previously been declared bankrupt.

EEC Treaty provisions regarding right of establishment and right to supply services have been applied by

Directives to some of these occupations. The Directives provide in such cases that documentary proof of good repute or of no previous bankruptcy issued by the State of origin shall be accepted by the host member State. Provision has been made, however, that where a country does not have a system of documentary proofs they may be replaced by a declaration on oath or in certain circumstances by a solemn declaration. Documentary proofs of this kind are not provided for in this country and it has accordingly been arranged that, for the purposes in question, affidavits of good repute or of non-bankruptcy may be made in this country before notaries public.

**Convention on Jurisdiction and the Enforcement of Judgment in Civil and Commercial Matters**

11.8. The working party, comprising representatives of all the member States, on adjustments to the Convention to meet the requirements of the new member States is making good progress and expects to conclude its work by the end of 1974. Aspects of the Convention dealt with by the working party so far include clarification of the concept of civil and commercial matters; the application of the Convention to judgments for the payment of maintenance (which would include orders for the payment of maintenance to deserted wives) particularly judgments which are incidental to proceedings concerning the status of persons; the relationship of the Convention to other Conventions; and the possibility of the Convention taking account of the common law doctrine of *forum conveniens* (under which a Court may decline jurisdiction where there is another equally competent and more appropriate Court and the ends of justice would, in the circumstances, be better served if the cause were tried in that other Court). It also discussed the additions to the list of prohibited grounds of jurisdiction in Article 3 of the Convention which should be made in respect of the new member States. A study group met at the end of October to examine problems arising in relation to maritime law. Its report will be considered by the main working party at its next meeting in December. The legal profession and the commercial interests concerned have been consulted on the Convention.

**Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings**

11.9. A second draft of this convention is being considered by the member States. A panel of experts from member States held a meeting in Brussels from 18 to 22 June 1973. This meeting had a twofold purpose :

(a) to consider comments submitted by the original six member States in relation tonthe draft and

(b) to explain the main provisions of the draft to the new member States.

Documents explaining the laws of bankruptcy and winding-up in this country have been furnished to the Commission. A further meeting took place in Brussels in October 1973 and a meeting has been arranged for January 1974. It is expected that it will be a number of years before this convention is in final form.

11.10. A meeting of a sub-group to revise the English text of the draft convention was held in Brussels on 20 and 21 September 1973. This sub-group made considerable progress and further meetings will be held to complete their work.

**Draft Convention on Private International Law**

11.11. The work of the committee of experts engaged in the harmonising of the rules of Private International Law has resolved itself into the formulation of a series of preliminary draft conventions the first of which deals with the law applicable to contractual and non-contractual obligations. This draft was considered at a meeting held in June 1973 of experts from all the member States and will be reconsidered at a later stage in the light of comments made by the member States.

## COMPANY LAW

**Approximation of member States' Company Law**

10.1. The Second, Third, Fourth and Fifth draft Directives on Company Law have been under consideration both at home in consultation with the various interests involved and in Brussels at meetings at which we were represented.

10.2. The draft *2nd Directive on Company Law* deals with measures to maintain the integrity of Company Capital in the interests of shareholders and third parties and will contain a provision prescribing minimum capital. It has not yet been decided whether private companies will come within the ambit of the directive.

10.3. The draft *3rd Directive on Company Law* is concerned with mergers by fusion as distinct from take-overs and it is intended to make certain information available about proposed mergers of this kind to shareholders and employees.

10.4. The draft *4th Directive on Company Law is* concerned with the formal content of the published accohnts of limited companies and it applies to both poblic and private companies bnt it is likely that private companies below a certain size will be exempted from the disclosure requirement.

10.5. The draft *5th Directive on Company Law* deals with the management structure of companies. It proposes a three-tier structure comprising a Supervisory Board, a management board and the General Meeting of shareholders as well as worker representation in companies with more than 500 employees.

10.6. The 5th draft directive offers the following models as methods of providing this worker representation :

(a) the members of the Supervisory Board are nominated by the General Meeting of shareholders and by the workers. At least one-third of the members must be nominated by the workers. The powers of nomination may be given either directly to the workers or to their representative.

(b) members of the Supervisory Board may be co-opted. Participation by shareholders and by workers is assured by the fact that the General Meeting of the workers may oppose the nomination of any candidate proposed. A candidate may be opposed on the grounds that he is unable to fulfil the tasks assigned to him or that his nomination would damage the balance of interests represented on the Board as between the company, the shareholders and the workers. The validity of such opposition by the shareholders or by the workers may be referred to an independent body established under legislation.

**Creation of a European Company Statute**

10.7. *European Company* : A draft Statute of a European Company was submitted by the Commission to the Council in 1970. It provides for the creation of a company under a law common to the member States of the Community. Worker participation is also envisaged in the Statute. It is not intended that the

Statute will displace other national companies formed under the individual laws of the member States but only that, in appropriate places, the Statute can be an alternative to the domestic laws. The Statute would be available at first only for large companies.

**Convention on Jurisdiction and the enforcement of Judgements in Civil and Commercial Matters**

11.13. This Convention was drawn up by the original member States in pursuance of the provision in Article 220 of the EEC Treaty requiring member States to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgments of Courts or Tribunals. It provides rules for the assumption of jurisdiction by the Courts of Member States in civil and commercial matters generally (subject to certain specified exceptions, i.e., matters of status and arbitration) and provides for the recognition and enforcement by each member State of the judgments of the courts of the other member States. The general object of the Convention is the free circulation of civil and commercial judgments throughout the Community. It came into force between the Six on 1 February 1973.

Under the terms of the Accession Treaty the new member States undertook to accede to the Convention and to the Protocol on its interpretation by the European Court of Justice subject to any necessary adjustments to be negotiated. A working group, representative of all member States of the enlarged Community, is now engaged in the examination of the problems of adaptation of the Convention to meet the requirements of the new member States.

When the adjustments are finally agreed they will be incorporated in a formal Protocol. Ratification of the Convention, as adjusted, by each of the new member States will then follow, as soon as each has enacted the necessary implementing legislation.

**Draft Convention on Bankruptcy, Winding Up Arrangements and analogous proceedings**

11.14. This draft convention is the outcome of approximately seven years work by eminent jurists from the original Member States meeting at intervals in a working group. It deals with the Bankruptcy of individuals, the Winding Up of Companies and the administration of insolvent estates of deceased persons. Proceedings in respect of insurance undertakings, and certain other undertakings (such as building societies) to be designated by the Contracting States, are to be excluded.

The underlying principle is that there shall be one bankruptcy or winding up in the Community which shall be recognised and effective (with some exceptions) in all the member States.

The draft convention also provides for the adoption by member States of a uniform law in respect of certain matters; on other matters existing national law will continue to apply. A second draft of the convention is now being considered by the member States.

11.12. The work of the committee has now moved forward to the preparation of draft articles on rules of Private International law applicable to Property Rights and other real rights in corporeal objects: preliminary draft articles were prepared at the June meeting already referred to but doubt was expressed by some delegations as to the possibility of drawing up rules of conflict, which would be universal in scope, relating to the recognition of securities in movables without dispossession and providing for retention of ownership upon the sale of movables. The Commission has now circulated a draft directive with a view to arriving at a solution to this problem within the nine member States only.

A sub-committee was appointed at the June meeting. This sub-committee met in Brussels in September and formulated proposals in regard to draft rules of Private International Law relating to movable property. These proposals will be examined in Brussels towards the end of November.

**Draft Directive on Guarantees**

11.13. A committee of experts drawn from the six original member States of the Community was established in 1971 to study the question of the harmonisation of national laws relating to guarantees. This committee prepared a preliminary draft directive which was considered by an enlarged committee with representatives from all nine member States at a meeting held in Brussels from 1 to 3 October 1973. The purpose of the draft directive is to achieve rules in regard to contracts of guarantee which would apply throughout the whole Community in order to facilitate the free movement of capital which is envisaged in Article 67 of the EEC Treaty. A further meeting of the committee of experts will be held in the first half of 1974.

**Harmonisation of Penal Law**

*Economic Penal Law*

11.14. Experts from the Nine discussed this question further at a meeting in Brussels on 17-19 September 1973. They agreed to add industrial products and transport to the earlier list of priority areas (see paragraph 11.16 of First Report).

**Draft Convention on Private International Law**

11.15. A committee of experts, consisting of delegates from the various member States, has been considering the possibility of harmonising the rules of Private International Law particularly in relation to:

(a) the law applicable to contractual and non-contractual obligations
(b) the form of legal instruments and evidence
(c) the law applicable to corporeal and incorporeal property and
(d) general questions on such matters as renvoi, public policy and classification.

The group of experts drawn from the original member States submitted a preliminary draft of a uniform law on contractual and non-contractual obligations in 1972. This draft is now being considered by experts from all the member States.

**Harmonisation of Penal Law**

11.16. *Economic Penal Law*: The question has arisen whether the inequality of penalties imposed in different member States for breaches of Community provisions would tend to hinder the full implementation of these provisions throughout the Community. The Council decided in June 1971 to study actively the problems posed in relation to the prevention and punishment of breaches of Community Regulations, Directives and Decisions. It was further decided that in this study priority would be given to the fiscal, customs, agriculture and food products fields. Experts from the Nine discussed this question in Brussels in November 1972. This meeting considered a draft of common rules on the prevention and prosecution of offences in the fields in question.

# PROCEEDINGS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

No. 20/73

## CASES 63-69/72 WILHELM WERHAHN AND OTHERS v. COMMUNITY 13/11/1973

**Damages and Interest**

The Court of Justice has given judgment in seven (joined) cases in which seven German undertakings claim damages and interest from the Community.

The applicants process durum wheat into cereal meal which they supply mainly to manufacturers of macaroni, spaghetti and similar products. Whilst the production of common wheat intended for bread-making shows a substantial surplus within the Community, that of durum wheat not only shows a substantial deficit but is also concentrated in certain regions, namely, as regards France, in Beauce and the south, and in southern Italy.

The claims are for an order against the Council and the Commission—as it is put in the application—and against the Community—as it is put in the reply—for payment of sums amounting to a total of DM 9,487,281 by wayof damages, plus interest at 7% since 1 February 1972, as compensation for detriment which the applicants allegedly sustained during the cereal marketing year 1971/1972. This detriment is said to have arisen from the deficient, irrational and illegal management of the common organisation of the market in cereals, especially as regards durum wheat, which is said to have resulted in German cereal meal manufacturers being obliged to buy their raw material—durum wheat imported from third countries—at the threshold price (125.25 u.a.), whereas their French and Italian competitors had been able to obtain homegrown durum wheat at the intervention price (112.44 u.a.) or thereabouts.

This distortion of competition allegedly resulted in the loss by the applicants of 20% of the German market in cereal meal, made up of the manufacturers of macaroni, spaghetti and similar products, and this loss had redounded largely to the advantage of French undertakings. The applicants base their claim to compensation chiefly on a wrongful act on the part of the Community institutions, in that they fixed the intervention price for French and Italian durum wheat at too low a level, or the threshold price for durum wheat imported from third countries at too high a level. By way of reply they further and as a subsidiary point cite the principle of entitlement to compensation for an illegal intervention by the administration—even if not culpable—affecting private property and equivalent to expropriation or dispossession.

The Court rejected the claims on the basis that the Community cannot incur liability in respect of a detriment allegedly suffered by individuals as the result of a legislative measure implying choices as to economic policy, save in the event of a sufficiently flagrant violation of a higher rule of law for the protection of the individual.

The institutions can give temporary priority to certain of the objectives of Article 39 in preference to maintaining existing positions. The concept of stabilization of markets cannot cover the maintenance of situations existing under previous conditions of the market.

If, when introducing a sole derived intervention price, the Council omitted to correct the disadvantages which indirectly the German manufacturers of cereal meal suffered in comparison with their French competitors, such an omission does not give rise to illegality. The Council was not obliged to verify whether circumstances of such a special nature could preclude the application of provisions that are satisfactory under normal circumstances.

# SOLICITORS AND THE EUROPEAN ECONOMIC COMMUNITY

The Council have invited Dr. Ivo E. Schwartz and Mr. C. W. A. Timmermans to lecture to members of the Society on Saturday and Sunday, 9th/10th March, on aspects of EEC law of particular interest to solicitors. The lectures will be given at the Talbot Hotel, Wexford, and the timetable is as follows :

**Saturday, 9th March 1974**

10.00-10.45 approx. *Topic* : The Law making procedure of the Community with particular reference to Company Law.
*Lecturer* : Dr. Ivo E. Schwartz, LL.M. (Harvard).

10.45-11.00 Coffee Break.

11.00-11.45 Discussion.

12.00-12.45 *Topic* : (a) Implications for Irish Law of the proposed Second Directive regarding requirements for the capital of a Company. (b) The proposed Third Directive on International Mergers and the Draft Convention on International Mergers. (c) The proposed Fifth Directive on the Structure of the Limited Liability Company.
*Lecturer* : Mr. John Temple Lang.

12.45- 1.15 Discussion.

1.15- 2.30 Lunch.

3.00- 3.45 *Topic* : (a) Application of the First Harmonisation Directive on Company Law in Ireland. (b) Implications for Irish Company Law of the proposed Fourth Directive on Company Accounts and proposals for future Harmonisation regarding consolidated accounts and groups of companies.
*Lecturer* : Mr. C. W. A. Timmermans.

3.45- 4.15 Discussion.

**Sunday, 10th March**

10.30-11.15 *Topic* : Creating a Common Market for Companies.
*Lecturer* : Dr. Ivo E. Schwartz, LL.M. (Harvard).

11.15- 1.00 Discussion (involving Dr. Schwartz, Mr. Timmermans and Mr. John Temple Lang).

Dr. Ivo E. Schwartz, LL.M. (Harvard), Director of the Directorate : "Approximation of Laws : Companies, Public Contracts, Intellectual Property, Fair Competition, General Questions", Commission of the European Communities. He studied law and economics in Germany and in the United States. He holds two law degrees, the Dr. Juris degree from the University of Freiburg (Breisgau) Law School (Germany) and the Master of Laws degree from Harvard Law School (United States).

Mr. C. W. A. Timmermans, Principal Administrator, of the European Commission, especially competent in Company Law. He undertook Law studies at the University of Leyden, Netherlands, and obtained a Doctor's degree in Law at the same University.

Mr. Timmermans worked for several years at the European Court of Justice in Luxembourg, as attaché of the Dutch Judge. In 1969 he joined the European Commission, where he works since in the field of company law.

Mr. J. Temple Lang, formerly of Dublin is now on the legal staff of the European Commission, Brussels.

A fee of £3.00 for each member attending will be charged for the course of lectures. Members proposing to attend are requested to complete and return the enclosed form together with remittance for £3.00. Entrance to the lectures will be on production of a card which will be issued in exchange for the subscription. Members will make their own arrangements for meals.

**THE LAW DIRECTORY AND DIARY 1974**

The Directory is now on sale in the Office of the Society. Price £3.00 (postage extra).

**Corrections to the Law Directory and Diary 1974**

(1) The name of the Editor of this Gazette has been accidentally omitted from the Society's Law School on page 6.

(2) The name "Desmond C. Moran" has been wrongly inserted on page 24. This should read "Carroll Moran".
The letter J. before "J. Desmond Moran" (Senior) should be omitted.

# UNREPORTED IRISH DECISIONS

**Irish Trust Bank wins its case against Central Bank—conditions judged to be "not validly imposed"**

In a reserved judgment, the President of the High Court (Mr. Justice O'Keeffe) held that conditions imposed by the Central Bank in relation to a banking licence granted to Irish Trust Bank, of Dawson Street, Dublin, were not validly imposed and that the I.T.B. could hold their licence without any such conditions.

**Pleadings**

Irish Trust Bank had sued the Central Bank claiming that the conditions were improperly imposed.

They claimed that on January 31, 1972, the Central Bank intimated that under Section 10 of the Central Bank Act, 1971, they proposed to make it a condition of the licence issued on December 23, 1971, that Mr. Kenneth W. Bates should cease to be a director of the company on or before April 6, 1972, and that as from that date the shareholders of the company should not include Mr. Bates or any nominee of his.

The condition also stipulated that, as from the same date, shareholders of the company should not include for an interest exceeding 10% any company in which Mr. Bates had an interest of 10% or more.

The company sought a declaration that the conditions were outside the powers of the Central Bank to impose and that they were unjust and invalid. They also sought a declaration that they were entitled to hold their licence freed and discharged from these conditions. They further sought damages and costs.

**Complies with Act**

In its defence, the Central Bank pleaded that they had granted the licence expressedly subject to such conditions as might be imposed in accordance with Section 10 of the Act. They pleaded that, at the time the licence was issued, they had been furnished by the company with particulars of Mr. Bates' career and early activities but that these had failed to disclose matters relevant to and necessary for a proper consideration of the application. They further pleaded that they did not infringe the constitutional rights of I.T.B. and denied that they had failed to act judicially or failed to formulate any precise or specific charge against Mr. Bates.

Delivering his judgment, the President said that Irish Trust Bank was formed in 1971 and had applied for and obtained a licence before the Central Bank Act came into force. At that time, a licence was available to anybody who paid the appropriate fee to the Revenue Commissioners and made the required deposit under the Central Bank Act 1971.

**Conditions to licence only subsequently imposed**

The President said that anybody engaging in the business of banking as defined in the Act was required to hold a licence and the relevant conditions came into operation as from the end of 1971. The plaintiffs had applied for a licence under the provisions of the Act. At first the Bank decided to refuse a licence, but later altered its view and decided to grant a licence which was in due course granted. There were at the time no conditions attached to the licence but it was the intention of the defendants—and they so informed the plaintiffs—that conditions would later be attached to the licence. The licence became effective as from the end of December, 1971, and about January 6, 1972, the Secretary of the Central Bank obtained some information which caused the defendants to be concerned about the status of the plaintiff company. Inquiries were made with the result that it was thought wise to communicate with the chairman of the plaintiff company and to discuss privately with him the suitability of Mr. Bates as a director of the plaintiff company.

Ultimately the defendants notified the plaintiffs under Section 10 of the Central Bank Act, 1971, of their intention to impose conditions on the licence. Section 10 provided that a licence should be subject to such conditions, if any, as the Bank might impose and specified at the granting thereof. There were conditions which in the Bank's opinion were calculated to promote the orderly and proper regulation of banking and they might be amended, revoked or added to, and conditions might be imposed in relation to a licence from time to time by the Bank, if, in their opinion, the amendments were calculated to promote the orderly and proper regulation of banking.

The President said that it was under this provision that the Central Bank decided to impose conditions on the licence granted to the plaintiffs. Sub-section 3 of the section provided that whenever the Bank proposed to impose conditions in relation to a licence or to amend or add to the conditions (a), it shall notify in writing the person holding the licence or to whom the licence is intended to be granted, that it intends to impose the conditions in relation to the licence or to amend or add to the conditions and show its reasons for so doing; and that the person may within 21 days after the date of giving of the notification, make representations in writing to the Bank; (b), the person may make such representations within the time, and (c) the Bank shall, before deciding to impose the conditions, or amendments to the conditions, consider any representations duly made to them under the sub-section.

**Central Bank not willing to accept a Director of plaintiff Bank**

Mr. Justice O'Keeffe said that the Bank, having decided to impose conditions, notified the plaintiff company by letter of January 31, 1972, of its intention to impose the conditions. Their reason for this course of action was that arising out of an inquiry which it had made it was not willing to accept Mr. Bates as a director of I.T.B. or as a shareholder in that company. The plaintiff bank had made representations which were being considered by the board of the Central Bank and it was decided that the conditions outlined in the letter of January 31 should be imposed unless there were substantial grounds for doubting the validity of such conditions.

The matter was not dealt with by imposing these conditions, perhaps because the Central Bank, when the Governor, secretary and other officials dealing with the matter came to implement the board's decision found that the letter of January 31 had not in fact complied with the requirements of sub-section 3, section 10, inas-

much as in effect it gave no reasons for the Bank's intention to impose conditions. "I think it cannot be thought that it is in compliance with the requirements of the section to say the Bank intends to impose conditions because the Bank has decided these are the conditions to impose. and that is, I think, a fair paraphrase of the letter of January 31."

**Imposition of conditions further deferred because director's association with another company with liabilities of £1 million was inacurately stated**

Mr. Justice O'Keeffe said that the Bank, instead of imposing the conditions, issued a new notification on February 29 indicating its intention to impose similar conditions but coming into effect on a later date—April 6, 1972, and stating its reasons for imposing the conditions in the interest of orderly and proper regulation of banking, were that inquiries of a confidential nature which the Bank had considered it prudent to make in England arising out of Mr. Bates association with Howarth of Burnley had provided substantial grounds for doubts regarding Mr. Bates' suitability to carry on banking business. The letter finished up: "Any representations by your bank, objecting to the imposition of these conditions by the board, must be supported by an unqualified testimonial of Mr. Bates' suitability from a bank director, or chairman or chief executive of one of the London clearing banks. Any such representations in writing to be made within 21 days of receipt of this letter."

Mr. Justice O'Keeffe went on: "Let me say at once that if the question at issue were Mr. Bates' suitability to be a director of a banking concern, the Central Bank might well have been doubtful about this suitability. One of the requirements of the Central Bank when a licence is being applied for was that a curriculum vitae of each of the directors should be supplied and a curriculum vitae for Mr. Bates was supplied and when the attention of the Bank was directed to his association with the firm of Howarth of Burnley in January, 1972, it was found that his curriculum vitae omitted to mention his association with this firm over a period of years, this being a firm which had, admittedly after he had ceased to be a director o rshareholder, got into financial trouble to the tune of around about £1,000,000."

Mr. Justice O'Keeffe said he thought the Governor of the Central Bank was, not unnaturally concerned with the fact that Mr. Bates' curriculum vitae had made no mention of his association with this concern and he thought anybody in the position of the Governor could hardly fail to be concerned about this omission. While it was not for him (judge) to say whether the circumstances of the downfall of Howarth of Burnley were such as to warrant the drawing of an inference from them that Mr. Bates was not a suitable person to be a director of a bank—and certainly gave scope to the directors of the Central Bank to form their own conclusions to that effect. "Therefore, let me say that any decision that I arrive at is not arrived at on the basis that Mr. Bates is necessarily a suitable person to be a director of a banking company or that it would be proper that the ownership of the plaintiff company should be unrestricted as to its composition.

**Imposition of conditions not lawful because Central Bank did not notify plaintiff that he could make representations within 21 days**

"But notwithstanding what I have said, I consider that the imposition of conditions was not a lawful imposition of conditions at all." The grounds were that the letter of February 29, 1972, indicating the intention of the Central Bank to impose these conditions did give the reasons why the Bank intended to impose them. This was in part compliance with the requirements of sub-section 3, section 10 but this sub-section expressly required the Bank to notify the holder of a licence that the holder might, within 21 days after the date of giving the notification, make representations in writing to the Bank in relation to the imposition of conditions, and this was clearly the requirement, that the Bank should notify the holder of a licence, of his unqualified right to make representations within the period of 21 days. What the Bank did in this case was to say that any representations must be supported by an unqualified testimonial as to Mr. Bates' suitability to be a bank director, from the chairman or chief executive of one of the London clearing banks. This was a condition limiting the right to make representations which was clearly not authorised by statute and to his (judge's) mind it vitiated entirely any suggestion that the last sentence of the letter, "Any such representation should be made in writing within 21 days of receipt of this letter," could be regarded as a compliance with the part of the sub-section which required the Bank to notify the holder o fa licence that representations might be made within 21 days.

Mr. Justice O'Keeffe said that this notice, having gone out in that form, the decision to impose the conditions was made on March 30. The letter notifying the imposition of the conditions was sent by hand to the plaintiff company on that date. The conditions were to be effective on and from April 6.

**Letter notifying imposition of conditions unreasonable, as having been sent on Holy Thursday, plaintiffs had not time to comply**

"March 30th was Holy Thursday and most business concerns would be closed down on Friday, Saturday, Sunday and Monday, and the effective period allowed to the bank in which to arrange not merely for the resignation of Mr. Bates as a director but for the transfer of 90% of its capital out of the ownership of Irish Trust Group Ltd. into the ownership of some other person was such that the Central Bank's own legal adviser expressed the view that it would be unreasonable toexpect compliance with the conditions by the date mentioned. I think it would, and I think that no person empowered to impose conditions could properly impose conditions which would be unreasonable to expect to be complied with. For these reasons it seems to me that the imposition of the conditions was entirely unwarranted. I am inclined to doubt whether, even if it were warranted, the Governor alone could impose the conditions since the conditions must be such as to be conditions which in the opinion of the Bank are calculated to promote the orderly and proper regulation of banking.

Accordingly he thought the plaintiffs were entitled to the declaration that the conditions had not been validly imposed and that they hold the licence without any such conditions.

He allowed costs of the action, including discovery and gave liberty to apply on the question of damages. He granted a stay in the usual form on the question of costs.

(Irish Trust Bank Ltd. v. Irish Central Bank—O'Keeffe, P.—unreported—November 1973).

**Claim for breach of warranty in respect of defective digger allowed but fundamental breach of contract, and damages for statutory breach under Hire-Purchase Act rejected.**

Plaintiffs, drainage contractors in Nenagh, claim damages against first defendants, equipment suppliers in Dublin, for alleged breach of warranty by which they were induced to enter into a Hire-Purchase agreement with the second defendants in March 1969. They claim damages against the second defendants for an alleged breach of the statutory condition of fitness contained in S.9 (2) of the 1946 Act. The plaintiffs further pleaded that there was a fundamental breach of a term of the said Hire Purchase Agreement, and a total failure of consideration which entitled them to rescind. The defendants pleaded that if the machine concerned was defective, this was due to plaintiffs own fault and neglect. The second defendants counterclaimed (1) for £1,518 due for arrears of instalments, and (2) £1,000 damages for breach of agreement to keep the machine in good repair.

The plaintiffs had purchased a John Deere Digger, and, while at work, were approached by the first defendants in March 1969. They offered the plaintiff an up to date Digger, valued at £4,000, for £2,200 on the understanding that it was overhauled and in perfect working order. Eventually the plaintiffs agreed to purchase this machine for £1,650, on condition that there was a "trade in" of their Deere machine for £550. When the machine was delivered, the plaintiffs signed a Delivery Receipt without reading it, which stated that the plaintiff, having examined the machine had found it in good order and condition. The machine was however defective, and between March 1969 and January 1970, various parts were ordered and delivered—including a reconditioned fuel pump, a gasket kit and a cylinder head, which came to more than £200. In January 1970, a reconditioned Torc Pump was ordered, but could not be fitted by the mechanic. The plaintics at this stage could not afford to pay for any further repairs, and after 3 weeks in a garage, the digger was left as a wreck on the roadside, where it still is: its condition has of course seriously deteriorated. The plaintiffs paid 7 months instalments of £66 each in respect of the new digger, but then complained about its bad condition, and that they could not work it, as it had broken down. It was only in May 1970 that the plaintiffs instructed their solicitors to write to the defendants about this, and the Plenary Summons was issued in August.

Undoubtedly a warranty was given by the first defendants that the machine was in perfect working order and that it had been overhauled. However, from the defects which appeared subsequently, it is evident that the machine was not in perfect order when it was delivered, and that there had therefore been a breach of warranty. But these defects did not amount to a fundamental breach of contract or to a breach of the statutory condition of fitness under S.9 (2) of the Hire Purchase Act 1946 that the machine was reasonably fit, as it was used by the plaintiffs on and off for ten months; the trouble with the cylinder and with the Torc Pump were not apparently due to any defect in the machine at time of delivery. Furthermore the first defendants were never told by the plaintiffs that the contract was at an end, and that they could take back the machine. The plaintiffs could not rescind the contract, as they were too late, not having repudiated the contract within a reasonable time of becoming aware of the breach of condition.

The claim against the second defendants, the Hire Purchase Company, must fail, as no breach of statutory condition has been established. The Hire Purchase company is entitled to judgment for £1,518 for the balance of instalments due, but the machine remains the property of the plaintiffs.

As regards damages, for breach of warranty against the first defendants, the plaintiffs were bound to take all reasonable steps to mitigate their loss, which they did not do, they should have terminated the Hire Purchase agreements. The damages in respect of defective items of equipment amounts to £140 plus £40 paid to the garage proprietor, the total damages, including loss of contracts, were assessed at £405. Accordingly a claim of £405 is allowed against the first defendants, and the action against the second defendants is dismissed, and their counterclaim for £1,518 granted.

(O'Meara and McCarthy v. Equipment Sales [Ireland] Ltd. and Allied Irish Finance Co. Ltd.—Pringle J.—Unreported—10 October 1973.)

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**Plaintiff builders awarded £6,000 without interest for balance due on erection of house, but counterclaim for alternative accommodation allowed**

Plaintiff Building Company sue defendants for £6,000, being balance due on foot of a written contract of August 1969 under which plaintiffs agreed to build a dwellinghouse on a plot in Sutton, Co. Dublin. Plaintiffs also claim interest on £6,000 at 8½% per annum from June 1970.

Plaintiffs contend they built the dwellinghouse in accordance with the specifications, save clause 61, which related to the provision of an insulating internal wall. As this was not done, plaintiffs paid defendant £350 compensation. Defendant alleges house was never completed in accordance with specifications. Plaintiffs were building 78 houses on the site, and defendant, who was a surveyos, constantly inspected his proposed dwelling. As a result of discussion, in June 1970 the two parties obtained estimates for the insulation, the defendant's one amounting to £620, and the plaintiff's one to £336, eventually it was agreed defendant would receive £350, which was duly sent. Pringle J. is satisfied that this sum was not paid for omitting to insulate the ceilings, but only the walls. The house has remained vacant for 3 years due to the omission to instal insulation in the ceiling. Undoubtedly at this time the plaintiffs were in breach of contract, and consequently not entitled to claim any interest. By refusing to carry out their contract, the plaintiffs have at law abandoned the contract; consequently they are not entitled to the payment of any balance outstanding. The plaintiffs accordingly are entitled to judgment for £6,000. The defendant is entitled to a total counterclaim of £263, plus a claim of alternative accommodation for 15 months at £70 per month totalling £1,050; during that period, he must offset the use of the balance of £6,000 which, at interest at 6% amounts to £450. This must be deducted from £1,050, leaving £600. To this must be added the counterclaim of £263, already referred to, making a total of £863.

(Kincora Builders Ltd. v. Cronin, Pringle J. unreported, 5 March 1973.)

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**Administration of several premises in Finglas**

Patrick Flood died on 13 January 1955, leaving his

widow, Breda and his only daughter, Ann Dolores, surviving him. He left 5 different properties in Finglas, Co. Dublin, of which the public house called "Lower House" was left under trust to his widow for life, with power to the trustees to sell. Apart from three pecuniary legacies of £200 each, the deceased left the residue of his estate to his daughter. Difficulties arose with the running of "Lower House" as a licensed premises, and eventually the trustees sold it for £7,000 in October 1957. With this money, the trustees agreed to buy the registered property known as Johnstown House on behalf of the widow for £2,255. The purchaser of Lower House had been allowed £2,700 from £7,000 in order to carry out necessary repairs to Johnstown House, and the purchaser's company, General Builders Ltd. undertook to do this. The money to complete the purchase of Johnstown House culd not be found, and proceedings were taken to have the estate administered by the High Court. In August 1958, McLoughlin J. ordered that an account be taken of the monies in the hands of the trustees and others, and that the Trustees could obtain a loan on the security of the premises, for the purpose of completing the transaction: the order was only a confirmation that a deposit of £550 had been paid. It was not possible to arrange this loan, and proceedings for specific performance of the contract were brought; ultimately the deposit was forfeited, and the widow was ejected from the premises.

Undoubtedly the plaintiff trustees should not have allowed the purchaser to make a preliminary deduction of £2,700 for repairs not carried out, but a complicated arrangement had meanwhile been made between the purchaser, and the Receiver of General Motors Ltd. The plaintiffs cannot make any claim for the purchase of the Finglas Dispensary, as they did not complete it. As regards the premises, "Montgomery's" in Finglas, the plaintiffs are accountable for unpaid balance of £250 plus 6 per cent interest.

The Examiner's Certificate was issued in July 1968, and in it, the plaintiff trustees were found to have received £4,968, and that they had paid out £2,593, leaving a balance due of £2,375. The following items disallowed by the Examiner were allowed by the Judge:

(1) £26 vendor's costs for sale of "The Dispensary".

(2) £200 part deposit on sale of Johnstown House.

(3) £356 for balance of deposit on Johnstown.

(4) £15.75 to valuers for valuation for Probate purposes.

(5) £177 costs for sale of "Lower House".

(6) £51 costs for sale of "Montgomery's".

(7) £10.50 costs of plenary summons to compel specific performance.

The total allowed is £837, which added to £2,593 previously allowed, comes to £3,430.

(Re: Patrick Flood, deceased—Anderson and Kenny v. Anne Dolores Flood and Breda Flood—Kenny J.—unreported—17 July 1973.)

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**A person who has no proprietary interest in the land may nevertheless apply for planning permission in respect of it**

Plaintiffs are owners of Frescati House, Blackrock and an adjoining 7 acres. They intended to demolish the house, develop the lands, erect a supermarket, a hotel and car park. They made four applications for planning permission to Dun Laoire Corporation—in October 1971, January and March 1972, and these were refused. They appealed to the Minister and an oral inquiry was held in October 1972. Before any decision was announced, the plaintiffs withdrew their appeals on 28 November 1972 and claimed compensation for £1,300,000, under the Planning Act 1963. On 4 October 1973 Dun Laoghaire Corporation granted planning permission for development of the lands under S.57 of the 1963 Act subject to certain conditions, but, on account of this, the Corporation rejected the application for compensation.

The defendant is the Hon. Secretary of the Frescati and Blackrock Protection Society and has strongly opposed the attempts by the plaintiffs to get planning permission which would involve the demolition of Frescati House. On 30 August 1973, the defendant applied to the Corporation for outline planning permission, and stated she wished to acquire an interest in the property. On 23 November 1973 the Corporation granted outline permission to the defendant for the retention of Frescati for residential purposes, and the erection of a three story office block on the lands.

Plaintiffs seek an injunction restraining the defendant from applying for planning permission in respect of Frescati and a mandatory injunction ordering her to withdraw the application for outline planning permission granted, and have applied meanwhile for an interlocutory injunction.

The net question is: May a person apply for and obtain planning permission in respect of property in which they have no proprietary interest of any kind?

Having examined the provisions of the Local Government (Planning and Development) Act 1963 and the Permission Regulations of 1964—S.I. No. 221 of 196b—in detail, Kenny J. held that there was nothing in the Act which suggested that the person applying for permission must have an estate or proprietary interest or right in the land. The Regulations merely require the applicant to state whether he has an interest, nothing more. The Regulations show that an "applicant" and an "owner" are not necessarily the same. Accordingly the applications by the plaintiffs for injunctions must fail.

(Frescati Estates Ltd. v. Marie Walker—unreported—Kenny J.—3 December 1973.)

# THE CHARITIES ACT, 1973

By JOSEPH S. MARTIN, Secretary, Commissioners of Charitable Donations and Bequests

In general four considerations gave rise to the Charities Act, 1973. They were, *firstly,* the need to provide an inexpensive procedure for the amendment of old Statutes and Charters governing Charities. (No doubt some of you have heard of the legal difficulties that the Governors of Kings Hospital encountered when they endeavoured to sell the school at Blackhall Place.) *Secondly,* the imperative necessity of raising the Commissioners' Cy-prés Jurisdiction to bring it into line with current money values. *Thirdly,* to improve some other provisions of the 1961 Act, and *fourthly,* to introduce some much needed innovations to facilitate the administration of Charity property. The manner in which these objectives have been achieved will now be described.

Let us consider the Sections of this Act separately.

*Section 1* is the interpretation Section. It stipulates that the 1961 Act is the principal Act.

*Sections 2 and 3* give the Board power to frame Schemes incorporating Charity Trustees. Similar provisions are contained in the Northern Ireland Charities Act, 1964. The provisions are a most useful adjunct to Solicitors, for it enables Trustees to become an incorporated body under a Scheme which will set out the terms of the Trust, and will provide effective machinery for the vesting of the charity property in the corporate entity. The virtues are apparent—cheapness, clear definition of the objects and the imprimatur—so to speak, of the Commissioners as to the charitable nature of the Trust. Another consideration is, that the American Courts and Probate Offices do not favour payment of charitable bequests being made to foreign charities, unless the charity in question is incorporated. In some previous cases of this nature, the Commissioners came to the rescue of the Irish Charity concerned by accepting the bequest on its behalf and by giving the American Courts a receipt for the payment under Section 41 of the 1961 Act, which authorises the Board to give an effectual receipt of payments for charitable purposes, where no person is available or competent to do so. On the framing of a scheme, the trust property will automatically vest in the charity on the trusts applicable, subject to any prior rights and liabilities.

*Section 4* enables the Board to frame Schemes altering or amending *Statutes or Charters* regulating charities so as to import a power of sale, a power to raise monies, power to extend the benefits of the charity to girls as well as boys or visa versa. Incidentally our first version of the sub-section concerned gave rises to some difficulty, as our definition would have had the effect of creating a third sex. The Scheme can also provide for the merger of Charities and for the appointment of Trustees of a religious persuasion other than that specified in the Act or Charter, if so requested by the Trustees. Before a Scheme of this nature can be made, public notice must be given of the proposal to do so. This would enable the Law Society to sell the King's Hospital with the sanction of the Board.

*Section 5* enables the Board to hand over to the appropriate authority some Churches originally vested in them under S. 15 of the 1844 Act.

*Section 6*: Is of some importance to the legal profession. The Section confers on the Board power to make a Vesting Order freeing charity property from the operation of onerous covenants in Leases where the person entitled to the Lessor's interest is unknown or cannot be found. Public notice of any proceeding under this Section must also be given. The circumstances which gave rise to the Section are interesting. Due to the closure of schools all over the County the question of selling the vacated premises arose. In the majority of cases, these Schools were built on land granted by a Local Landowner in exercise of the power conferred on him under the Leases for Schools (Ireland) Act, 1881. All these Leases had implied covenants under Section 5 of the Act, the most important being the right of re-entry if the premises should cease to be used as a School. Before giving their consent to an Application to sell a school subject to such Lease, the Commissioners insist in getting a waiver of the Covenant, whether terpressed or implied, from the Successor-in-Title to the Lessor. In not a few cases, this proved to be an impossibility in practice, hence the new Section. But the Section also provides for relief in the case of other Leases containing onerous Covenants where the same circumstances apply. For instance in the case of a Lease containing a Covenant restricting the user of the property to a particular purpose, for example as a burial place for a particular sect. and for no other purpose. At least two months public notice of an Order under this Section must be given.

*Section 7* enables the Board to direct that the costs and expenses of proceedings under Sections 2 to 6 shall be paid out of the Charity property.

*Section 8* extends the Board's *Cy-prés* jurisdiction from £5,000 to £25,000. Although the circumstances in which the *Cy-prés* Doctrine can be applied are set out in Section 47 of the 1961 Act, it should be noted that before the Doctrine can be invoked, a general charitable intent must be shown in the instrument under which the Trust was created. If the charitable gift exceeds £25,000 a *cy-prés* scheme must be framed by the High Court.

*Sections 9 and 10* are financial Sections (Section 9 [3]) in particular removes the restrictions on the Board's power to authorise investment of Charity funds placed on them by Section 32 of the 1961, Act, which in general confined investment to Irish Equities. Under Section 9(3) there is complete discretion as to which investments can be chosen. Section 33 of the 1961 Act is re-enacted in new form.

*Section 11*: Is of high importance to legal practitioners. The side note reads "power of Board to authorise or make sale, exchange certain other disposition and or mortgages of charity land". Sub-Section 2 should be particularly noted. It provides that a sale between one Charity and another whereby a public benefit results, the Board can sanction the sale notwithstanding that the consideration money does not represent the full market value of the property. In all other cases the Board deem themselves obliged under the Act to ensure that the purchase money does represent the full current market value of the property. Having regard to soaring land prices, a sale between two Charities would be out of the question, were it not for the provisions of the Sub-Section. This Section is a substitution for

Section 34 of the 1961 Act.

*Sections 12 and 13* give the Board additional powers relating to the redemption of charitable annuities charged on land, and for the authorisation of certain Leases of such land. The Board are empowered to act in cases where there are no trustees, or where trustees are unknown.

*Section 14* re-enacts Section 43 of the 1961 Act in an improved form. Under the former version of Section 43, the Commissioners' power to appoint new Trustees of charity property was confined to property comprising land. They had no power to appoint Trustees of cash or securities. The new version remedies this, and moreover, it has streamlined the rather protracted procedure laid down by the old Section, for example, a months public notice was required before the Commissioners could make an Order appointing now Trustees. This period is now reduced to fourteen days. The Board must publish notice of orders appointing new trustees within ten days. Any interested party may appeal to the High Court against an order of the Board within 21 days of publication, and the High Court may extend this period if necessary.

*Section 15* strikes a sombre note. It provides that where the Board orders a bill of costs to be taxed, the Solicitor concerned shall not be entitled to any costs other than these so taxed.

Finally, I come to what appears to me to be the most radical change effected by the Bill, namely, the almost virtual abolition of publication of charitable bequests.

*Section 16* substitutes a new Section for Section 52 of the 1961 Act. In effect, the new Section reverses the previous rule requiring *Executors* to publish a notice of charitable bequests unless exempted from doing so by the Board. Under the new Section, a general exemption from publication is given, unless the *Board* require publication to be made in any particular case. As an alternative to publication, the Board may now ask for evidence of payment of a charitable bequest or in the case of a deferred or contingent bequest a letter of awareness from the Charity concerned. Under Sub-Section (1) the Executors are required to comply with such requirement as the Board may specify within six months of the date of Probate, *or* within two months from the date of the Board's requirement, whichever is the later. This new procedure is identical with that which has been in operation in Northern Ireland since 1964. Our new Act came into operation on the 17th July, 1973, and, pending more detailed consideration of their requirements under the Section, the Board as an interim measure stipulated their present requirements as follows—they are :

(i) That the above memorandum be resubmitted for further consideration at a meeting in the next term.

(ii) That by way of an interim arrangement, however, the Board direct that in any case where the charitable gift is not given to a named Charity or where the gift is of a contingent or deferred nature and the amount thereof does not exceed £10,000 in value, receipts or letters of awareness, as the case may be, shall be called for. Where any such gift exceeds £10,000 in value, the matter shall be submitted to the Board for their directions under Section 52 of the Charities Act, 1961, as amended by Section 16 of the Charities Act, 1973. The penalty for non-publication is increased from a fine of £50 to £100.

It is stressed that these are but interim requirements. In conclusion it is submitted that the operation of the Act is in the teething stage. The Board's staff are as yet inexperienced at dealing with its practical operation, but they are most willing to give any assistance open to them to solicitors in applying the new remedies set out in it.

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# £2m Lost in Fund Fraud, says QC

Investors from practically all over the world were "taken for a very expensive ride" in a $5 million (£2 million) offshore mutual fund swindle, it was said at the Old Bailey yesterday.

Edward Jules Markus, 38, a financial adviser of Green Street, Mayfair, pleaded not guilty to 42 charges of fraud and conspiracy. Mr. William Forbes, Q.C., prosecuting, said that the jury might conclude that money put into the fund was now "lost and gone for ever".

In just over a year from the end of 1969 to early 1971, investors from practically all over the world except the United States and Britain, but particularly from West Germany, were induced to part with a total of $5,800,000 (£2,300,000), said Mr. Forbes.

There was no attempt to induce British investment. The proceedings were brought in Britain because for most of the time the vehicle of the fraud, "Agrifund", operated from an address in Green Street.

**Promised advantages**

Agrifund was completely bogus and what appeared in literature and sales talk as an imposing edifice of important-sounding companies was "a ramshackle collection of largely paper dummies".

Behind the companies could be seen the figure of Markus, a Canadian, and his associates. Agrifund promised many advantages, but concentrated on immediate liquidity and the opportunity to redeem money at once.

In January, 1971, it was announced to all investors that Agrifund had had all its assets sold by the management company to a company called Investors Financial Management Corporation, said to be an international holding and operating company.

It was also said that the company would convert, whether investors liked it or not, the Agrifund certificates which had with them the promise of immediate redeemability into "very high-sounding" guaranteed-income certificates. They were not going to be payable until December 31, 1975.

*The Daily Telegraph*, 3 October 1973

# RIGHTS, DUTIES AND OBLIGATIONS OF SOLICITORS

A LECTURE TO APPRENTICES

By PATRICK C. MOORE, Vice-President, 1972-'73

This topic covers a very wide field and I intend to limit my observations primarily to the duties and obligations of solicitors and primarily from the practical point of view.

## RIGHTS

As to solicitors' rights these are mainly contained in the Statutory Provisions of the Solicitors' Acts 1954-1960, and regard must be had to the many Statutory enactments governing the administration of Justice under our legal system. The most important enactment is of course the Courts of Justice Act 1971, which extends to solicitors a right of audience in all Courts.

It must be pointed out that solicitors' rights and privileges arise only when he is retained as such by a client. In other words the retainer is the foundation on which the relationship of solicitor and client rests. Without a retainer that relationship cannot come into being.

The retainer is defined in Cordery on Solicitors, 6th edition, page 65 as follows:

"A retainer is a contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to fulfil certain obligations."

Thus "a gentleman's agreement" will not suffice. See *J. H. Millar & Son re Percy Bilton Ltd.* (1966) 2 All E.R., 894.

In the absence of any agreement to the contrary the general rule is that when a client retains his solicitor, the solicitor contracts to finish the business for which he is retained. The rule applies both to contentious business and non-contentious business.

The termination of a retainer is one to which considerable care should be given by the solicitor so that he may relieve himself of responsibility and also recover the costs to which he may be lawfully and reasonably entitled up to the date of such termination.

So far as the client is concerned he may as a general rule change his solicitor when he wishes to do so, and the client may terminate a retainer at any time and employ whom he chooses. See *Watts v. Official Solicitor* (1936), 1 All E.R., 249, C.A.

As you are aware in litigation change must be effected in accordance with the relevant Rules of Court and the new solicitor must see that his name is inserted on the record immediately.

The authority, the liability and the disabilities of a solicitor when a contract of retainer has been established are very fully dealt with in Cordery on Solicitors 6th Edition.

## PRIVILEGE OF COMMUNICATION

Briefly, written and oral communication which pass directly or indirectly between client and solicitor in his professional capacity, and in legitimate course of professional employment, are privileged in the client's favour, though not relating to a cause in progress or in contemplation at the time when they are made. This rule is for the protection of the client to enable him to confide unreservedly in his legal adviser. The *privilege* is limited to the extent that, no Court can be called upon to protect communications which are in themselves part of a criminal or even unlawful proceeding, but in order to displace the *prima facie* right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence is broken, there must be some definite charge of something which displaces the privilege. (Per Halsbury L.C.)

Since the privilege is that of the client, it is actively enforced in Court as well as against the solicitor's clerk or partner as against the solicitor himself, and a motion for an injunction to restrain the disclosure will lie, and may perhaps be heard in private.

It is important to note that the privilege is *the privilege of the client,* not the solicitor. If the client chooses to withdraw the veil of secrecy the law interposes no further difficulty.

## NEGLIGENCE

Negligence has been defined as the absence of such care as it was the duty of the defendant to take. The fact that a professional man has been negligent, or that his client has suffered damage, does not of itself give rise to a cause of action, for negligence alone does not give a cause of action, and damage alone does not give a cause of action: the two must co-exist. But if negligence constitutes a breach of contract presumably there must be a cause of action, if only for nominal damages.

Actionable negligence may be said to possess three essential ingredients: the complex concept of duty: breach of the duty, and damage suffered by the person to whom the duty was owing. In the case of a solicitor and his client such negligence involves:

(a) a legal duty towards the client to exercise care or skill, or both;
(b) a breach of that duty by the solicitor, that is a failure to attain the standard of care and skill prescribed by law;
(c) actual loss to the client as the direct result of such breach.

Where there is professional negligence on the part of the solicitor, the client's cause of action is breach of contract and not tort. See *Baggot v. Stephens, Scanlon & Co.* (1946) 3 All E.R., 577. Although circumstance may, in the absence of any contract or fiduciary relationship, create a special relationship between the advisor and the person advised sufficient to impose upon the advisor a duty of care in the giving of advice, the presence of a contract or fiduciary relationship in which an extensive duty of care is expressed or implied makes it unlikely that the client will need to rely upon the existence of any lesser duty imposed by law.

The question whether the liability arises in contract or tort may be academic in so far as solicitors are concerned, but it is of importance to them that the damages recoverable are assessed on different principles.

It has already been stated that the relationship of solicitor and client is created by the retainer given by the client to, and accepted by the solicitor and that the *retainer is a contract between the parties.*

## OBLIGATIONS ARISING OUT OF RETAINER

### 1. To be Skilful and Careful

At Common Law a solicitor contracts to be skilful and careful, for a professional man gives an implied undertaking to bring to the exercise of his profession a reasonable degree of care and skill. It follows that this undertaking is not fulfilled by the solicitor who either does not possess the requisite skill, or does not exercise it. It seems imaterial whether the solicitor is retained for reward, or volunteers his services, or whether or not he has a practising certificate in force at th etime.

The standard of care usually adopted is that of the reasonably competent solicitor but if the solicitor is consulted as a specialist the standard of a specialist may be expected. Ignorance of the law is no excuse but as was said by Abbot C.J. "No attorney is bound to know all the law; God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being an error as a cautious man might fall into" *Montriou v. Jefferys* (1825) 2 C.P. 113.

Although a solicitor is not bound to know all the statutes, there are some, e.g., Statutes of Limitations, 1957, which it is his duty to know.

Although a solicitor is not liable for a mistake as to the construction of a doubtful statute difficult to interpret, or unexplained by decisions, he may be liable if he fails to realise that the statute presents difficulties of interpretation. On the question as to how far a solicitor may be liable for negligence for delay, it has been said that it could be wrong to hold a professional man guilty of negligence because everything is not dealt with by return of post. See *Potter v. London Transport Board* (1965)—109 Solicitors' Journal, 233.

### 2. To protect the Clients' Interest

Since the solicitor's duty to his client is based on the contract of retainer, he owes no duty of care to anyone other than his client, save where he is liable as an Officer of the Court or where some special relationship exists.

The exact scope of the solicitor's duty to protect his client's interest is difficult to define, but according to Scott L.J. a solicitor should at least be able to :

(a) carry out his instructions in the matters to which the retainer relates, by all proper means;
(b) consult with the client on all questions of doubt which do not fall within the express or implied discretion left to him; and
(c) keep his client informed to such an extent as may be reasonably necessary. See *Groome v. Crocker* (1938) 2 All E.R., 394, 413.

It is however no part of the solicitor's duty, in the absence of special instructions, to advise his clients on matters of business. Thus a solicitor is under no duty to advise his client whether a sale is a prudent one or whether an independent valuation is desirable. See *Bowdage v. Harold Mitchel More & Co.* (1962) 106 Solicitor's Journal, 512.

## LIABILITY IN PARTICULAR CASES

### 1. In Contentious Business

*Skill and Care*

Tingle C.J. observed in *Godfrey v. Dalton* as follows :

"It would be extremely difficult to define the exact limit by which the skill and diligence which an Attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia* or *lata culpa* mentioned in some of the cases for which he is undoubtedly responsible. The cases, however, which have been cited appear to establish, in general that he is liable for the consequences of ignorance, or non-observance of the rules of practice of the Court; for want of care in the preparation of the cause for trial or of attendance thereon with his witnesses and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error of judgment on points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to specialists in their particular spheres."

### 2. Informing and advising the client

Where litigation is in prospect, it is the duty of the solicitor to make proper investigation into the cause of action to enable him to form an opinion as to whether a cause of action exists which is likely to succeed, but a solicitor need not comply with every request from the lay client and it is a matter for the solicitor concerned to consult Counsel as he shall see fit. If the solicitor decides that no good cause of action exists, it is the solicitor's duty to inform his client and advise him not to proceed, and he is not liable for negligence if the client insists on instituting proceedings. It is also the duty of the solicitor to try to prevent useless litigation. See *Edwards v. Edwards* (1958) 2 All E.R., 179.

Where a client has alternative remedies and the solicitor is instructed to pursue one and fails to inform his client of the other that is open to him, is he guilty of negligence? These cases are doubtful and must be decided on the particular facts and merits of each case. In general a solicitor should explain to his client the legal consequences of any step which the client proposes to take and he is also obliged to inform the client of alternative remedies if any, which are available to him.

It is the solicitor's duty also to communicate offers of compromise to his client; but where the solicitor is called upon to advise upon what terms a compromise should be effected, he is under no duty to reason out the matter with and quote authority to his client, though it may be proper to inform him that the law is unsettled.

### 3. In matters of Procedure

In matters of Procedure a solicitor is liable for ignorance of familiar points, as for not filing Plenary or Originating Summones in time to prevent the Statutes of Limitations running; for not taking proceedings within the period prescribed by Statute; and for many other matters which it is his duty to be aware of, as an Officer of the Court.

### 4. In Non-Contentious Business

A solicitor is liable for loss occasioned by ignorance on points of ordinary law.

## SALE AND PURCHASE OF LAND

In these cases the solicitor must make all usual and relevant searches (1) He must insist on the production of all original documents when he is purchasing part of the property only, for the purpose of satisfying himself that the main property is not subject to any equitable mortgage, charge or lien : (2) when purchasing investment property he must ascertain and inform his client whether the lettings are protected, lettings under the

Rent Restriction Acts or otherwise: (3) he should ascertain what restrictions on alienation, if any, exist in the leases or other roots of title; and ascertain if the vendor purported to sell the property in breach of trust: (4) he must proceed with due expedition to-deeds or transfers and the loss resulting. The solicitor should not permit his client to enter into a second or third contract for sale until he is satisfied that all pre-existing contracts are terminated and no longer capable of being the subject of an action for a specific performance and damages.

## LOSS OF DEEDS

A solicitor is liable in an action of detinue to his client if the solicitor loses or mislays the client's deeds, or fails to deliver them up in a reasonable condition and so arranged as to be fit for use. An action for negligence may also lie.

## SOLICITOR'S INDEMNITY INSURANCE

The Incorporated Law Society have established a combined Liabilities Insurance for members of the Incorporated Law Society of Ireland effected through the Irish Underwriting Agencies Ltd., 42, Dawson Street, Dublin 2.

The form of policy and the nature and extent of the indemnity given by the underwriters is considered to be very satisfactory having regard to the difficulties facing this kind of risk and it is urgently suggested that every solicitor should effect professional indemnity insurance through this agency for the benefit of himself and all the members of the profession. No solicitor should open a practice or continue in practice until such time as he has effected the necessary cover for his own peace of mind, for the protection of himself and his family, for the protection of his client, and for the protection of the good name and standing of the profession generally.

As a matter of interest the form of policy issued by the Irish Underwriters Agencies Ltd. covers in addition to professional indemnity the following additional indemnities:

Public Liability; Single Accident Indemnity, limit £100,000; Family Legal Liability; Single Accident Indemnity, limit £100,000.

It also appears that under the heading of professional liability the insured must pay the first £250 of every claim.

Under the section providing for professional liability cover is effected during the period of insurance against:

Breach of professional duty as solicitors by reason of any neglect or omission or error whenever or wherever occuring or alleged to have occured on the part of (i) the insured or their predecessors in business or (ii) any person (including any agent) at any time employed by the insured or such predecessors in the conduct of any business conducted by or on behalf of the insured or the said predecessors.

Further cover is given for breach of warranty of authority, breach of duty as described in *Hedley Byrne & Co. v. Heller & Partners* (1963) 2 A.E.R., 594, and for breach of an undertaking committed in good faith, for libel and slander by any person and also in respect of any documents entrusted, lodged or deposited with the insured as described in the particular provision.

It is particularly pointed out that the insured should and must give immediate notice in writing to the Irish Underwriting Agencies Limited of any circumstances of which they shall become aware during the currency of cover which is likely to give rise to a claim against them. Such notice having been given, any resultant claim which may be made after the expiration of the period of insurance, shall, for the purpose of the policy be treated as a claim made during the currency thereof.

Particular attention is also drawn to the general conditions which states that the insured shall not admit liability for or settle any claim or incur any costs or expenses in connection therewith without the written consent of the Insurers, who shall be entitled, if they so desire, to take over and conduct in the name of the insured the defence or settlement of any claim, or otherwise as therein provided.

It is a matter of vital importance for the insured to co-operate with the Underwriters in giving notice of any claim or possible claim which they may discover during the currency of the policy and it is also vitally important that no letters be written to the client admitting liability or in any way usurping the function of the Underwriters establishing a claim against the insured in respect of which indemnity will be sought against the Underwriters.

This condition is of vital importance towards the effective maintenance of the scheme of arrangement with the Law Society as letters written by insured solicitors may have the effect of acknowledgment taking particular claims out of the Statute of Limitations and depriving the Underwriters and the insured of a good defence to a claim.

Suffice it to say that one of the first considerations of a solicitor setting up practice on his own or in partnership with other members of the profession is the existence of an effective professional indemnity against negligence of a sum sufficient to cover the maximum amount of any claim that can or may be made against the firm.

## STATUTE OF LIMITATIONS

Every solicitor must aquaint himself fully with the provisions of the Statute of Limitations, 1957, which is an Act to consolidate with the amendments certain enactments relating to the limitation of actions and arbitrations. The Act came into operation on the 1st January 1959.

Section 11 of this Act provides that no action shall be brought after the expiration of six years from the date on which the cause of action accrued in respect of (a) actions founded on simple contract, (b) actions founded on quasi contract, (c) actions to enforce a recognizance, (d) actions to enforce an award where the arbitration agreement is not under seal or where the arbitration is under an Act other than the Abitration Act 1954.

In other words there is a six year limit within which proceedings must be instituted and default in instituting proceedings within that period will render the solicitor liable for damages, for breach of duty if he is instructed by his client to institute proceedings and he fails to do so within the prescribed time.

It is further pointed out that an action for damages against a solicitor being founded on the contract is statute barred under this specific provision after the lapse of a period of six years, and it is therefore of vital importance that no solicitor who has a professional indemnity insurance should make any admission or give any acknowledgments which would have the effect of taking the cause of action out of the provisions of this section.

*Claims for personal injuries.* Section II Sub-Section

2(b) provides that any action claiming damages for negligence nuisance or breach of duty where the damages claimed by the plaintiff for the negligence nuisance of breach of duty consists of or includes damages in respect of personal injuries to any person shall not be brought after the expiration of three years from the date on which the cause of action acrued.

It is vitally important therefore in all running-down actions or in fact in all claims for damages whether arising out of a contract or other tort liability that the proceedings be instituted within the statutory period of three years, otherwise the solicitor will be liable for negligence and damages consequent on such negligence.

Under Section 11 it is further provided that no action claiming damages for slander shall be brought after the expiration of three years from the date on which the cause of action accrued.

It is also well to remember that actions for the recovery of land are statute barred after twelve years as well as actions for the recoveries of amounts due on foot of any mortgage or charge.

Ground rents are only recoverable for a period of six years.

These are some of the salient features of the provisions of the statute and it is advisable for every solicitor to acquaint himself fully with these limitations because he is under an absolute duty to his client under his contract of retainer in matters to which the statute is applicable.

## THE SOLICITORS PROFESSION

The solicitor occupies a very trusted and responsible position in our community and his advice and guidance is sought on many matters far removed from the realm of the law. The family solicitor is the only person in our community or society who can be approached with confidence when trouble looms on the horizon, and I think it is true to say that no solicitor in practice has shirked the responsibility of endeavouring to resolve family and domestic problems and generally contributing to the increase of human happiness so far as lies in his power.

There are about 1,500 solicitors practising in the Republic of Ireland and it is difficult to conceive what other group or profession in our society could in any way supplant the trusted and confidential service rendered by the solicitor to those who seek his aid and guidance.

You must always be prepared to undertake work and services for which there is little or no reward and you must jealously guard the confidence reposed in you.

Above all, as a solicitor, you must maintain high standards and impecable integrity in all your dealings, not alone with your own clients but with your colleagues and in particular you must honour to the letter personal undertakings and assurances given in your capacity as a solicitor to financial and other institutions who rely on you to protect them for facilities afforded by reason of your undertakings and status as a member of an honourable profession.

You must always be courteous, considerate and helpful, not alone to your own clients but to your colleagues on the opposite side and to those with whom you have dealings and contact in the pursuit of your professional activities. Be courteous always in your correspondence and do not be aggressive or offensive and always try to achieve your objective couched in language which though firm is nevertheless polite. The fact that your clients have quarrels between themselves which must be fearlessly championed by you, nevertheless there is no necessity for you on that account to descend as, alas some do, to ungentlemanly personalities, or vulgar abuse.

Finally honour all your undertakings and ensure that no personal undertaking is given by you unless you are certain of your ability to honour it, even at your own expense and out of your own pocket.

Finally maintain friendly relations and understanding with all your colleagues because on their co-operation and help will depend your success in business and the avoidance of many pitfalls of which you may be unaware and which your loyal colleagues will bring to your notice in a spirit of co-operation in the interests of yourself and of your client.

## ESTABLISHING A PRACTICE

You will have to ask yourself the question as to the amount of capital required to establish a practice either alone or in conjunction with some of your colleagues and your ability to generate an adequate income to meet the repayments on borrowed capital and pay overhead charges.

Alternatively you may decide to seek an assistantship in an established practice for the purpose of gaining experience either in conveyancing, litigation, probate or company law. This procedure will enable you to make a better assessment of your future plans and it will also give you time to seek out other partnerships arrangements or alliances enabling you to share the burden of establishing a practice or alternatively take over a practice or join with one of your younger colleagues in sharing the expense of overheads while carrying on your independant practice.

If you intend to buy a partnership or purchase a practice you will be well advised to exercise considerable care by seeking a full disclosure of the accounts and have such accounts examined by a professional accountant and if no such accounts or inadequate accounting is not available you will be well advised to discontinue further negotiation as you might find yourself launched into a decadent practice from which it would be too late for escape, for there is no knowing what catastrophies might befall you.

Perhaps the better advice or guidance in this regard would be for you to enter into a probationary period of two or three years in the particular office before a final decision is made.

The final suggestion is that you as a member of the Incorporated Law Society will seek the advice and guidance of the secretariat before you enter upon any partnership or purchase a practice as the Society will be able to give you advice and guidance on matters which might vitally affect your decision before irrevocable steps were taken.

## CLIENTS

Let us consider your relations with and attitude towards your clients. Remember always that politeness goes a long way and costs nothing. Your client must feel that you have his personal interest at heart immediately he sets foot in your office and you must also indicate that you are pleased to see him and you are only too ready and willing to help him to the best of your ability.

You can adopt a light and humorous attitude as the occasion demands or you may have to be very sympathetic and understanding, where bereavements or other calamities have befallen the clients family.

It is important that you take immediate control of the situation and not alone take control but be seen to take control by taking all the necessary instructions there and then and arranging for such further enquiries as are necessary to enable you to deal expeditiously with the problem. If letters must be written they might be written in the presence of the client as evidence of your sincerity to pursue and help him before he leaves your office after the first interview.

**Attendance Sheets**

It is most important that an attendance be taken at the first interview with the full Christian names and address of the client with the client's telephone numbers at his business address and at his home address and see to it that a file is opened immediately and registered less the attendance be lost putting you in the embarrassing situation of admitting your total neglect of the client's instructions when he next calls to see you for further pursuit of the matter in hands.

It is also a good plan to ask the client to get in touch with you at a specific time in the future in default of your writing to him to call in the meantime, with further reference to the subject matter. This procedure means that the client is not embarrased by calling at some future date to check up whether or not any progress has been made with his case, because, when he does call, he will be coming on your express invitation which will remove any unnecessary tensions that might otherwise exist.

## MAKING OF WILLS

One of the surest ways of consolidating the friendship and the confidence of the client in you is the making of his Will. Clients are reluctant sometimes to approach this topic but when an opportunity presents itself which enables you at least to discuss the problem and, if the Will is a simple one, whereby the client wishes to leave all to his wife or all to her husband, you would be well advised to dictate the Will there and then, and have it executed on the basis that it can be changed at any time as circumstances require. It is of vital importance, when a client asks you to make a Will or to call to some friend of his for the purpose of making a Will by reason of ill health, or by reason of the fact that the relative or friend is in hospital, to give immediate and absolute priority to such instructions because any delay on the part of the solicitor is a neglect that will not be overlooked, in the event of the untimely passing of the relative, or friend in question.

It is most important in making Wills to eliminate all complications, such as creation of trusts and life estates, particularly where small or middle class estates are involved, which do not warrant the creation of complicated settlements, because they create unnecessary problems for the widow and children and are really of no advantage in the final analysis. However each case must be treated upon its merits, and there may be very special circumstances on which you must adjudicate, and advise the client what is the simplest and most effective way of dealing with the problem on the basis of a Will that can be reviewed after a further short lapse of time.

With regard to Wills it has always been my practice to retain the registered Will in a special envelope into which is put the testator's instructions and at the same time a copy of the Will is handed to the Testator with a note to the effect that the original of the Will is retained. It is desirable to keep a Register of Wills and see to it that all original Wills are kept in some specific order in a given proof safe or in the strong room as the case may be.

It is vitally important to see that Wills are properly executed and if the solicitor is a beneficiary he should not under any circumstances be a Witness to the Will and if he is the recipient of a large legacy he should not even draft the Will.

## LITIGATION

All litigation is primarily concerned with the ascertainment of the facts based on sworn statements or affidavits on the Chancery side and the evidence of witnesses on the Common Law side. The bulk of the proceedings on the Common Law side appear to be concerned with what are commonly referred to as running-down Actions and in all these cases the facts are ascertained by examination of the witnesses on the basis of which the Judge charges the Jury based on the facts so ascertained and the weight of the evidence in support of them.

As solicitor you will be concerned primarily with the ascertainment of the facts. It has often been said "Ascertain the facts and the Law will look after itself".

A knowledge of the Law of Evidence and of the Law applicable to the particular case is of course of great assistance in enabling you to pursue the ascertainment of the true facts apart from mere hearsay to one-sided, possibly garbled version, which no doubt your client or the witnesses will sometimes place before you.

Sometimes a client will insist on telling you so much that is immaterial that you cannot see "the wood for the trees". Others deliberately keep from you such of the details as they believe may militate against them. It is your function to approach the ascertainment of the facts with a critical eye, probe the features that appear probable, and whether the story submitted to you is such as to warrant credence.

It is always a good plan to submit the client to a gentle cross-examination on the basis that you are teaching him the type of questions that will be put to him on the witness stand by cross-examination of defending counsel or solicitor.

It is most important that you ascertain as far as possible all the material facts and of course it is important that you are put in possession of all important and material documents. You will next have to apply the Law, and, if necessary, consider the whole position. You will then have to advise your client as to his position, and that if he is not satisfied with your view, he is at liberty to instruct you to place the matter before counsel who will consider the position, before the final decisions are reached.

On the financial side, it is a matter for you to consider, having regard to the circumstances of the case, whether or not you will ask for a sum on account to cover your medical reports, counsel's fees, court fees and other relevant outlay as it is generally not possible to collect such fees if the proceedings end unsuccessfully.

The furnishing of medical reports and procuring the attendance of medical witnesses is a matter that presents some difficulty and solicitors should be very careful not to give undertakings to doctors to pay for medical reports or for their attendance to give evidence, in the belief that, such claims will be waived in the event of the plaintiff not succeeding in his claim. The only thing that a solicitor can do in these circumstances is to sub-poena the doctor to give evidence and leave it to the Judge to make a decision rather than the solici-

tor becoming involved in unnecessary personal expense to medical witnesses with no hope of reimbursement, and naturally such expense will be added to your other expenses which must be incurred if the action is to come to trial.

## CONVEYANCING

A great deal can be said about this particular practice, but from the point of view of the client the most important thing is the stamp duty, registration fees, mortgage fees and a general appreciation of the total financial position in connection with in all probability the sale of the client's own house and the purchase of a new house either on a new estate or one of the older vintage, coupled with the arrangement of the necessary finances from a lending institution to cover the appropriate margin to enable the transaction to be finalised.

There will also be the problem of providing the client with the necessary bridging finance, to complete the purchase of his new house, so that he can give possession of his old one to the purchaser of his old property. Sometimes there are existing mortgages to be discharged on the old property and new mortgages to be created on the new one involving complicated accountancy procedure which will render it necessary for the solicitor acting to give undertakings to the financial institution providing the bridging finance, and it is the giving of these undertakings that extreme care must be exercised. It is suggested that no undertaking whatsoever be given by a solicitor until he has obtained from his client an irrevocable retainer coupled with an irrevocable authority authorising the solicitor to give an undertaking to the bank or other financial institution to lodge the proceeds of the sale of the client's house to the credit of his particular account with the bank, and also to lodge the proceeds of the mortgage advance on the new house when same is made available by the particular lending institution concerned.

An irrevocable retainer and an irrevocable authority is necessary because it is competent for any client to discharge the retainer of his solicitor after the solicitor has given the necessary undertakings and in such circumstances the solicitor concerned has no authority to withold the documents from the client's newly appointed solicitor, on payment of his proper costs and charges. He is not apparently entitled or in a position to revoke the undertakings already given to the lending institutions, who have in fact advanced the money or part thereof leaving the solicitor in the very uncomfortable position of having to honour his undertaking in circumstances where there is no hope of recoupment. There is a case on record where the solicitor concerned in such case was called upon and did in fact honour the undertaking, thereby suffering the loss as there was no source from which it was recoverable, the particular client having gone out of the jurisdiction in circumstances which rendered it impossible for the solicitor to pursue his remedies.

The general inference to be drawn in matters of this kind is for solicitors to be extremely reluctant to give undertakings except in circumstances where they are absolutely sure of their client's integrity and financial standing, and in such circumstances where the solicitor cannot be removed from control of the finances until such time as the undertaking is fully honoured and discharged.

There is one final point in conveyancing matters and it is this : that a solicitor acting for a purchaser or for a vendor should so far as the purchaser is concerned collect all stamp duties, registration fees and costs and mortgage fees prior to the completion of the purchase. Clients expect to pay the full amount and ascertain the full liability at that stage and not five or six months later. So far as vendors are concerned, they prefer to pay all their expenses at the time of the completion of the financial side of their transaction so that no further accounts will be furnished several months later.

It is quite clear and well known that failure to adhere to this procedure will result in the solicitor neither receiving his own fees, but he will also find it impossible to recover the stamp duties and outlays. In addition, the solicitor will have a dis-satisfied client who will not consult him in future transactions, and generally speaking it is bad business from the point of view of the client as well as bad business from the point of view of the solicitor.

## FILING, ACCOUNTS AND OFFICE ADMINISTRATION

### Filing

(1) Every client is worthy of a file, and this file should be opened immediately after the instructions and attendance has been taken by the solicitor and a registration number should be given for the file. Some solicitors adopt the practice of numbering files on a yearly basis, i.e. in 1973 you start with No. 1 file and end with 700, the first file is called 1/1973 and the other files are numbered consecutively up to the 31st December, 1973, and the same procedure applies for 1974 and consecutively every year thereafter. It is a good practice no matter how small the practice is to have a register of these files opened in alphabetical order and also have a duplicate register giving the reference numbers in numerical order. These files can then be put into filing cabinets alphabetically under the name of the client which makes the file readily accessable at any time the file is required while it is a current file.

When the transaction has been completed and finalised it is usual in some systems to remove the file from the current cabinet and put it away in some registration department giving it a P/A number (i.e. a Put Away number) and establishing a card index for all these files which are completed and put away. This system enables current files to be separated from "dead" files or completed files and contributes towards the efficiency of the establishment in eliminating dead wood from the living trees.

(2) There is then of course the problem of dealing with Title Deeds and Documents which are part and parcel of the client's file and in most offices it is the practice to give the bundle of Title Deeds the same reference number as the current file. The various bundles of Deeds and Documents are identifiable by reference to a manilla cover into which Deeds and Documents are placed identifying the Documents with the client's file. These folders and documents can then be placed in a special cabinet and not placed in the filing cabinet because their bulk would render the depositing of the files in a filing cabinet useless, cumbersome and undesirable. It is vitally important that every bundle of Deeds must have a folder on top identifying them and reliance must not be placed under any circumstances of hoping that the staff will place the client's Deed on the top of the bundle as the final and only means of identification at any given time. Such a practice is fraught with the gravest danger and great frustrations will be suffered in trying to identify deeds

with a file or find Deeds at any given time.

**Accounts**

It is vital to establish an Accounts' Department or establish at least a valid accounting system .

The minimum requirements in this regard are :

(a) A cash receipt book suitably tabulated.
(b) A cheques Journal suitably tabulated.
(c) A petty cash book suitably tabulated.
(d) A ledger of all clients' accounts and incorporated therewith or separate therefrom a nominal ledger dealing with all the miscellaneous office accounts.
(e) A fees book in which will be entered all the profit costs taken from the ledger account and which are essential for income tax and other returns and if necessary a wages and salaries book and where applicable a stock book showing all the stationery.
(f) A postage book, etc.

It seems to be a desirable practice to have a comprehensive receipt book for all moneys coming into the office and numbered numerically into which and from which is issued receipts in chronological order and in numerical order of all sums from one penny upwards received into the office. This may seem an elementary procedure but it is a procedure which it is vitally necessary to stress and every receipt in that book must be accounted for to the solicitor or the person responsible for checking the cash receipts.

All stamp duty to the Revenue Commissioners should if possible be paid by cheque rather than cash as otherwise it is impossible to have a check on the large payments for stamp duties and registration fees on a cash basis.

Every solicitor who has a practice and has the custody of clients' moneys and the responsibility for payment of stamp duty and outlays must take it upon himself to check and verify from time to time the accuracy of the accounting procedure to ensure that clients' accounts and trust monies are fully provided for, that all documents have been properly stamped and registered and the stamp duties properly debited and accounted for.

Generally speaking, of course, the Solicitors' Accounts Regulations must now be complied with and this necessarily involves an annual audit and checking of the accounts for the purpose of compliance with the regulations.

It is absolutely essential for you as a solicitor starting in practice to consult the Accountant who will be responsible for giving the annual certificates to the Law Society and arrange for him to set up the accounting system and the opening of the Books of Account and it will be your obligation as a solicitor to see that all entries are made in it from day to day and it should be checked from week to week. If the accounts are entered up daily and checked weekly there will be no problem as all items will be easily identifiable at that stage. If there are delays for months in the entering up of the books the work will be doubled or trebled because the items will not be easily identifiable without considerable research, reference to files, receipts and other documents causing frustration to all concerned.

Defaulting solicitors owe their position at times to sheer misfortune or often to inexcusable carelessness, seldom to deliberate dishonesty. If you are honest with yourself and follow the principles briefly enunciated you should have no difficulty in keeping to the straight and narrow path and being, as I trust, you will be an ornament to the profession.

# Some Aspects of Irish Constitutional Reform

PART 3

by COLUM GAVAN-DUFFY, M.A., LL.B. (Editor)

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**The Right to Property**

The right to property elaborated in Article 43 of the Constitution will next be considered. It will be noted that as Section 1, 1, of this Article has been drafted in exceptionally strong terms, it should be so construed regardless of subsequent limitation. Subsection 1 reads: "The State acknowledges that man in virtue of his rational being has the natural right antecedent to positive law to private ownership of external goods." Subsection 2: "The State accordingly guarantees to pass no law attempting to abolish the right to private ownership or the general right to transfer, bequeath and inherit property." Section 2 of this Article tries to restrict this right, and ought accordingly to be very strictly construed. Section 2, Subsection 1, states that the State recognises, however, that the exercise of the aforementioned rights ought in civil society to be regulated by the undefined principles of social justice. Subsection 2: "The State accordingly may as occasion require, delimit by law the exercise of the said rights with a view to reconciling their exercise with the (undefined) exigencies of the common good." *In Pigs Marketing Board v Donnelly* (1939) I.R. 413, it was contended that the then law delegated legislative power to the Pigs Marketing Board in contravention of Article 15 of the Constitution, and that it interfered with trade competition and contraction of proprietary rights, thus violating Article 43. Unless the broad definition of "Social Justice" contained in the Encyclicals is to be accepted, one would be inclined to agree with Mr. Justice Hanna's view that in a Court of Law, Social Justice seems to be a nebulous phrase involving no question of law for the Courts, but mere questions of ethics, morals, economics and sociology. It was there stated that as the days of *laissez-faire* were at an end, it followed that the omniscient and all-wise members of the Oireachtas must be the sole judge of whatever limitation is established on property rights.

However, a different emphasis was placed on property rights in the so-called Sinn Fein Funds Act 1947 case, *Buckley v The Attorney General* (1950) I.R. 67. An Act called the Sinn Fein Funds Act 1947 had been passed by the Oireachtas. By Section 10 of that Act it was provided that all further proceedings in the action between the present representatives of Sinn Fein and the old Sinn Fein were to be stayed, and that upon an *ex parte* application being made by the Attorney General to the High Court, that Court should dismiss the action and direct that the Sinn Fein Funds should be disposed of in a manner specifically laid down by the Act. When the application was made to the High Court, it was held to the consternation of the State, that it should be refused on the ground that the Court could not comply with the provisions of that Act without arrogating its proper jurisdiction in a cause of which it was duly seized. On appeal to the Supreme Court, that Court held, affirming the High Court, per O'Byrne J., that insofar as the provisions of that Act were repugnant to the Declaration contained in Article 43 of the Constitution as to the right of private property, so as to recognise such exercise with the exigencies of common good, the exigencies of the common good is not peculiarly a matter for the legislator, but the decision of the Legislature is at all times capable of review by the Courts. As Mr. Justice O'Byrne stated, the effect of Article 6 combined with Article 34 to 37 of the Constitution is to vest in the Courts the exclusive right to determine justiciable controversies or between citizens and the State. In bringing these proceedings, the plaintiffs were exercising their Constitutional right and they were and are consequently entitled to have the matter in dispute determined by the judicial organ of the State. The decision in the Sinn Fein Funds case obviously represents the only logical view as to how Article 43 of the Constitution is to be interpreted and can in no way be restricted by the subsequent decision of *Attorney General v Southern Industrial Trust and Simons* (1960) 94 I.L.T.R., because that case merely decided that the Customs Authorities had a right to seize a car belonging to a hire purchase firm because it had been exported illegally to Britain by the hirer through Northern Ireland by means of a false declaration. It seems most unlikely that this decision will be followed as it is hard to reconcile some of the vague statements in the judgment of the Court delivered by the late Mr. Justice Lavery.

The next human right to be considered is the *Right to be treated as a Human Person,* more specifically set out in Article 40, Section 3, of the Constitution previously considered and subsequently put into effect, particularly in the case of *The State* (Quinn) *v Ryan* (1965) I.R. 118, where the action of police officers in arresting the accused near the Four Courts after he had obtained an order of *habeas corpus,* bundling him into a car, and driving him straight to the Northern Ireland border, and handing him over to British police officers to be transported to Britain to face a charge of larceny of television sets, without giving him an opportunity of getting in touch with his solicitors nor applying anew for *habeas corpus,* was rightly characterised by the Chief Justice as a scheme to eliminate the Courts completely and to defeat the rule of law as a factor of Government. He added at p. 121: The claim made on behalf of the police to be entitled to arrest a citizen and forthwith to bundle him out of the jurisdiction before he has had opportunity of considering his rights is the negation of law and a denial of justice. It is unfortunate that the Supreme Court deemed it sufficient to exonerate in that instance the police officers who had taken part in this miscarriage of justice, despite the fact that they were found guilty of contempt of court.

**The right to determine the form of Government**

As we have seen, by Article 6, Section 1, of the Constitution, all powers of Government, legislative, executive and judicial, derive under God from the people whose right it is to designate the Rulers of the State, and in final appeal to decide of national policy according to the requirements of the common good. Subsection 2. These powers of Government are exercisable only by or on the authority of the organs of the State established by the Constitution.

At the same time it was decided by the Supreme Court in *Byrne v. Ireland* (1972) I.R. 241, that the State is undoubtedly a juristic person which is variously liable for the tortious acts of its servants committed while in the course of employment.

Cognisance should also be taken of the noble terms of the Preamble particularly its reference to "seeking to promote the common good with due observance of prudence, justice and charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord be established with other nations, do hereby adopt enact and give to ourselves this Constitution."

It is thus clear that the Irish people have a right to determine their own form of Government, but only irregularly at election times and not, when they wish, by means of the Initiative. Furthermore, by Constitutional Amendment (No. 4) Act 1972, the age of voters for Dail and Presidential elections was reduced from 21 years to 18 years.

**The right of association**

The next right is that of *Association* contained in Article 40, Section 6, Sub-Clause 3. This Clause states that the State guarantees liberty for the exercise of the following rights subject to public order and morality namely—inter alia—the right of the citizens to form Associations and Unions. Laws, however, may be enacted for the regulation and control in the public interest of the exercise of the foregoing right. Laws regulating the manner in which the right of forming Associations and Unions and the right to free assembly may be exercised shall, however, contain no political, religious or class discrimination. It is known that it was intended that the new Industrial Relations Bill should contain very stringent penalties to be enforced in the event of unofficial strikes, but this was found impracticable to enforce. There is little doubt that unofficial lightning strikes have become a very serious impediment to the growth of our economy. It would henceforth be necessary to devise some means whereby no strikes will be legal unless adequate notice would officially be given by the trade union concerned. According to the Constitution Committee Report, it would seem that legislation is to be drafted providing for a minimum number of members for unions, and provision will be made to seek increased deposits for unions seeking negotiations. Apparently a Bill had been drafted to minimise the decision in *Educational Co. v Fitzpatrick* (1961) I.R. 345, and to provide that picketing would always be lawful in the interests of full union membership, but it is more than likely that this legislation would be declared unconstitutional.

Some of the more recent Supreme Court decisions relating to Trade Union Law are interesting, particularly as they were passed by a 3-2 majority.

In *E.I. Co. Ltd. v. Kennedy* (1968) I.R. 69, Henchy J. had held that the plaintiff company was entitled to a full investigation of the circumstances of the claim for improved conditions of employment before the defendants could commit irreparable damage by persistent picketing, and that the defendants would not be allowed to picket in a provocative manner. However the majority of the Supreme Court (O'Dalaigh C.J., Haugh and Walsh JJ.), in allowing the appeal, held that, at the hearing, there had been *prima facie* evidence of a trade dispute about terms of employment and conditions of labour, and sustained the defendant's right to picket peacefully. It was also held that there had not been sufficient evidence of the continuance of the unlawful picketing which existed at first to justify granting an interlocutory injunction, although this picketing had been exceptionally violent and unruly.

In *Becton-Dickinson v. Lee* (No. 2), unreported, 19 December 1972, the majority of the Supreme Court (O'Dalaigh C.J., Walsh and Butler JJ.) held that a separate trade union with very few members was entitled to picket to gain recognition, despite the fact that there was a contract between the employers and two other large unions that all employees in the firm would belong exclusively to those unions. The reasoning was that if a particular trade union was designated by workmen as their representatives in a negotiating capacity, then they are doing something connected with their employment. If an employer refuses to treat with that designated representative, then that refusal can allegedly constituted a trade dispute. This appears to give rise to the dangerous doctrine that a handful of union members in a firm can declare unnecessary strikes and then picket on the alleged ground that there is a trade dispute, thus causing unnecessary hardship.

The minority views of Fitzgerald and Henchy JJ. shared in the High Court by McLoughlin J., that the purpose of the picket was to coerce the company to break their contract with the two unions with whom they had an agreement seems reasonable, and a perpetual injunction would appear to have been justified here.

At present, Article 40, Section 6, purports to give an effective triple guarantee. (1) The right to Free Speech. (2) The right of Peaceable Assembly and (3) The right of Forming Associations and Trade Unions. All these rights which are not necessarily connected are most effectively hedged in with curbs and restrictions. This Section requires to be completely recast to offer adequate protection. It would seem that each of these three quite separate rights should be set out in completely different sections.

The present right of Freedom of Association is guaranteed by the *Industrial Relations Act 1946* whereby a Labour Court is established which may issue non-enforcable recommendations in disputes between employers and workers. Furthermore, broadly speaking the excessively wide rights conferred upon Trade Unions under the Trade Disputes Act 1906 as to protection of their liability have generally not been affected. However, in *Educational Company v Fitzpatrick* (1961) I.R. 345, it was held by the Supreme Court that it would be unconstitutional for any members of any Trade Union to compel non-members working with them to join a Trade Union. Nothing in the Constitution should prevent the State from instituting special orders of honour, by which deeds of valour and special services to science, art and literature could be recognised.

**Freedom of expression**

The right to Freedom of Expression is set out in

Article 40, Section 6, Subsection 1, but it is as usual circumscribed by many restrictions. This Sub-Clause reads as follows: "The State guarantees liberty for the exercise of the following rights subject to public order and morality. I. *The right of the citizens to express freely their convictions and opinions.* The education of public opinion being, however, a matter of such grave importance to the common good, the State shall, however, endeavour to ensure that organs of public opinion such as the radio, press and the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State. The publication or utterance of blasphemous, seditious or indecent matter is an offence and shall be punishable in accordance with law. There is very little to be added to this Clause save to stress that its provisions are strongly worded in favour of the State and could be used to suppress freedom of speech at the pleasure of the Government. In fact there is little doubt but that the former Government has tended to abuse its powers, and to curb the freedom of the press quite unnecessarily. The partial and draconian press censorship exercised during the war will forever remain a first-class iniquitous blot on the administration. It is furthermore difficult to justify in regard to statements of illegal organisations how a Minister may interfere with the news talks of Radio Eireann by allegedly censoring any item of news which displeases him even if an accurate statement is issued by a responsible body or arranging with a compliant Director-General to curb independent television programmes. In considering this right to freedom of expression it would seem necessary to emphasise the *wide right conferred by Article 40, Clause 3 of the Constitution.* Of all the Clauses in the Constitution this seems to me the one which requires to be construed in an activist sense. As Chief Justice O'Dalaigh stated "In *re Haughey* (1972) I.R. at page 264, Article 40 Section 3 of the Constitution is a guarantee to the citizen of the basic fairness of procedures. The Constitution guarantees such fairness, and it is the duty of the Court to underline that the words of Article 40, Section 3, are not political shibboleths but provide a positive protection for the citizen and for his good name." It is most unfortunate that the first case relating to personal rights under this Constitution arose as a result of the Emergency created by the situation arising from the Second World War. In the unusual conditions of neutrality then prevailing, the Courts found it necessary to construe the powers given to the State in the widest possible terms and to give the most literal construction to the emergency provisions of the Constitution. It is well known that the Emergency Powers (Amendment) Act 1940 permitted the Government to order suspects to be interned without trial during the emergency. In view of these full emergency powers it is submitted that the permanent legislation contained in the Offences against the State (Amendment) Bill 1940 should have been construed in a more liberal spirit.

**Activism and self-restraint**

What must the spirit of activism contain? According to Professor McWhinney the tradition involves the notion that in the field of political and civil rights, the Court should keep a sharp look out on any legislation restricting those rights, in order to ensure full compliance with the spirit of the Bill of Rights—in other words, laws restricting freedom should be subjected to the most rigorous scrutiny. Professor McWhinney has well summarised convincing arguments in favour of the Doctrine of Activism as follows:

(1) The Judges are an elite group better intellectually equipped than mere Ministers or Civil Servants.

(2) When certain basic rights are threatened, it is far fetched to rest upon any abstract academic conception of the separation of powers.

(3) There is little doubt that the maintenance of a free society rests on the existence of an independent judiciary. The most famous Judges associated with the doctrine of activism are Justices Black, Douglas and Murphy and Brennan, in the United States, Chief Justice Duff of the Supreme Court of Canada, and Mr. Justice Faz-Ali of the Supreme Court of India as well as Lord Denning in Britain. As against the activist attitude, where the Constitution is interpreted liberally, there is, of course, the strict and literal interpretation of the Constitution which has often become the traditional attitude of various Supreme Courts in construing their country's Constitution, and has consequently been called the *Tradition of Judicial Self Restraint.* One of the main principles of Judicial Self Restraint is, of course, the primary presumption of the constitutionality of legislation no matter how far-fetched, and the implied principle that Judges should humbly defer to the popular will as expressed by legislation unless the Statute specifically infringes one of the fundamental principles of the Constitution. According to this school, *Activism* entails taking sides in a political conflict, and the Courts may thus eventually become embroiled in an undignified controversy. Furthermore, this school recognises, as Judge Hanna did, the social-ethical limitations to the effectiveness of human acts. As Judge Frankforter said, a people must make their own salvation and not expect it to be served up to them by Judges—he did not, however, define the expression "a people". The jurisdiction of Common Law Courts has necessarily been limited in Constitutional cases, as it has normally been based on the grounds of either *Ultra Vires or of Natural Justice.* Judge Leonard Hand described the spirit of moderation as the temper that does not press an undue advantage to its bitter end which can understand and will respect other sides, which recognises a common faith and the common aspirations of all citizens. While Judges are highly specialised for wise community policy making, undoubtedly the Courts have but the most rudimentary powers to enforce Decrees, and therefore must ultimately be dependent on the State in this respect.

**The *Habeas Corpus* clause**

In considering Article 40, Clause 4, of the Constitution, it is necessary to mention the case of the *State* (Browne) *v Feran* (1967) I.R. 147, when the Supreme Court decided that an appeal does lie to the Supreme Court from an Order of Acquittal by the High Court in a *habeas corpus case. The Activist School* appears to have received a rebuff. It was stated in one of the judgments that in the construction of a Constitution, words which in their ordinary meaning import inclusion or exclusion cannot be given a meaning other than their ordinary literal meaning, save where the authority lies within the Constitution itself. It was also stated in the case of *Nicolaou v The Adoption Board* (1966) I.R. 640, that legal rights, unless specifically guaranteed by the Constitution, may be adversely affected or completely taken away by legislation. This statement seems difficult to reconcile with the statement that the Courts

can protect rights other than those specifically conferred in the Constitution as specified by Mr. Justice Kenny and the Supreme Court in the Fluoridation Case—*Ryan v Attorney-General* (1965) I.R. 294. This dictum appears furthermore to give undue power to the legislature. Article 34, Clause 4, Sub-Clause 3, reads: The Supreme Court shall with such exception and subject to such regulations as may be prescribed by law have appellate jurisdiction from all decisions of the High Court. It was held that, as no Statute had been passed since 1937 specifically stating that the decision of the High Court in making a conditional Order of *habeas corpus* absolute, was final and conclusive, the State had consequently a right to appeal against this acquittal. With respect, it would seem that the securing of an Order of *habeas corpus* once it is made absolute is one of the greatest protections a citizen has against any unlawful detention by the Executive, and this has been recognised as one of the bulwarks of our liberties for centuries. It is difficult to understand how the Supreme Court may hold a detention valid and lawful even after the High Court as a result of a full investigation has held it invalid, and that if the applicant happens to be still within the jurisdiction he could be re-arrested and detained. As was pointed out in the Browne case, the jurisdiction of the High Court here is absolute, because no exception prescribed by law can limit its jurisdiction.

The final order granted by the High Court means in effect that a thorough investigation of the circumstances has been carried out and that the Judge is fully satisfied that the accused is entitled to be set free. It seems to me that no procedural construction of the Constitution should entitle a higher Court to question this. It would seem to be a fundamental condition of the Common Law that the matter should rest there, regardless of any literal interpretation of any Constitutional text, as the principle of *habeas corpus* is such a vital one in Common Law. In the Browne case, it was stated that the Constitution of 1922 and 1937 represented new statements of fundamental principles, and that they would have to prevail if they were inconsistent with the older law—but, with respect. it was not intended to introduce a new procedure for *habeas corpus* in 1922.

Article 40, Clause 1, reads that *all citizens shall as human persons be held equal before the law.* This shall not be held to mean that the State shall not in its enactments have due regard to the differences of capacity, physical and moral, and of social function. This Article as mentioned in the Nicholaou Case—(1966) I.R. 639—is not to be read as a guarantee or undertaking that all citizens are to be treated by the law as equal for all purposes, but rather as an acknowledgment of the human equality of all citizens, and that such equality will be recognised in the laws of the State. Furthermore, in the same case—(1966) I.R. 64—in construing Article 40, Clause 3, Sub-Clause 1, of the Constitution, the Supreme Court stated that it had not been shown to its satisfaction that the father of an illegitimate child has any natural rights as distinct from legal rights to either custody or society of that child. The Court was not satisfied that any such rights has ever been recognised as part of the Natural Law. This appears to be an unduly strict interpretation.

It was unfortunate that the Adoption Act 1952 had to be construed so strictly in Nicolaou where the father of the child had at all times a genuine interest in the child's welfare.

**Presumption of constitutionality**

*In the State* (Sheerin, McGarry and O'Hanlon) *v The Governor of St. Patrick's Institution* (1966) I.R. 379, it was stated by the Supreme Court that the Oireachtas established by the 1937 Constitution is the only Parliament subject to the Constitution. It follows that all laws previously in force are presumed not to be in conflict with the Constitution unless they specifically infringe some provision of it. *In the State* (Quinn) *v Ryan* (1965) I.R. 124, Mr. Justice Walsh stated that amongst the personal rights guaranteed by the Constitution is the right not to be deprived of personal liberty, save in accordance with law. It is quite clear that a right to apply to the High Court in respect of *habeas corpus* is conferred on every person who wishes to challenge the legality of his detention. It seems to follow that any law which makes it possible to restrict that right, must necessarily be invalid having regard to the provisions of the Constitution.

Acts of the Oireachtas also enjoy the presumption of being not repugnant to the Constitution in force at the date of the enactment, unless such repugnancy be clearly shown. Acts of the Parliament of the former United Kingdom of Great Britain and Ireland, of which the Petty Sessions Act, 1851, was one, enjoy no such privileged position. By virtue of Article 50 of the Constitution, the Petty Sessions Act, 1851, was continued in force after the coming into operation of the Constitution only to the extent to which its provisions were not inconsistent therewith. This Supreme Court is the creation of the Constitution and is not in any sense the successor in Ireland of the House of Lords. The jurisdiction formerly enjoyed by the House of Lords is but part of the much wider jurisdiction which has been conferred upon this Court by the Constitution. It is only in the case of a law the Bill for which has been referred to the Supreme Court by the President, under Article 26 of the Constitution, that there is no longer jurisdiction in any Court to question the constitutional validity of that law.

In *Attorney-General v Ryan's Car Hire Service* (1965) I.R. 654, Mr. Justice Kingsmill Moore had stated the principles by which the Supreme Court was no longer bound by the doctrine of precedent as follows: In my opinion the rigid rule of *Stare Decisis* must in a court of ultimate resort give place to a more elastic formula. Where such a court is clearly of opinion that an earlier decision was erroneous, it should be at liberty to refuse to follow it, at all events in exceptional cases.

**Article 45: Directives of Social Policy**

It is understood that these fine-sounding phrases have been derived from the almost Marxist Spanish Republican Constitution of 1931. These are all pious aspirations allegedly for the guidance of the Oireachtas, but as the Courts cannot take any cognisance of them, they appear to be completely superfluous, as the average Deputy or Senator is completely unaware of their existence.

You will apreciate that it is not possible in a short space of time to deal adequately with this most intricate subject, but an endeavour has been made to present to you what appears to me to be the most glaring defects of our Constitution, and to suggest to you the best way in which they could be remedied.

It has only been possible to point out briefly some of the innumerable problems that would arise in the event of a wholesale revision of the Constitution. It will be

noted that the present text of the Constitution is so long-winded that it has left as many problems unsolved as it has endeavoured to solve. As the problems to be solved are too numerous, and are most unlikely to be presented seriatim to the vote of the people, it might be wise to consider whether a completely revised text of the Constitution should be presented as one document in a future popular referendum. It is submitted that it would be impossible for the average elector to grasp a number of amendments to the Constitution, upon which he would be asked to vote separately.

An example of the difficulty in drafting a comprehensive constitutional amendment was *Constitutional Amendment* (No. 3) *Act,* 1972, which enabled the State go join the European Economic Community, and which placed Community law on a *par* with Irish law.

# STATUTORY INSTRUMENTS

S.I. No. 315 of 1973

## SOLICITORS' ACT 1954 (FEES) REGULATIONS 1973

By virtue and in pursuance of Sections 4, 5, 79 and 82 of the Solicitors' Act 1954 the Incorporated Law Society of Ireland hereby make the following Regulations:

1. From and after the date of these regulations the fees specified in the schedule hereto shall be paid to the Society by the applicant in respect of the matters therein mentioned.
2. These regulations shall come into operation on the 29th day of November 1973.
3. The Solicitors' Practising Certificate Fees Regulations 1971 (S.I. No. 341 of 1971) are revoked as from the date of operation of these regulations as regards applications for practising certificates for the practice year 1974/'75 or any later practice year but shall continue to apply to applications for practising certificates for the practice year 1973/'74 or any earlier practice year.
4. These Regulations may be cited as the Solicitors' Act 1954 (Fees) Regulations 1973.

SCHEDULE

| | |
|---|---|
| 1. On application for a practising certificate for the practice year 1974/'75 or any later practice year by a solicitor who practises or carries on his business in the City of Dublin or within three miles therefrom ... | £41.00 |
| 2. On application for a practising certificate by a solicitor who does not practise or carry on his business in the City of Dublin or within three miles therefrom ..... | £38.00 |
| 3. On application under Section 17 of the Solicitors' (Amendment) Act 1960 for a copy of an entry on file A or file B ..... | £ 1.00 |

Dated this 29th day of November 1973.

Signed on behalf of the Incorporated Law Society of Ireland.

THOMAS V. O'CONNOR,
President of the Incorporated Law Society of Ireland.

EXPLANATORY NOTE

The fee payable by a solicitor on taking out a practising certificate is raised from £31 to £41 in the case of a solicitor practising in Dublin and from £28 to £38 in the case of a solicitor practising elsewhere. The fee payable for a copy of an entry on File A or File B is unchanged.

S.I. No. 333 of 1973

## SOLICITORS ACT 1954 (APPRENTICESHIP AND EDUCATION( (AMENDMENT) NO. 2 REGULATIONS 1973

The Incorporated Law Society of Ireland in exercise of the powers conferred on them by Sections 4, 5and 40 of the Solicitors Act 1954 hereby make the following regulations.

1. These Regulations may be cited as the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) No. 2 Regulations 1973 and shall be read together with the Solicitors Act 1954 (Apprenticeship and Education) Regulations 1955 (S.I. No. 217 of 1955) (hereinafter called "the Principal Regulations"), the Solicitors Act 1954 (Apprenticeship and Education (Amendment) Regulations 1956 (S.I. No. 307 of 1956), the Solicitors Act 1954 (Apprenticeship and Education (Amendment) Regulations 1960 (S.I. No. 94 of 1960), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1965 (S.I. No. 201 of 1965), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1966 (S.I. No. 230 of 1966), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1968 (S.I. No. 17 of 1968), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1969 (S.I. No. 110 of 1969), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1970 (S.I. No. 108 of 1970), the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1971 (S.I. No. 218 of 1971), The Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1972 (S.I. No. 49 of 1972 and the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1973 (S.I. No. 47 of 1973) and shall insofar as they are inconsistent therewith alter and amend the same. The Regulations hereinbefore mentioned may be cited collectively as the Solicitors Act 1954 (Apprenticeship and Education) Regulations 1955-1973.

2. These Regulations shall come into operation on the 13th December 1973.

3. Paragraph 10 of the Principal Regulations as amended by the Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 19 9 (S.I. No. 110 of 1969) and Solicitors Act 1954 (Apprenticeship and Education) (Amendment) Regulations 1973 (S.I. No. 47 of 1973 are hereby deleted and the following paragraph is substituted therefor.

10. The subjects at the preliminary examination shall be as follows :

(a) English and Mathematics.

(b) One of the following subjects, that is to say, Latin, French or German.

(c) Any two of the following subjects : q History, Geography, Greek, Latin, French or German (if not taken as a compulsory subject under (b) above), a modern language (other than Irish) approved by the Court of Examiners, Physics, Chemistry, Biology, Commerce (which is composed of four Sections namely Economics, Business Organisation, Accountancy and Economic History of which the candidate will take one Section only).

Signed on behalf of the Incorporated Law Society of Ireland this 13th day of December 1973.

PETER D. M. PRENTICE,
President of the Incorporated Law Society of Ireland.

EXPLANATORY NOTE

This note is not part of the regulations and does not purport to be a legal interpretation thereof.

The effect of the regulations is to provide that a candidate taking the preliminary examination should pass in five subjects of which only English and Mathematics remain as compulsory subjects. Latin which was formerly compulsory is now optional insofar as a candidate may now elect to take French or German instead.

## DUN LAOGHAIRE DISTRICT COURT

From the 1st day of January, 1974, sittings of the District Court in Dun Laoghaire have been extended following the making of an Order by the President of the District Court dated 7th November, 1973, in accordance with the provisions of the Courts (Supplemental Provisions) Act, 1961, which Order is published in the Iris Oifigiul of the 15th January, 1974. The District Court sits in Dun Laoghaire on two days a week for the transaction of the following business originating in the area comprising the Borough o fDun Laoghaire within the Dublin Metropolitan District :

| | | | |
|---|---|---|---|
| Courthouse at Dún Laoghaire | each Tuesday and Thursday | 10.30 a.m.-1.00 p.m. 2.00 p.m.-and 4.00 p.m. | Civil Business (Appendix 1) Juvenile Business (Appendix 2) Custody Business (Appendix 3) Summary Business (Appendix 4) |

There is also a District Court Office in the Courthouse in Dun Laoghaire which operates fulltime.

# STATUTES OF OIREACHTAS ACTS 1973

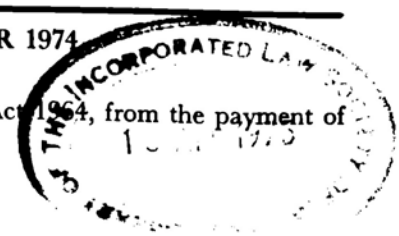
1. Broadcasting Authority (Amendment) Act, 1973 ..... 3 April
2. Social Welfare (Pay-Related benefit) Act, 1973 ..... 4 April
3. Electoral (Amendment) Act 1973 11 April
4. Minimum Notice and Terms of Employment Act, 1973 ..... 10 May
5. European Communities (Confirmation of Regulations) Act, 1973 ... 13 June
6. Sugar Manufacture (Amendment) Act, 1973 ..... 29 June
7. Local Elections Act, 1973 ..... 29 June
8. Local Government (Rates) Act, 1973 ..... 29 June
9. Fóir Teoranta (Amendment) Act, 1973 ..... 29 June
10. Social Welfare Act, 1973 ..... 29 June
11. Redundancy Payments Act, 1973 2 July
12. Regulation of Banks (Remuneration and Conditions of Employment) (Temporary Provisions) Act, 1973 ..... 17 July
13. Charities Act, 1973 ..... 17 July
14. Ministers and Secretaries (Amendment) Act, 1973 ..... 18 July
15. Road Traffic (Amendment) Act, 1973 ..... 30 July
16. Criminal Procedure (Amendment) Act, 1973 ..... 2 August
17. Civil Service (Employment of Married Women) Act, 1973 ..... 2 August
18. Presidential Establishment (Amendment) Act, 1973 ..... 2 August
19. Finance Act, 1973 ..... 9 August
20. European Communities (Amendment) Act, 1973 ..... 9 August
21. Dairy Produce (Miscellaneous Provisions) Act, 1973 ..... 9 August
22. Oireachtas (Allowances to Members) and Ministerial and Parliamentary Officers (Amendment) Act, 1973 ..... 9 August
23. Auctioneers and House Agents Act, 1973 ..... 14 November
24. Place-Names (Irish Forms) Act, 1973 ..... 23 November
25. Holidays (Employees) Act, 1973
26. Courts Act, 1973 ..... 26 November
27. Army Pensions Act, 1973 ..... 27 November
28. Genocide Act, 1973 ..... 19 December
29. Air Navigation and Transport Act, 1973 ..... 19 December
30. International Development Association (Amendment) Act, 1973 ... 19 December
31. Agricultural Credit Act, 1973 ..... 19 December
32. Telephone Capital Act, 1973 ..... 24 December
33. Arts Act, 1973 ..... 24 December
34. Appropriation Act, 1973 ..... 24 December

**PRIVATE ACTS—NONE**

## COURTS (GUARDIANSHIP OF INFANTS) FEES ORDER 1974

S.I. No. 13 of 1974

This Order, which comes into operation on 31st January 1974, exempts proceedings in the Circuit Court, the High Court or the Supreme Court, under the Guardianship of Infants Act 1964, from the payment of Court fees.



# INTERNATIONAL BAR ASSOCIATION

## SECTION ON BUSINESS LAW, LONDON CONFERENCE, NOVEMBER 7 AND 8, 1973

In 1970 the International Bar Association formed its first Section to cater for those of its members concerned with international business problems. It now has over 1,400 members from all over the world, publishes its own Journal and a Directory of its members. The first meeting of the Section took place in Monte Carlo in 1972 and its second Conference in London on November 7 and 8. Over 200 Section members attended together with approximately 100 guests all of whom were free to participate in the following Committee discussions :

*Admiralty and Maritime Law* (Chairman : Lennart Hagberg, Sweden) where the principal matters considered were the results of two questionnaires sent out to Committee members dealing with Arrest of Vessels and Enforced Sales of Vessels, co-operation with the Comité Maritime International and the United Nations bodies concerned with shipping law.

*Aeronautical Law* (Chairman : Dean Booth, U.S.A.) which sponsored a two-day seminar on Multinational Joint Ventures in New Aircraft Development from the viewpoints of the airlines, manufacturers, lenders and insurers. Over 100 lawyers were present at the seminar.

*Antitrust Law and Monopolies* (Chairman : Arved Deringer, Germany) which discussed reports on recent developments in the E.E.C. countries and the extra-territorial application of antitrust laws.

*Procedures for Settling Disputes* (Chairman : Jean Robert, France) which enquired into the enforcement of foreign judgments, the serving of writs abroad and ways of improving arbitration procedure.

*Commercial Banking* (Chairman : Bela Szathmary, U.S.A.) which considered problems related to International Loan Agreements. Four international lawyers, Dr. Klaus Bölhoff, Dr. Pedro de Elizalde, James B. Hurlock and Adrian Smart presented papers on this subject and answered questions from the members. It was decided that the Committee should now consider the subjects of Bank affiliates abroad—restrictions from at home and from the host Governments; liberalizing the road towards an integrated international money market and new types of "negotiable" instruments on the international money market.

*Environmental Law* (Chairman : Keith Imlah, England) which discussed the relations of this Committee with other bodies, particularly the United Nations, concerned with the protection of the environment. The future work programme and structure of the Committee was also considered and it was agreed that the subjects of oil pollution by ships and by-production from the seabed should be given priority.

*Business Organisations* (Chairman : John T. Subak, U.S.A.) which discussed the role of a Director, Multi-National Corporations and the European Company.

*Insurance* (Chairman : F. Baron van der Feltz, Netherlands). This Committee discussed a paper prepared by Mr. F. Salomonson, Netherlands, on important developments in Common Market Insurance Law.

*Creditors' Rights, Insolvencies and Reorganisations* (Chairman : Joachim Kilger, Germany). This Committee arranged a two day meeting. On the first day it considered the draft European Bankruptcy Convention under the Chairmanship of Muir Hunter, Q.C., and on the second Creditors' Rights and Insolvency Laws. Members also reported on, amongst other matters, changes in Creditors' Rights in their own countries.

*Public Utilities* (Chairman : Philip Turner, England) which gave preliminary consideration to the relationship between governments and public utilities, fixing and regulating consumer rates, the influence of private capital on public utilities not publicly financed, the laws, rules and regulations dealing with the use of fossil fuel and nuclear energy in generating electric current and whether, and to what extent, petroleum resources should be brought into the public utilities field and publicly owned. Mr. Yukinobu Ozaki also presented a paper on Governmental Regulation over electricity and city gas supplies in Japan.

*Patent, Trademark and Copyright* (Chairman : Gordon Henderson, Canada) whose agenda included the proposed Trademark Registration Treaty and the effect of the Vienna amendments to the proposed Treaty, the Patent Co-operation Treaty and Erosion of Industrial Property Rights.

*Sales of Goods* (Chairman : Antonio Maria Pereira, Portugal) which considered a draft document setting out basic principles relating to General Terms and Conditions applicable to International Sales Contracts.

*Taxes* (Chairman : Jean-Claude Goldsmith, France) which considered national reports on "Tax Treatment of investments in developing countries". Mr. R. Lend reviewed the progress made since 1965 with regard to the negotiation of multinational conventions with developing countries and the question of "Branch against Subsidiary" was also discussed.

*Petroleum and Mineral Resources* (Chairman : Laszlo Gombos, England). This Committee invited to address them Roy Thomas Pleasance, F.C.A., Manager, Tax Administration of British Petroleum Co. Ltd. and Chairman of the U.K. Oil Taxation Committee on "The Taxation of Oil and Gas Production on the U.K. Continental Shelf and the Mainland (including Territorial Waters); F. L. Faust, Manager, Tax Administration, Gulf Oil, London on "Taxation of Oil and Gas Production in the U.S.A. with special reference to the Depletion Allowance and Foreign Tax Credits" and Eli Lauterpacht, Q.C., Fellow of Trinity College, and Lecturer in Law at the University of Cambridge on "Co-operation between oil producing and oil consuming countries".

*Issue and Trading in Securities* (Chairman : John Gauntlett, England). This Committee has established five sub-committees on Accounting Practices, Acquisitions and Mergers, Extraterritorial Application of Securities Laws, Rights of Minority Shareholders and Stock Exchanges and all met during the Conference. In the afternoon, Mr. Peter Lee, Secretary of the Panel on Takeovers and Mergers in London, spoke on "The City Code on Takeovers and Mergers".

*International Construction Contracts* (Chairman : Jean B. Vadon, France) which discussed its work programme and agreed to study the following topics :

(1) Damages, Limitation of liability and penalties.

(2) Force Majeure and acts of events beyond control.

(3) Performance guarantees.

(4) Monetary Clauses and price revision.

(5) Applicable Law and settlement of Disputes.

# THE 15th CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

**July 28 to August 2, 1974, Vancouver, Canada**

## THE WORKING PROGRAMME

The Council of the I.B.A. have provisionally decided upon the following working programme to follow upon the Opening Plenary Session of welcome to those attending the Conference.

## MAIN OPEN SESSIONS

**Topic No. 1—"The Right to Practise and of Establishment Abroad"**

This subject was discussed in 1972 in Estoril at a meeting convened by the I.B.A. and the Union Internationale des Avocats and the recommendations made at that meeting have been circulated for consideration to all the member Bar Associations and Law Societies of the I.B.A. In Vancouver the subject will be submitted for discussion by a special I.B.A. Committee under the chairmanship of Dr. Werner Deuchler of Germany. The Commission Consultative in Europe which has been studying the subject for several years has been invited to co-operate in this session. It is hoped that firm recommendations will be reached as to the basis upon, the extent to and the conditions under which a lawyer properly qualified to practise law in one country should be permitted to practise and/or establish a law office in another and that these may prove acceptable to the I.B.A.'s 66 member Bar Associations and Law Societies. This is, therefore, a Topic of exceptional importance to all practising lawyers with interests abroad.

**Topic No. 2—"Delays in Trial Procedures"**

This Topic will be prepared and presented by The Hon. Robert H. Hall as chairman and Mr. Richard A. Green as Rapporteur, both of whom have been nominated by the American Bar Association.

**Topic No. 3—"The Extraterritorial application of the Law"**

This Topic will be prepared and presented by the Section on Business Law of the I.B.A. with Dr. Arved Deringer in the chair.

**Topic No. 4—"The relative merits of the Adversary and Inquisitorial Systems of Trial"**

This Topic will be prepared and presented under the chairmanship of George S. Cumming, Esq., Q.C., who has been nominated by the Canadian Bar Association.

**Topic No. 5—"International Legal Problems in Connection with the Drafting and Proving of Wills"**

This Topic will have David Pyott as Chairman and Barry Lock as Rapporteur-General, both of whom have been nominated by The Law Society, England.

**Topic No. 6—"Freedom of the Mass Media versus the Right to Privacy"**

This will be a full day's programme in which it is hoped invited guests representing facets of the mass media—the press, radio and television, will take part.

## SEMINARS

**Seminar No. 1**

A discussion on some topical aspect of **Legal Education** to be organised by Professor James M. MacIntyre of the University of British Columbia.

**Seminar No. 2**

**"The Rights of Women under Family Law"** (or some similar title) will be prepared and presented by the National Association of Women Lawyers in the U.S.A. This Seminar has been included in view of the fact that 1975 is to be United Nations Women's Year.

## OTHER MEETINGS

A general meeting of Member Organisations and a Conference of Presidents and Bâtonniers of Member Organisations will both be held.

Among the other meetings to be held are those of the *Standing I.B.A. Committees.* The Committee on Professional Ethics will hold an open meeting on **"An International Code of Professional Ethics".** The Committee on the Practice of the Law by Non-Lawyers will also hold an open meeting, and there will be meetings of three newly formed committees—The United Nations Affairs Committee, the European Affairs Committee, and the Committee on Ombudsmen.

The *International Legal Aid Association* will present for general debate in Open Meeting a subject of special significance to the developing countries, possibly in connection with fund raising.

All 20 Committees of the *Section on Business Law* will hold meetings during the Conference week open to all Conferees. The General Meeting of Section members will be held at the conclusion of the Section luncheon.

The new *Section on General Practice* will hold its inaugural meeting.

## SOCIAL PROGRAMME

The Canadian Bar Association has appointed a Special Committee to advise on the arrangements to be made for the social programme and a Ladies' Programme. Full details of these will be included in the May 1974 issue of the Journal, and will include a day tour to Victoria, Vancouver Island, and a reception by the Lieutenant Governor of British Columbia.

## REGISTRATION

Registration forms and travel and accommodation details can be obtained from the officially appointed agent in your area. These are :

for Europe, Africa, the Middle East and Asia :

Thomas Cook & Son Ltd.,
Berkeley Street,
London W1A 1ES, England.

Registration fees are as follows :

| | | |
|---|---|---|
| Accredited member of a Bar Association or Law Society (not being an I.B.A. Patron or Subscriber) | $90 | $105 |
| Each Guest of above | $55 | £ 70 |
| I.B.A. Officers, Councillors, Patrons and Subscribers | $75 | $ 90 |
| Each Guest of above | $40 | $ 55 |
| Normal Fees. | | |

**Note**—Registration fees must be paid before 1 May 1974, after which date a "late fee" is payable.

The Legal background to Mr. Nixon's battle over White House tapes ...

# HOW PRIVILEGE PROTECTS THE PRESIDENT

By PROF. ARTHUR GOODHART

**"The forced publication of confidential recordings seems to be a doubtful innovation"**

It is in the best American tradition that the present bitter concict between President Nixon, the Senate Committee, and the Grand Jury sitting in Washington should be centred on an apparently simple question: has the President a legal privilege not to disclose the tape recordings that were made in the White House both before and after the Watergate breakin took place?

To understand this legal question it is necessary to begin with a definition of the word "privilege", although this has been avoided by most of the newspaper commentators. A legal privilege is a provision that evidence which is compellable as a general rule can be excluded on special grounds either by the judge or on the motion of one or more of the parties. A person who claims a privilege is not attempting to break the law, as has sometimes been said: he is asking that an exception, to which he is entitled, should be recognized.

These privileges are not based on the content of the questions, but on the relationship between the parties. They are few in number, and may change from time to time, but they have given rise to difficult problems, as in the present case.

The most romantic privilege is the matrimonial privilege. Both English and American law provides that, as a general rule, neither a husband nor a wife can be required, in a criminal case, to give evidence against the other. This privilege has given rise to a failure of justice in a number of cases, especially those in which a marriage takes place shortly before a trial so as to shut out evidence that would lead to a conviction, but nevertheless this is better than the suffering that might be caused if one spouse were forced to denounce the other.

A second privilege arises in the lawyer-client relationship provided that there is no conspiracy between them to commit a crime. Thus the privilege can be claimed even if the client confesses to his lawyer that he has committed a murder.

Here again the privacy of the lawyer-client relationship is regarded as being so important that it is enforced even though it leads to injustice in a particular case.

The third privilege arises out of the relationship between a priest and a person making a confession. Here there is a difference in theory between English and the American law, but, in fact, the relationship is regarded as conclusive in both systems. Professor Wigmore, whose *Law of Evidence* has been recognized as the leading authority on this subject, quoted at length from Jeremy Bentham's famous *Rationale of Judicial Evidence*:

> "The basis of the enquiry is, that this institution is an essential feature of the Catholic religion, and that the Catholic religion is not to be suppressed by force. ... To all individuals of the profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of this kind, some would stand firm under the persecution, others would sink under it. ... The advantage gained by the coercion—gained in the shape of assistance to justice—would be casual, and even rare; the mischief produced by it, constant and all extensive."

When we turn to the Watergate cases we find that it is difficult to discover any agreed principles. Thus it has been said that the privilege does not extend to the criminal law. I disagree with Professor Bickel who said (*The Times*, September 3, p. 12): "Whatever else the privilege may cover, it can never have been intended to cover evidence of crime." It is true that the evidence of a crime on a tape recorder is not the same as oral evidence of a crime given in court but this is a distinction which is hardly a reasonable one. In the privileges mentioned above the purpose almost always is "to cover the possible evidence of crime."

It has also been said that an order issued by a Grand Jury for the submission of relevant evidence is an absolute one, so that even a President must obey it. The answer to this is that not all orders issued in the name of the Grand Jury are absolute as is shown by the privileges against self-incrimination and against a spouse's evidence in matrimonial cases which need not be obeyed. It is reasonable, therefore, to hold that a privilege against the disclosure of confidential tape recordings will not necessarily be invalidated because it is made by a Grand Jury.

This brings us to the central question of the present case in regard to the nature of the President's privilege concerning confidential documents in his control. It is a privilege (a) strictly limited to matters of national security or to (b) matters relating to the public interest, or (c) a privilege relating to all documents in his possession which he regards as being confidential? Unfortunately there is no direct evidence concerning the correct answer as the Constitution is silent on this point. This is hardly surprising as the Constitution, and its first 10 amendments, is in the nature of an outline: it occupies less than 10,000 words. Article I sect. 6 provides in part, that no member of either House shall "be questioned in any other place" for any speech or debate in either House, but it says nothing about confidential papers.

We must, therefore, turn to the precedent cases and debates regarding the Presidential privilege, but we find that they are so limited that they can be counted on the fingers of one hand. There is hardly any emphasis on "national security" and no attempt to define its meaning.

It is the second phrase "matters relating to the public interest" which finds greater support. This is broader than "national security" which has become increasingly difficult to define under modern conditions as it may depend on constant changes not only in armaments but also in political allies and in financial support. It is, therefore, more realistic to accept the third test based on the President's possession of the documents and his decision that they are of a confidential nature, and of possible public concern. The all-important point here is that the decision must be made by the President, and not by a Senate committee, or the Senate or the House of Representatives, or a court of law. It is here that common sense must govern because there are no

statutes or precedents which are of binding authority, although the fact that at no time since the Constitution was enacted has compulsion been applied although from time to time there have been incompleted threats.

In conclusion, two important points must be considered. The first is that the President is subject to the law so that he cannot seize private property illegally or imprison anyone arbitrarily even though it may not be possible for the courts to enforce their decisions against him. The President cannot break the law arbitrarily. But this is an entirely different situation from that in which a President, who is in possession of confidential papers, refuses to disclose them even though a Grand Jury or a Court believes that it is in the public interest that he should do so. It must be remembered that this privilege is attached to the office of the President and not to any other public officer. His is the final decision and is not subject to review as is that of the others. He may know what the public interest may be while an official may be thinking in terms of his own office.

In *Wigmore* it is said that:

"The executive branch traditionally has declined to hand over confidential files to other branches where it has been considered contrary to the public interest to do so. Investigative files often contain hearsay gossip, and other remote information from which the Government hopes to develop leads. Public disclosure of such trivia and possible falsehoods might work grave injury and injustice to those involved."

The position of a President is far different from that of any other public officer because an attack on him may lead to a national disaster. It has been repeatedly stated in the foreign press that the loss of confidence in President Nixon's authority has been a major cause of the financial difficulties which the United States has suffered, especially in the exchange value of the dollar. It has also been suggested that the sudden oil crisis is due in part to the Arab belief that this is a favourable time in which to bring pressure on the President. In the circumstances the forced publication of confidential tape recordings, some of which may be open to mis understanding, seems to be a doubtful constitutional innovation.

It does not follow from this that impeachment proceedings could not be brought against the President on the ground that his refusal to hand the confidential documents to the investigators constituted an action which was a serious violation of his duties, but it would be astonishing if such a proceeding would prove to be successful, as the President's refusal would be legally justified.

—*The Times*, 15 October 1973

# LEGAL EDUCATION IN NEW ZEALAND

by DR. R. G. LAWSON

In the United Kingdom, legal education is effected through the universities and the various colleges of law. A practising lawyer will often have experienced both kinds of institution. In New Zealand, however, the universities provide the only source of instruction. The universities involved are those at Auckland, Wellington, Christchurch and Otago.

Once at a university, the New Zealand student has two options open to him: he can either so structure his LL.B. course as to mean that he can qualify to practise law; or he can choose a degree course giving of itself no professional rights.

Basically, a law degree in New Zealand consists of 17 "units". Once a student has, normally over four years, achieved passes in 17 subjects he will graduate with his LL.B. Such a degree would not allow him to practise, however meritorious it was. Before he becomes so privileged he must, in those 17 subjects, have included certain topics stipulated by the New Zealand Law Society, the body which administers the profession. Those stipulated are Contract, Commercial Law, Land Law, Torts, Criminal Law, Equity and Company Law. Finally, the would-be practitioner must pass a further six "professional subjects", making a total of 23 subjects in all. These professional subjects are Conveyancing, Taxation and Estate Planning, Ethics and Advocacy, Office Administration, Evidence and, finally, Procedure.

The student who graduates with these 23 subjects behind him not only does so with his degree but he has also become entitled to admission to the profession as a Barrister *and* Solicitor of the Supreme Court of New Zealand. The existence of a fused profession, and the relatively smooth method of entry, marks a very clear distinction from the position in England. Thus admitted, the newly-qualified practitioner pays an annual subscription of (approximately) £50 per annum to his local law society. This will be an affiliate of the New Zealand Law Society, a body which recently celebrated its centenary. The code of ethics which the society administers, and the Law Practitioners Act of 1955 under which it operates, closely follow the English example.

It remains to be pointed out that a practitioner must be a member of a firm for at least two years before he can practise on his own. Those who wish to do so will then practise exclusively as barristers, others as solicitors. But which ever choice is made, each has the right of appearance before any court in the land.

**Administration**

The system of judicial administration in New Zealand will be familiar to English eyes. The court at the bottom of the ladder is the Magistrates' Court: it is placed below the Supreme Court, which in turn is beneath the Court of Appeal. Over all of these stands the Privy Council. Unlike Australia, New Zealand seems disinclined to abolish appeals to this last tribunal.

The magistrates' court needs explanation. Unlike the similarly named English courts the New Zealand magistrates' court is presided over by a salaried stipendiary magistrate who will have been a practitioner of seven years' standing. It is probably true to say that this court approximates to the English county court.

The Supreme Court is staffed by 17 Judges, one of whom is the Chief Justice, currently Sir Richard Wild. Normally, the Supreme Court consists of one Judge sitting alone, but in exceptional cases a full court of three Judges will hear the case. The writer recalls only one such case in recent years, concerning (perhaps inevitably) drunken driving.

The Court of Appeal, as presently constructed, dates

only from 1954. Prior to that, there was a Court of Appeal which could fairly be described as the Supreme Court under another hat, hearing appeals from itself. Now there are four Judges, one of whom is President of the Court of Appeal, now Sir Thaddeus McCarthy, specifically assigned to this Court. The Chief Justice is also a member *ex officio*. This Court in session consists of three Judges, two who are specifically Court of Appeal Judges, together with one Supreme Court Judge. The latter is selected by rotation.

The Judiciary, as befits a fused profession, is drawn from the ranks of both those who have practised as barristers or solicitors. The Court of Appeal Judges, in turn, are drawn from the Judges of the Supreme Court. Appointments are not made directly to the Court of Appeal from the ranks of the practitioners.

The law officers of the Crown are two in number: the Solicitor-General and the Attorney-General. Their functions are identical to those performed by their English counterparts. One point of distinction is, however, that the Attorney-General is often Minister for Justice as well. A far cry from the separation of powers!

**Conclusions**

The broad judicial system in New Zealand is sufficiently close to that in England to enable the lawyer of one country to feel at home in the other. The common law heritage of New Zealand makes the links even stronger. It seems a pity, however, that while the New Zealand courts pay ample attention to English cases, there is little evidence of reciprocity. To the writer's knowledge, there are many New Zealand precedents of value in the field of commercial law. Again, the judgment of the New Zealand Court of Appeal in *Stephenson v Waite Tilemann* [1973]] 1 N.Z.L.R. 152, is of monumental importance to the question of remoteness of damage. Now that England is severing her economic ties with the Commonwealth, it would be pleasurable to see this compensated for by a keener recognition of the jurisprudence of these former dominions.

# CORRESPONDENCE

**Valuation Office Delays**

C. E. Callan & Co.,
Boyle,
10/10/'73

Secretary,
Incorporated Law Society of Ireland.

Dear Sir,

The recent arrangement with the Estate Duty Office will help to process Estates more quickly.

However, we find that the "Bottleneck" appears to be in the Valuation Office, where there appears to be considerable delay in that department reporting to either the Estate Duty Branch or the Adjudication Office on Deeds.

It may be that this department is understaffed and unable to cope with the business sent to them for Valuation.

In the circumstances, the Society should examine the matter with a view to helping Solicitors to deal with business more quickly.

Yours faithfully,
Thomas Callan

9/1/1974

Thomas Callan, Esq.,
Messrs. C. E. Callan & Co.,
Solicitors,
Boyle, Co. Roscommon

Dear Sir,

I acknowledge receipt of your letter of October 10.

I have placed this matter before the Council of the Society and I am directed to request from you specific details of cases in which delay has occurred in the Valuation Office.

I am furthermore directed to publish your letter and this reply in the Gazette for the purpose of ascertaining whether other members of the profession are experiencing the type of delay you refer to. If this is the case it is hoped that practitioners will write to the Society outlining specific details of cases in which delay has occurred.

Yours faithfully,
Patrick Cafferky,
*Assistant Secretary*

**Requisitions on Title**

Patrick Noonan, B.A., LL.B.,
Athboy,
Co. Meath
27/11/1973

The Secretary,
Incorporated Law Society of Ireland.

Dear Sir,

The Law Society's Requisitions on Title are much too long and a great many of the questions asked are not Requisitions on Title a tall. I cannot see how a query relating to a Wireless Aeriel or a Television Aeriel has anything to do with the title to the property. The worst thing about them is that Purchasers just bang out these Requisitions without deleting the inappropriate ones and it is a common thing to be asked to deal with Fishery rights in connection with a house in the middle of the City of Dublin. I suggest that a Notice would be put in the Gazette drawing attention of Solicitors to the fact that leaving all these Requisitions in causes a great deal of unnecessary waste of time and money. I think the Requisitions should also be reviewed. For example there is a Requisition there as to identity and in the Law Society's own precedent Contract, this Requisition would be excluded. I am put to the trouble each time of referring the Requisitioner to the Contract.

Yours faithfully,
Patrick Noonan

Patrck Noonan, Esq., B.A., LL.B. 9 January 1974
Solicitor,
Athboy, Co. Meath

re.: **Societys' Requisitions on Title**

Dear Mr. Noonan,

Your letter of 27 November has been considered by the Council of the Society and upon report of the Court Offices and Costs Committee I have been directed to request more specific details of clauses which you are not particularly happy about.

I am also directed to publish the correspondence in the Gazette with a view to obtaining the views of the profession. Any Solicitors reading the correspondence

may then write to the Society indicating their views as to the suitability of certain clauses contained in the requisitions.

Should sufficient response be forthcoming, the requisition may be amended in the light of the experience of practitioners making use o fsame.

Yours sincerely,
Patrick Caffekry,
*Assistant Secretary*

Murtagh E. Burke & Co., Dingle, Co. Kerry. 30/10/1973

Dear Sir,

Paragraph 29 on page six of the Law Society Contract is not completely clear regarding the right to forfeit certain deposits. Apparently it is well established law thatt his right exists even where it is not specifically stated in the contract. None the less to avoid the slightest ambiguity in future we suggest that a statement to this effect is included in paragraph 29 or elsewhere in the next printing of The Law Society Contract. In reference also to the deposit it might also be stated that in addition it is also paid "in earnest to bind the contract".

Yours faithfully,
M. E. Burke & Co.

Peter Callery, Esq., 9 January 1974
Murtagh E. Burke & Co.,
Solicitors,
Dingle, Co. Kerry

Re.: **Law Society Contract for Sale—Right to forfeit deposit**

Dear Sir,

Your letter of 30 October 1973 has been considered by the Council of the Society. I am directed to insert later a short article in the Gazette dealing with the question of forfeiture.

The article will terminate with a request to practitioners to submit their views to the Society and the question of amendment of the contract for sale will be considered in the light of the views.

Yours faithfully,
Patrick Cafferky,
*Assistant Secretary*

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**Insurability of Apprentices**

Department of Social Welfare, Dublin 1
Mr. James J. Ivers, 3 December 1973
Director General,
The Incorporated Law Society of Ireland.

Dear Sir,

I am directed by the Minister for Social Welfare to refer to your letter of 30 November 1973 concerning the insurability under the Acts of Solicitors' Apprentices, and to state that, at present, the position is that employment under a contract of apprenticeship is compulsorily insurable under the Social Welfate Acts. However, employment as an apprentice in a Solicitor's office for less than 18 hours in the week, where the employed person is not mainly dependent for his livelihood on the remuneration from the employment, is expected from insurance under the Acts other than for occupational injuries benefit. In all other cases such employment under a contract of apprenticeship is insurable under the Acts at the full ordinary rate of contribution.

A social welfare contribution is payable at whatever rate is applicable for each contribution week during the whole or any part of which an employed contributor is employed by an employer. However, no contribution is payable in respect of any week in which no services are rendered and no remuneration is paid.

With regard to your enquiry concerning the position of solicitors' apprentices under the Social Welfare Pay-Related Scheme, this scheme will apply only to those whose employment is insurable at the full ordinary rate of contribution.

Yours faithfully,
(Miss) E. O'Toole

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Association Belge des Juristes d'Entreprise,
C/o Union Carbide Europe,
Avenue de la Renaissance, 34
B-1040 Bruxelles/Belgium
Eric A. Plunkett, Esq., 5 December 1973
Secretary,
The Incorporated Law Society of Ireland.

Dear Mr. Plunkett,

I have read the correspondence which you have exchanged with out former Chairman, Jean Van Uytvanck, whom I am now replacing.

Our Association in cooperation with the Bar Association for Commerce, Finance & Industry and The Law Society—Commerce and Industry Group, is organizing a meeting in Brussels on March 14 and 15, 1974, about the problems of agency and distribution contracts in EEC law with particular emphasis on the application of competition law. We are already assured of the participation of EEC officials from the Law Division and from the Competition Division, including Dr. Schlieder and other distinguished speakers.

We would welcome the attendance of the members of the Law Society of Ireland and also, more generally, we should be delighted if we could establish regular relations with Irish Lawyers.

The leaflets for the conference are not yet available but I shall send you a few copies as soon as possible. The conference will be held in French, English and Dutch with simultaneous translation and the fee (without hotel or transportation) will be approximately £40.

Needless to say, this short letter is only intended as a first contact and, should you wish, as I hope, to pursue the matter any further, I would be delighted to supply you with more detailed information and to answer any queries you may have.

Yours sincerely,
Guy J. Pevtchin,
*Chairman*

Corporate Bodies' Solicitors' Association,
4 Cowper Gardens,
Rathgar,
The Editor, Dublin 6
The Gazette, 28 December 1973
Incorporated Law Society of Ireland

Dear Mr. Gavan Duffy,

I have been notified by the Chairman of Association Belge Des Juristes D'Entreprise that that Association in cooperation with the Bar Association for Commerce, Finance & Industry and the Commerce and Industry Group of the Law Society (of England) is organising a conference to be held in Brussels on the 14th and 15th March next on the problems of agency and distribution contracts in the EEC with particular emphasis

on the application of the Competition Law. The conference will be conducted in French, English and Dutch with simultaneous translation. Registration, which will not cover transport or hotel accommodation, will be approximately £40. No further information is available at the moment but some leaflets on the event will be published when arrangements have been completed.

The Societies organising the conference invite the attendance of members of the Corporate Bodies Solicitors' Association and of Irish Lawyers generally, expressing their wish to establish regular relations with their counterparts in this Country.

Since the subject to be dealt with is of fundamental importance to Solicitors advising clients in the commercial field and as the participation of EEC officials from the Law Division and the Competition Devision has been assured, some members of the Incorporated Law Society may wish to attend the conference. You might care to mention the event in the Gazette as a preliminary announcement. When I receive the brochure, I hope to be able to give you more detailed information.

Yours sincerely,
R. B. McConnell,
*Chairman*

**Delays in Valuation Office**

Valuation Office
6, Ely Place,
Dublin 2
14th January 1974

Jas J. Ivers, Esq.,
Director of the Incorporated Law Society.

Re : Meeting in the General Valuation Office on the 8/1/74.
Subject Matter : Arrears of Estate Duty Cases in the office.
Present : Mr. J. J. Ivers (Director of the I.L.S.) and Messrs. McNicholl, Duffin and Kelly (Commissioner, Secretary and Staff Valuer respectively).

Dear Mr. Ivers,

It emerged in our discussion with you regarding delays in processing Estate Duty cases that one of the serious bottlenecks in the General Valuation Office arises from difficulties in co-relating the particulars returned in the Form D.I. with those in the Valuation Lists. It was mutually agreed that the scope of these difficulties would be very much reduced by the adoption of the following suggestions for the future :

1. Particulars on Form D.I. to be in type-script.
2. Complete all columns on the Form D.I. with relevant information.
3. That the following documents should be attached to the form D.I. (a) copy of Rate Demand Notes (preferably applicable at date of death) for each item or Certificate of Valuation from the Local Authority. (b) Copy of Auctioneer's or Valuer's Certificate.

The Commissioner for his part undertook to take all steps in his power to reduce the backlog of cases. At present there are some old files in the office which are held up because no replies were received from Solicitors when Demand Notes were requested. May I think you for your courtesy and understanding of the difficulties associated with the problem and I trust that through mutual co-operation an appreciable improvement will be effected.

Yours faithfully,
Martin Kelly

# BOOK REVIEWS

**Lipstein (Kurt)—The Law of the European Economic Community.** Royal 8vo.; pp. xliii, 368; London, Butterworth, 1974; £8.60.

Professor Lipstein has recently been appointed Professor of Comparative Law in Cambridge, and the vast learning, clarity and erudition displayed in his previous writings have been of great benefit to him in writing this volume. The treatise is divided into three parts and the aim, admirably achieved, is to show how the general framework provided for in the individual articles of the Treaty of Rome have been supplemented by Regulations, Directives and Decisions. The original abstract principles have now produced numerous concrete rules, but undoubtedly the ephemeral haste has sometimes tended to colour the percanent nature of the legislation.

Part I deals with the origins and purpose of the European Communities. It is emphasised that the Community is a full Customs Union tending towards the elimination of discrimination. Apart from the Treaty, Regulations and Directives it is also stressed that the general principles of the law common to the Member States is one of the main sources of Community Law. If there is a conflict between Community Law and domestic law in a Court of a Member State, the question must primarily be one of domestic constitutional law, but if the same problem arises simultaneously in the European Court in Luxembourp, then the question is primarily one of Community Law. The limited number of the provisions of the Treaty applicable to individuals are fully listed, with relevant cases, on page 29. When a national Court refers a case to the European Court under Art. 177 that Court is restricted in interpretation, as it cannot consider the facts of the case or any aspects or characteristics of domestic law, and cannot render a decision on the merits.

Part II deals with the range of the Treaty and its implementation, and is concerned with such problems as Customs Duties, Agriculture, Freedom of Establishment, Freedom of Movement of Workers, Transport, Cartels and Monopolies, Abuse of Dominant Position, and Fiscal Provisions. Part III deals in detail with the various remedies such as that arising on a reference by Domestic Courts administering Community Law. There is also an invaluable full chapter on procedure in the Community Court, which is so different to ours. The practitioner who has mastered the contents of this book will have an adequate knowledge of Community Law, thanks to the lucid style and pervasible learning of Dr. Lipstein which are so helpful. The presentation and printing are, as usual, excellent.

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**Elegantia Juris**—being selected writings of Professor Francis Headon Newark, Q.C. Edited by Francis J. McIvor. 8vo.; pp. xvi, 391; Belfast, Northern Ireland Legal Quarterly; 1973; £5.25.

This finely produced volume contains various legal articles written by Professor Newark in various Journals btween 1944 and 1970. Professor Newark, who came originally from Warwickshire and was a First Class Law graduate of Oxford, was appointed to Queen's University, Belfast, as an omniscient lecturer in no less than six law subjects in 1937. In 1946 Professor Newark obtained the chair of Jurisprudence, and in 1963, the chair of Civil Law; he had also been Secretary to the Academic Council and Editor of the Northern Ireland Law Reports until his retirement in September 1972. Although selected, the scope and variety of the erudition and learning of Professor Newark are outstanding as some of the following titles will show: "The Boundaries of Nuisance" (a learned historical account); "The Accidental Fires Act (N.I.) 1944" (following the Irish Act of 1943); "Dependent Relative Revocation (1955); "Public Benefit and Religious Trusts" (1946); "Bad Law" (1966); "Off-Beam Law Reform" (1968); "The Bringing of English Law to Ireland" (1972). The Case of Tanistry" (1952); "Notes on Irish Legal History" (1947); "Legislation Law and Precedent in Northern Ireland" (1970); "The Anatomy of a Law Report" (1965); "Headnotes" (1956); "Elegantia Juris" (1961); "Marriage in Law and Society" (1955) and "The Future of Roman Law in Legal Education" (1959). Some of his Obites Dicta have also been held for posterity, such as this one in 1955:

> "Approximately 50% of all litigants come out of the court room convinced that Justice has not been done."

Dr. Newark's sharp intellect and wide erudition are also shown in his Book Reviews. The essay, "Elegantia Juris" is an outstanding example in instruction how to deal with difficult legal phraseology. Mrs. McIvor has edited this volume with great sagacity, and has chosen the material from Professor Newark's writings admirably. The publishers deserve praise for the high standard in presentation and printing.

# DUBLIN SOLICITORS BAR ASSOCIATION

**UNCOLLECTED SEARCHES IN REGISTRY OF DEEDS**

The Association have been advised that there are a very large number of Negative Searches awaiting closing and collection by Solicitors. The Officials of the Registry would be grateful if Solicitors could arrange to close and collect these outstanding Searches as their number is causing inconvenience to the Registry.

# SOLICITORS APPRENTICES LIAISON COMMITTEE

The Solicitors' Apprentices Liaison Committee 1973-'74 consists of :

*Third Law* : Timothy Bouchier-Hayes, Chairman. David Leon, Secretary and Treasurer.

*Second Law* : Philip Joyce, David Turner.

# ALUMNI OF HAGUE ACADEMY

It is intended to hold the 26th Congress of the Association of Attenders and Alumni of the Hague Academy of International Law in Israel from Sunday, May 19, to Sunday, May 26, inclusive. Amongst the places to be visited are Jerusalem, Bethlehem, Jericho, Nazareth, Safed, Hafa, Caesarea, Tel Aviv, and Ashkelon. The price for the eight day Israeli tour alone, including accommodations, but excluding air travel to and from Israel, is £130 ($240). Particulars can be obtained from Miss Noelle Maguire, Solicitor, 10 Ardee Street, Dublin 8, or Bullock Harbour, Dalkey, Co. Dublin.

Applications must be received before 1 April 1974.

# SOCIETY OF YOUNG SOLICITORS —GALWAY SEMINAR

The Society will hold its next Seminar during the weekend 26/28 April 1974 at the Breat Southern Hotel, Galway. The theme of the Seminar will be based on Modern Aspects of Criminal Law and Procedure.

# FEBRUARY LAW EXAMINATIONS, 1974

Kindly note that no examination entries will be accepted after **Friday, 8 February 1974.** As arranged, the examinations will commence on Friday, 15 February 1974.

James J. Ivers
*Director General*

## CORRECTION

In the December 1973 Gazette, in an article at page 248 there appeared a statement that "complaints are made in U.C.D. about terrible staff-student ratios, and lecturers who know no Irish law". As most of the staff of the Law Faculty in University College are graduates either of the National University, or of Queen's University (Belfast), this statement does not apply to them. The view expressed is obviously not that of the Law Society nor of its Editor, and it is regretted that such a statement published negligently should have caused offence.

# THE REGISTER

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificate

An application has been received from the registered owner 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 is in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 31st January 1974.

D. L. McALLISTER,

Registrar of Titles

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

### Schedule

(1) Registered Owner: Denis O'Brien; Folio N O.: 8803; Lands: Kilriffet; Area: 6a. 3r. 28p.; County: Tipperary.

(2) Registered Owner: Patrick Dillon; Folio No.: (1) 11313; Lands: (1) Macetown; Area: (1) 19a. 2r. 20p.; Folio No.: (2) 11313; Lands: (2) Obertstown; Area: (2) 8a. 2r. 35p.; Folio No.: (3) 11313; Lands: (3) Obertstown; Area: (3) 22a. 1r. 23p.; County: Mayo.

(3) Registered Owner: Denis J. White; Folio: 45586; Lands: Coos South; Area: 3a. 1r. 8p.; County: Galway.

(4) Registered Owner: Arthur Kilgallen; Folio No.: 67; Lands: Soodry; Area: 13a. 2r. 6p.; County: Sligo.

(5) Registered Owner: William Lindsay; Folio No.: 729; Lands: Tonyhull; Area: 18a. 3r. 19p.; County: Cavan.

(6) Registered Owner: Gerard Anthony Joseph Rush; Folio No.: 19623L; Lands: Part of the townland of Blanchardstown in the Barony of Castleknock situate to the north of the Royal Canal in the Town of Blanchardstown; Area: 0a. 0r. 10p.; County: Dublin.

(7) Registered Owner: James Lyons; Folio No.: 1039; Lands: (1) Cartronroe; Area: (1) 26a. 0r. 16p.; Folio No.: 1039; Lands: (2) Annagh; Area: (2) 1a. 2r. 0p.; County: Sligo.

(8) Registered Owner: Andrew Cummins; Folio No.: 14941; Lands: Danescastle; Area: 16a. 2r. 29p.; County: Wexford.

(9) Registered Owner: Thomas Conway and Bridget Conway; Folio No.: 17454; Lands: (1) Tintern; Area: (1) 32a. 3r. 15p.; Folio No.: (2) 17454; Lands: (2) Saint Kierans; Area: (2) 9a. 2r. 32p.; Folio: (3) 17454; Lands: (3) Burkestown; Area: (3) 1a. 0r. 0p.; County: Wexford.

(10) Registered Owner: Patrick Clarke; Folio No.: 15845; Lands: Not Stated; Area: Not Stated; County: Dublin.

(11) Registered Owner: Michael Mooney; Folio No.: 1034; Lands: Kilbarry; Area: 55a. 2r. 11p.; County: Waterford.

(12) Registered Owner: Patrick Daniel O'Dwyer; Folio No.: 10020; Lands: Grange; Area: 39 perches; County: Limerick.

(13) Registered Owner: Arnold McDonald; Folio No.: 1716; Lands: Knockahonagh; Area; 31a. 0r. 6p.; County: Queens.

(14) Registered Owner: Arnold McDonald; Folio No.: 6285; Lands: Luggacurren; Area: 46a. 3r. 18p.; County: Queens.

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**Solicitor** required for office in the city of Waterford. Salary negotiable and commensurate with qualifications and experience. Box 102, Law Society.

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**Assistant Solicitor** required. Experience necessary. Please furnish full particulars to Patrick J. McCormack, Solicitor, Tipperary Town.

## LOST WILL

Re: **Miss Martha Rowan,** deceased, late of 10 Anne Street Waterford. Will any person knowing the whereabouts of the Last Will and Testament of the above deceased please communicate at once with the undersigned Solicitors.

D. D. MacDonald & Co.,
Solicitors,
55 Mtrrion Square,
Dublin 2.

---

**Miss Bridget Farrell,** deceased, late of 6 Cast le Terrace, Phibsboro, Dublin and formerly of 22 Constitution Hill. Will any person having knowledge of a Will of the above mentioned deceased, who died on the 22 November 1973 please communicate with Messrs. Patrick F. O'Reilly & Co., Solicitors, 8 South George's Street, Dublin 2.

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**Mary T. Korowicz,** deceased, late of 17 Greenmount Lawns, Terenure, Dublin 6. Would any Solicitor having knowledge of a Will or a Codicils made by the above-named deceased plese communicate as a matter of urgency with the undersigned. Taylor & Buchalter, Solicitors, 126 St. Stephen's Green, Dublin 2.

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### Lost Deeds

Some original documents of title relating to the premises 360 Clontarf Road, Dublin, were mislaid in the vicinity of the Four Courts in September 1972. Would any person having any knowledge of the whereabouts of these documents please communicate with Messrs. Hussey & O'Higgins, Solicitors, 17 Northumberland Road, Dublin 4.

---

**Girl** (17½) having matriculated Summer 1973 and now studying for Leaving Certificate, seeks apprentictship Autumn 1974. Suitable Premium paid. Replies to Box Number 100.

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**Girl** (17) having matriculated Summer 1973, now studying for B.C.L., seeks apprenticeship Autumn 1974. Suitable Premium paid. Replies to: Mary Kennedy, 28 Waltersland Road, Stillorgan, Co. Dublin.

---

**Student** (25) qualifying Autumn 1974 with B.A. and B.C.L. (Hons.) (U.C.C.) seeks apprenticeship as soon as possible. Also two years experience in United States. Suitable premium paid. Replies to Box No. 101.

---

**B.C.L. Student** (19) seeks solicitor with view to apprenticeship. Has experience of office work and willing to work. Replies to: Mr. Enda Moran, 3 Kensington Villas, Mt. Pleasant Ave., Rathmines, Dublin 6.

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**Would Solicitors** for the late **Margaret Crooke** whose last address was at 29 Upper Buckingham Street, Dublin please contact Mrs. Marie Delaney at 8 Farnham Drive, Finglas, Dublin 11.

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# *Directory of Surveyors, Auctioneers, Valuers, Land ana Estate Agents*

## CORK

LISNEY & SON, Estate Agents, Auctioneers, Valuers and Surveyors, 35 Grand Parade, Cork. Telephone: (021) 25079.

## DUBLIN

ADAM, JAMES & SONS, Auctioneers, Valuation Surveyors, Estate Agents. Also Fine Art Sales, Valuations. 26 St. Stephen's Green, Dublin 2. Telephone: 638811. (Estd. 1877).

ARRAN AUCTIONEERS (AA) LTD., Auctioneers - Valuers - Estate Agents. Telephone: 66543/62866, 35 Fitzwilliam Place, Dublin 2.

BRIERLEY & CO. (W. John M. Brierley, A.R.I.C.S., M.I.A.V.I., Philip L. Chambers, A.R.I.C.S.), Auctioneers, Surveyors, Valuers and Estate Agents, 18 Dawson Street, Dublin 2. Telephone: 60990.

COSTELLO & FITZSIMONS LTD., Auctioneers and Valuers. Specialists in sale of businesses as going concerns. Also Estate Agents for Investment Properties and Flats. 58 Haddington Road, Dublin 4. Telephone: 61861/694971.

DILLON ASSOCIATES LTD., Estate Agents, Valuers, Auctioneers, 21 Northumberland Road, Ballsbridge, Dublin 4. Telephone 677571/67048.

FINNEGAN MENTON, Estate Agents, Auctioneers, Valuers and Surveyors, 17 Merrion Row, Dublin 2. Telephone 63914.

GILBERT & SON LIMITED, Auctioneers, Estate Agents, Valuers, M.I.A.V.I., M.I.R.E.F., 25 Lower Baggot Street, Dublin 2. Telephone 63557/63558.

GUINEY, EAMONN, M.I.A.V.I., Auctioneers, Valuers, and Estate Agents. 60 Ballygall Road East, Glasnevin, Dublin 11. Telephone 342833/342221.

HAMILTON and HAMILTON (Estates) LTD., Auctioneers, Estate Agents and Valuers, M.I.A.V.I. 17 Dawson Street, Dublin 2. Telephone: 775481.

JACKSON-STOPS & McCABE, Surveyors, Auctioneers, Estate Agents and Valuers. Estate House, 8 Dawson Street, Dublin 2. Telephone: 771177.

JONES, LANG, WOOTTON, Chartered Surveyors, 60/63 Dawson Street, Dublin 2. Telephone: 771501. Telex: 4126.

LISNEY & SON, Estate Agents, Auctioneers, Valuers and Surveyors, 23 St. Stephen's Green, Dublin 2, and 35 Grand Parade, Cork, and 9 Eyre Square, Galway. Telephone: Dublin 64471.

MORGAN SCALES & CO. (Desmond G. Scales F.I.A.V.I.), Auctioneers, Valuers, Estate Agents and Managers. 24 South Frederick Street, Dublin 2. Telephone: 60701 and Rathmines 973870.

O'CONNELL & LYONS LTD., Auctioneers, Valuers and Estate Agents, 455 South Circular Road, Rialto, Dublin 2. Telephone 755694.

ORCHARD AUCTIONEERS LTD. (David E. St. C. Herman, M.I.A.V.I., M.I.R.E.F.), Property Auctioneers, Valuers, Estate Agents and Rent Collectors. Specialists in the valuation of Antiques and Fine Arts. The Fountain House, Rathfarnham, Dublin 14. Telephone 909590.

TOWN AND COUNTY AUCTIONS LTD., M.I.A.V.I., M.I.R.E.F., Auctioneers, Estate Agents and Valuers. 2 Clare Street, Dublin 2. Telephone 60820/60791.

ORCHARD AUCTIONEERS, M.I.A.V.I., M.I.R.E.F., The Fountain House, Rathfarnham, Dublin 14. Telephone 909590.

## GALWAY

LISNEY & SON, Estate Agents, Auctioneers, Valuers and Surveyors, 9 Eyre Square, Galway. Telephone: (091) 3107.

THE GAZETTE OF
THE INCORPORATED
LAW SOCIETY
OF IRELAND

MARCH 1974.
Vol. 68 No. 3

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# EDITORIAL

# Social Insurance for all

The principle of social insurance for all appears to have been accepted, when the Social Welfare Act 1973 was passed. Section 12 of that Act removed the remuneration limit of £1,600 which had been introduced by the Social Welfare (Miscellaneous Provisions) Act 1965 as from 1 April 1974 and henceforth all persons, whether employed or self-employed, are at one stroke liable to pay social welfare contributions regardless of their remuneration. Socialists contend that if all persons pay the requisite contributions, they will in due course be entitled to the requisite benefits. This does not appear to take into account the wide wording of Article 40, Section 3 of the Constitution by which the State guarantees in its laws to respect and as far as possible to defend and vindicate the personal rights of the citizens. Furthermore the State is compelled without limit to protect as best it may, and in the case of injustice done, to vindicate the life, person, good name and property rights of every citizen. Insofar as a citizen wishes voluntarily to join the State social insurance scheme, obviously no restraints should be placed upon his wish. But it is submitted that previous Constitutional judgments of the Supreme Court can be relied upon for the proposition that the Minister has not acted in accordance with the Constitution by compelling everybody to join a social insurance scheme willy-nilly, whether they wish to avail of the benefits or not, on the alleged ground of the Common good. It has been stated in the Sinn Fein Funds case—1950 I.R.—that the common good is not within the exclusive preserve of the Legislature. This appears therefore, to be a manifest injustice to the personal and property rights of the citizen if he has made satisfactory private arrangements through insurance to meet contingencies like illness, death or unemployment. In many Continental countries, all citizens above a prescribed limit, which presumably would be £2,400, have a free choice to join or not to join a social insurance scheme. If as a result of *Fitzpatrick v. Educational Company*, a citizen has a right to join or not to join a trade union, it is submitted that a citizen above a prescribed limit has all the more a right to join or not to join a prescribed social insurance scheme.

# THE SOCIETY

# Proceedings of the Council

**FEBRUARY 7**

The President in the Chair also present Messrs. B. Allen, Walter Beatty, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony E. Collins, Gerard M. Doyle, Joseph L. Dundon, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, Thomas Jackson, John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. kargetson, Perald J. Maloney, Patrick C. Moore, Patrick McEntee, Brendan A. McGrath, John J. Nash, Peter E. O'Connell, Patrick F. O'Donnell, Dermot G. O'Donovan, James W. O'Donovan, Rory O'Connor, William A. Osborne, David R. Pigot, Mrs. Moya Quinlan, Brian W. Russell, Robert McD. Taylor and Ralph J. Walker.

**Gazumping**

The Council has arranged with the Construction Industry Federation for a meeting between members of the Legal Profession and of the Building Industry with regard to formulating standard policy relating to booking deposits taken by builders on new houses and to prevent any forms of "gazumping".

**Twelfth Interim Report of the Committee on Court Practise and Procedure**

The Society have made detailed representations to the Department of Justice and Court organisations. The views of local Bar Associations were stressed by the Society in its representations.

**Review of Conveyancing Procedures**

The Council appointed a Committee to review conveyancing procedures with a view to suggesting legislative reform which may be necessary.

**Practise by Solicitors as Unlimited Companys**

The Council were advised by Counsel that solicitors could not practise in the form of an unlimited company. The Council accepted that this advice was correct.

**Solicitor devoted to wholetime Legal Aid Project**

The Council approved of a newly qualified solicitor setting up a free legal advice project on the basis that he was restricted to acting on an advisory capacity for a limited period, after which the matter will be reviewed.

# UNREPORTED IRISH CASES

**McGee v. Attorney General—Section 17 (3) of the Criminal Law Amendment Act 1935. Which restricts the importation of contraceptives is unconstitutional.**

**Facts:**

Plaintiff Catholic married woman and Irish Citizen, aged 27, lives with fisherman husband and four young children, including twin girls in Loughshinny, Co. Dublin. The parties were married in June 1968. The plaintiff claims that pregnancies led to serious attacks of Cerebral Thrombosis, Paralysis and toxaemia. She contacted her doctor, and he advised her, in view of her health, to order some contraceptive jelly which would not induce pregnancy, if ordinary sexual relations were to be continued. The Customs authorities eventually seized the contraceptive jelly under S.47 of the Customs Consolidation Act 1876 on the ground that S.17 of the Criminal Law Amendment Act 1935 absolutely prohibited the sale and importation of Contraceptives. The plaintiff seeks a declaration that the said S.17 is unconstitutional, as being inconsistent with the following Articles of the Constitution :

(1) Article 40, Section 1.
(2) Article 40, Section 3.
(3) Article 41.
(4) Article 42.
(5) Article 44 (Section 2.
(6) Article 45 of the Constitution.
(7) The Preamble and Article 6.

(1) **Article 40, Section 1 of the Constitution**

**Per Walsh J.** It is claimed that Section 17 discriminates unfairly against the plaintiff and fails to hold her as a human person equal before the law, in that it fails to have due regard to her physical capacity, her moral capacity and her social function, in the situation as regards her health in which she now finds herself.

The provisions of Article 40, Section 1, would permit the State to discriminate between married persons and others in the sense that where conception could more than ordinarily endanger the life of a particular person within the normal state, the law could have regard to this difference in physical capacity and make special exemptions in favour of such persons.

**Per Fitzgerald C.J.** (**dissenting**). In considering Article 40, Section 1, the plaintiff has personal characteristics not common to all citizens, insofar as (1) she is a female, (2) she is a married woman, (3) she is of childbearing age, and (4) a further pregnancy would expose her to dangerous risks on account of her health, which is the real basis of her claim. Nevertheless this section does not create any inequality affecting plaintiff's right, and therefore Section 17 does not contravene it.

(2) **Article 40(3) of the Constitution**

**Per Walsh J.** An exemption on the ground of health would be justified under Article 40, Section 3, on the grounds that one of the personal rights of a woman in the plaintiff's state of health would be assisted in her efforts to avoid putting her life in jeopardy. Hence the State has the positive obligation to ensure by its law that there would be available to married women in the plaintiff's state of health the means, whereby conception which was likely to put her life in jeopardy, might be avoided, when it is an extraordinary risk. It would in the nature of things be much more difficult to justify refusal to do this on the grounds of the common good than in the case of married couples generally.

**Per Henchy J.** It is the totality and absoluteness of the prohibition effected by S.17 that is impugned as allegedly infringing her constitutionally guaranteed rights as a citizen. The unspecified personal rights guaranteed by Article 40, Section 3, are not confined to those specified in the Constitution. It is for the Courts to decide in a particular case whether the right relied on comes within the Constitutional guarantee. To do so, it must be shown that it is a right that inheres. The lack of precision in this case is reduced when this Article is read in the light of what the Constitution deems to be fundamental to the personal standing of the individual.

The dominating feature of the plaintiff's dilemma is that she is a young married women, living in cramped quarters of a mobile home with her husband and four infant children on a slender income, who is faced with considerable risk of health or of crippling paralysis if she becomes pregnant. The net question is, is it Constitutionally permissible in the circumstances for the law to deny her access to the contraception methods chosen by her, and which she and her husband wish to adopt?

The answer lies primarily in the fact that Mrs. McGee is a wife and mother. It is the informed and conscientious wish of herself and her husband to maintain full marital relations, but without incurring the risk of a pregnancy that may very well result in her death or in a crippling paralysis. S.17 frustrates that wish. It goes further, it brings implementation of it within the range of the criminal law. Its effect therefore is to condemn the plaintiff and her husband to a way of life which at best will be fraught with worry, tension and uncertainty that cannot but adversely affect their lives, and at worst will result in an unwanted pregnancy causing death or serious illness. And this in a Constitution which, in its preamble, proclaims as one of its aims the dignity and freedom of the individual, and which in Art. 40, Section 3(2) casts on the State a duty to protect as best it may from unjust attack, and, in the case of injustice done, to vindicate the life and person of every citizen.

S.17, so far from respecting the plaintiff's personal rights, violates them. If the plaintiff observes this prohibition (which in practice she can scarcely avoid doing) she will endanger the security and happiness of her marriage, she will imperil her health to the point fo hazarding her life, and she will subject her family to the risk of distress and disruption. If, on the other hand, she fails to obey the prohibition in Section 17, the law, by prosecuting her, will reach into the privacy of her marital life, in seeking to prove her guilt. **In my opinion, S.17 violates the guarantee by the State in Article 40, Section 3(1) by its laws to protect her personal rights—not only by violating her personal right**

**to privacy in regard to her marital relations—but, in a wider way, by frustrating and making criminal on her part to effectuate the joint decision of husband and herself, to avail themselves of a particular contraceptive method, so as to ensure her life and health, as well as the integrity, secutiry and well-being of her marriage and of her family.**

**Per Budd J.** There is no presumption in favour of the constitutionality of a pre-Constitution Statute. Section 17 was therefore only carried forward if not inconsistent with the Constitution. The construction of the Constitution is essentially a matter for the Courts. It is not contested that the plaintiff considered her decision to be the best open for her. Her husband agreed with her. The State guarantees as far as practicable by its laws to vindicate the personal rights of the citizen. What more important personal right could there be in a citizen than that to determine in marriage his attitude and resolve his mode of life concerning the procreation of children. **While "personal rights' 'are not set out specifically nevertheless in our society, the right to privacy including that of marital relationship is universally accepted.** S.17 is in conflict with the personal rights of the citizen as to the guarantee contained in Article 40, Section 3(1) to respect, defend and vindicate the personal rights of the citizen relative to the privacy of married life and marital relations.

**Per Griffin J.** One of the personal rights claimed on behalf of the plaintiff is the right of privacy in her marital relations with her husband. The Constitution does not define the personal rights guaranteed by Article 40. It was howver pointed out by Kenny J. in *Ryan v. Attorney General* (1965), I.R. at page 313 that the general guarantee in Article 40(3) extends to rights not specified in Article 40, and that there are many personal rights of the citizen which follow from the Christian and democratic nature of the State which are not mentioned in Article 40 at all. The Courts have not attempted to define with exactitude or to make a list of the rights which may properly be included in the category of personal rights, but Kenny J. instanced the rights to bodily integrity and the right to marry. Inherent in the right to marry is the right of married persons to establish a home and bring up children. **The right of marital privacy is one of the personal rights guaranteed by Article 40, Section (3) (1).** In that subsection, the guarantee of the State in its laws to respect the personal rights of the citizen is not subject to the limitation of "as far as practicable". In my opinion, a statute which makes it a criminal offence for plaintiff or her husband to import or to acquire possession of contraceptives for use within the marriage is an unjustifiable invasion of privacy in the conduct of the most intimate of their personal relationships. Accordingly Section 17 (3) is inconsistent with the Constitution.

**Per Fitzgerald C.J.** (*dissenting*). The right to marry and the intimate relations between husband and wife are fundamental rights which existed, and have existed, in most, if not all, civilised countries for many centuries. These rights were not conferred by the Constitution in this country in 1937. The Constitution goes no further than to defend and vindicate and protect those rights from attack.

If Section 17 prohibited the use of contraceptives, it might reasonably be held to contravene Article 40. The Section howver does not do so, and, in my opinion, is not inconsistent with any of the clauses of that Article.

**Article 41 of the Constitution**

**Per Walsh J.** It is claimed that Section 17 is inconsistent with Article 41(1) of the Constitution in that it violates the inalienable and imprescriptible rights of the family in a matter which the plaintiff claims is peculiarly within the province of the family itself. This Section attempts to frustrate a decision made by the plaintiff and her husband for the benefit of their family as a whole, and thereby attacks and fails to protect the Family in its Constitution. Furthermore it is claimed that Section 17 is inconsistent with Article 41(2) of the Constitution, in that it fails to recognise and give due weight to a private family decision of the plaintiff and her husband touching her life within the home, and thus endangers the plaintiff's life, and refuses to allow her to live her life within the home.

**It is to be noted that Articles 41, 42 and 43 emphatically reject the theory that there are no rights without law, no rights contrary to law and no rights anterior to law. They indicate that Justice is placed above the Law, and acknowledge that Natural Rights or Human Rights are not created by law, but confirm their existence and give them protection.**

**The individual has natural and human rights over which the State has no authority. The Family as the natural primary and fundamental unit group of Society has rights as such which the State cannot control.** However the individual as a member of Society, and the Family as a unit of Society, have duties and obligations to consider and respect the common good. As *O'Byrne J.* stated in *Buckley v. A.-G.* (1950) I.R. 67—the power of the State to act for the protection of the common good is not one reserved for the Legislature, because the decision of the Legislature can always be reviewed by the Courts. **This means in concrete terms that the Oireachtas is not free unjustifiably to encroach upon the fundamental rights of individuals or of the family in the name of the common good**—or by act or omission to abandon or to neglect either the common good, or the protection or enforcement of the rights of individual citizens.

In considering Article 41—the plaintiff's most important claim—the state of her health is immaterial. The strong wording of the Article is stressed where the State, while recognizing the Family as the natural, primary and fundamental unit group of society, and as a moral institution possessing inalienable and imprescripitible rights antecedent and superior to all positive law, guaranteed to protect it in its constitution and authority as the necessary basis of social order, and as indispensable to the welfare of the Nation and of the State. Furthermore, the parents are recognised as the natural guardians of the children of the family, and those who have the right to determine how family life is to be conducted. It is a matter exclusively for the husband and wife to decide how many children they wish to have—and the parents have a correlative right to agree to have no children. But any action on the part of either husband or wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of that human life.

The sexual life of a husband and wife is of necessity and by its nature an area of particular privacy. If the husband and wife decide to limit their family or to avoid heaving children by use of contraceptives this is a matter peculiarly within the point decision of the husband and wife, and one into which the State

cannot intrude. However the fact that the use of contraceptives may offend against the moral code of a majority of the citizens of the State would not *per se* justify an intervention by the State to prohibit their use within marriage. **The private morality of its citizens does not justify intervention by the State into the activities of those citizens unless and until the common good requires it.**

**The rights of a married couple to decide how many children, if any, they will have, are matters outside positive law. It is outside the authority of the State to endeavour to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon that husband and wife which they do not desire. Article 41 guarantees the husband and wife against any such invasion of their privacy by the State. It follows that the use of contraceptives by them within that marital privacy is equally guaranteed against such invasion, and, as such, assumes the status o fa right guaranteed by the Constitution.** Section 17, insofar as it unreasonably restricts the availability of contraceptives for use within marriage is inconsistent with Article 41 for being an unjustified invasion of the privacy of husband and wife in their sexual relations with one another. This declaration sought should only go in respect of Subsection 3 of Section 17 which bans the importation of contraceptives. That does not necessarily mean that the provisions as to sale of contraceptives in Section 17(1) cannot be impugned. If the prohibition on sale had the effect of leaving a position where contraceptives were not reasonably available for use within marriage, then that prohibition must also fail.

**Per Fitzgerald C.J.** (*dissenting*). It was submitted on behalf of the plaintiff that, in addition to the rights of herself and her husband, based on their married state that in some way the four infant children of the marriage were entitled to be considered by the law as being entitled to protection as having an interest in seeing that the family was not further enlarged. This contention appears to me to be completely untenable. It appears to me to be fundamental to the married state that the husband and wife and they alone shall decide whether they wish to have children, and the number of children they wish to have.

### Article 42

**Per Walsh J.** The plaintiff has also invoked the provisions of Article 42(1) of the Constitution by relating her decision to practise contraception as being partly motivated by their desire to provide for the better education of their existing children, and that S.17 attempts to frustrate that decision.

**In a pluralist society such as ours, the Courts cannot, as a matter of Constitutional Law, be asked to choose between the defining views, where they exist, of experts on the interpretation by different religious denominations of either the nature or extent of these Natural Rights as they are to be found in the Natural Law.** The same considerations apply also to the question of ascertaining the nature and extent of the duties, which flow from the Natural Law. Indeed the Constitution itself speaks of these duties when referring to the inalienable duty of parents to provide, according to their means, for the religious, moral, intellectual, physical and social education of their children.

**Per Fitzgerald C.J.** (*dissenting*). I see nothing in S.17 which is in any way inconsistent with Article 42 of the Constitution. That Article is only concerned with the duties and rights of parents and the duty of the State in relation to the education of children. While Art. 42(3) provides that parents shall not be obliged, in violation of their conscience, to send their children to a State school or to any particular type of school, it is quite unjustifiable to take the word "conscience" out of its context and seek to apply it to the wish of the parents as to whether they would have children or not.

### Article 44(2)

**Per Walsh J.** Article 44(2) of the Constitution guarantees freedom of conscience and the free profession and practice of religion, subject to public order and morality, to every citizen. The plaintiff claims that S.17 prevents her from leading her private life in accordance with dictates of her own conscience. The plaintiff states that so far as her conscience is concerned, the use of contraceptives by her is in accordance with her conscience, and that, in using them, she does not feel that she is acting against her conscience.

What Article 44(2) (1) means is that no person shall directly or indirectly be coerced or compelled to act contrary to his conscience in so far as the practice of religion is concerned, and, subject to public order and morality, is free to profess and practice the religion of his choice in accordance with his conscience. Correlatively, he is free to have no religious beliefs, or to abstain from the practice and profession of any religion. It does not follow that because a person feels free, or even obliged in conscience to pursue some particular activity not in itself a religious practice, that such activity is guaranteed protection by Article 44. What the Article guarantees is the right not to be compelled or coerced into a way which is contrary to one's conscience, so far as the exercise, pracitce or profession of religion is concerned. Religiously speaking, the society we live in is a pluralist one. As stated in the *Quinn's Supermarket* case (1972) I.R. 15, guarantees of religious freedom and freedom of conscience are not confined to the different denomination of the Christian Religion, but extended also to *other* religious denominations.

**Per Fitzgerald C.J.** (*dissenting*). In my opinion the freedom of conscience referred to in Article 44(2), relates exclusively to the choice and profession of a religion. Hence the word "conscience" cannot be taken out of context, and applied to the decision of the plaintiff and her husband, or any other named, as to whether they should have children or not.

### Article 45

**Per Fitzgerald C.J.** (*dissenting*). Article 45 refers to principles of social policy intended for the general guidance of the Oireachtas in its making of laws, which are declared to be exclusively its province, and not cognizable by any Court. In my opinion, the intervention by this or any other Court with the functions of the Oireachtas under the Article is expressly prohibited. To hold otherwise would be an invalid usurpation of legislative authority.

**Per Walsh J.** The plaintiff has claimed that Article 45(1) is applicable. This states that the State shall strive to promote the welfare of the whole people by securing and protecting as effectively as it may a social order in which Justice and Charity shall inform all institutions of the national life. (This claim is subsequently rejected.)

**Preamble and General Observations**

**Per Walsh J.** The plaintiff also invoked the portion of the Preamble to the Constitution in which "the People, in giving themselves the Constitution, express the intention to seek to promote the common good with due observance of Prudence, Justice and Charity so that the dignity and freedom of the individual may be assured".

There is no law in force in the State which prohibits the use of contraceptives either in or outside of marriage, or the manufacture or distribution of contraceptives manufactured within the State. (There are none of these.)

The Attorney-General contended that a statutory provision in force prior to the Constitution could continue to be in force and to be carried over by Article 50 even though its provisions were such as could not now be validly enacted by the Oireachtas, because of the provisions of the Constitution. Stated as a general proposition, this is in direct conflict with Article 50 and is quite unsustainable. **In my view, Article 50 by its very terms, both in its Irish and English texts, makes it clear that laws in force in Saorstát Éireann shall continue to be in force only to the extent that they are not inconsistent with the Constitution.** If the inconsistency arises for the first time after the coming into force of the Constitution, i.e. 29 December 1937, the law carried forward thereupon ceases to have effect.

To control or prohibit the sale of contraceptives is not *per se* necessarily unconstitutional, nor is a control on the importation of contraceptives *per se* necessarily unconstitutional. There may be many reasons grounded on considerations of public health, such as risk of infection, or of public morality, or even fiscal or protectionist reasons, why there should be a control on the importation of such articles. What is challenged here is the constitutionality of making these articles unavailable ... in the present state of the law, which involves the possibility of a criminal prosecution and conviction. In concrete terms, O'Byrne J's dictum in *Buckley v. Attorney-General*—(1950) I.R. 67—that the Legislature is not free unjustifiably to encroach upon the fundamental rights of individuals, or of the family, in the name of the common good, or by act or omission to abandon or to neglect the common good, or the protection or enforcement of the rights of individual citizens, is approved.

Counsel for the Revenue Commissioners contended that it was a matter for the plaintiff to prove that, if she had a right to use contraceptives within the privacy of her marriage, that it was for her to prove from whence this right sprang. At first sight, this appears reasonable, but it ignores an essential fundamental point—the rights of a married couple to decide how many children they will have, if any—these are matters outside the reach of positive law, where the means employed to implement such decisions, do not impinge upon the common good, or destroy or endanger human life. It is clear that, in the case of a moral code governing private morality, where the breach of it is not one which injures the common good, then it is not the State's business to intervene. **It is outside the authority of the State to intrude into the privacy of the husband and wife relationship for the sake of imposing a code of private morality upon the husband and wife, which they do not desire.**

The claim under Article 41 is admissible on the basis that the plaintiff is a married woman, whereas the claim under Article 40(3) is admissible on the different ground that her state of health is impaired.

Both in its Preamble and in Article 6 of the Constitution, God is acknowledged as the ultimate source of all authority. The Natural or Human Rights which I have referred to earlier are part of Natural Law. Many argue that Natural Law may be regarded only as an ethical concept, and, as such, is a re-affirmation of the ethical content of law in its ideal of justice. The Natural Law as a theological concept is the law of God promulgated by reason and is the ultimate governor of all the laws of man. **In view of the acknowledgment of Christianity in the Preamble, and the acknowledgment of God in Article 6, it must be accepted that the Constitution intended Natural Human Rights as being in the latter theological category of Natural Law rather than simply as an acknowledgment of the ethical content of law.** When the Constitution speaks of certain rights as being imprescriptible or inalienable, or being antecedent or superior to all positive law, it does not specify what all of those are. In a pluralist society such as ours, the Courts cannot, as a matter of constitutional law, be asked to choose between the differing reasons, where they exist, of experts on interpretation by the different religious denominations of either the nature and extent of the duties which flow from Natural Law, such as the inalienable duty of parents to provide for the religious, moral, intellectual and physical education of their children. In this country, it falls finally upon the Courts to interpret the Constitution—and, in so doing, where necessary, to determine what are the Rights which are superior or antecedent to positive law, and which are unprescriptible and inalienable. In the performance of this difficulty duty, there are certain guide lines laid down in the Constitution for the Judge. **The very structure of the Articles and the content of the Articles dealing with Fundamental Rights indicate that Justice is not subordinate to Law. In particular Article 40 Section 3 expressly subordinates Law to Justice.** Both Aristotle and the Christian philosophers have regarded Justice as the highest human virtue, but the virtue of Prudence was also esteemed. But the great additional virtue introduced by Christianity was that of Charity—not the charity which consists of giving to the deserving, which is but Justice, but that Charity which is also called mercy. The Preamble mentions the due observance of Prudence, Justice and Charity, so that the freedom of the individual may be assured. The Judges must therefore, as best they can, from their training and experience, interpret these Rights, in accordance with their idea of Prudence, Justice and Charity. **No intrepretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.** The development of the constitutional law of the U.S.A. is ample proof of this.

**Per Henchy J.** The Criminal Law Amendment Act, 1935, is aimed, not at population control, but at the suppression of vice, and the amendment of the law relating to sexual offences. Section 17 creates a criminal prohibition in an area in which the Legislature thought fit to intervene in the interests of public morality. What it seeks to do is, by means of the sanction of the criminal law, to put an end, as far as it was possible to do so by legislation, to the use of contraceptives in the State. It does not in terms make the use of contraceptives a crime, but the totality of the prohibition aims at nothing less. The effect of Section 17(1) makes it legally impossible to sell or buy a contraceptive within the State. **Because contraceptives are not**

**manufactured in this State, the effect of S. 17 is—that it is not legally possible to obtain a contraceptive. It is doubtful if the Legislature could have taken more effective steps by means of the criminal law to put an end to their use.**

**Per Fizgerald C.J.** (*dissenting*). I think it well to make it quite clear that, while it is pleaded and proved that the plaintiff and her husband are of the Roman Catholic religion, the issue to be determined is not based on any issue related to any particular religion.

It is perhaps worthy of note that the product known as "The Pill" can be imported and sold in the open market quite lawfully. It is not included in the Schedule which prohibits the importation or sale of contraceptives.

It is, I think, well to realise that **the plaintiff's claim here is, as a citizen,** and **that if any portion of Section 17 is declared unconstitutional, the benefit to be derived from such a decision is equally to be enjoyed by every citizen, be they married or not.** The fact that the plaintiff professes a particular religion, or that she and her husband have agreed upon a particular course, is quite irrelevant. To hold otherwise would be to distinguish between citizens of different religions. Having regard to the constitutional provision prohibiting divorce, the physical or mental illness of one spouse necessarily has its repercussions on both, perhaps for their joint lives. These appear to me to be natural hazards which must be faced by married couples with such fortitude as they can summon.

**An English divorce obtained fraudulently by fear is invalid, consequently the first wife is entitled to administer her husbands' estate, to the exclusion of the second wife.**

The husband married his first wife, Alice, at the age of 21, in a Catholic Church in Dublin in December 1940. They were both Irish citizens, lived in various addresses around Dublin, and eventually had seven children. The husband was a domineering man who was very successful in business. He treated his wife with cruelty, and used physical violence against her on numerous occasions, so that she was very frightened of him. He was also having numerous adulterous associations with other women, but the wife remained with him for the sake of the children. Finally the husband had acquired two houses, one in Blackrock, where the wife and family resided, and one in Leopardstown, where he lived himself. The husband also bought his mother a house in Blackburn in Lancashire where he used to stay occasionally.

The husband had intimated on numerous occasions that he desired to get a divorce from his wife, but she did not want it. Despite this, he instructed solicitors in Manchester in 1957 to prepare a full petition for divorce. The plaintiff wife was named as petitioner, and it was falsely stated that the plaintiff wife and husband were domiciled in England. The petition then stated that a divorce was sought on the ground that the husband had deserted the wife for three years. The documents were sent to the husband by post, and the husband threatened his wife with aggravated physical violence if she did not sign them, and subsequently attend at the hearing. On July 21, 1958, the husband and wife attended at Manchester High Court, and, after a short hearing, the wife was granted a *decree nisi* of divorce, provided that the husband paid his wife £40 per month, the rent of the house, and the children's school fees. The *decree nisi* was eventually made absolute on 7 January 1959. The husband then gave his address as Blackburn, and, married his second wife, Lydia, in a Registry Office in England, although he subsesuently came to live in Dublin.

The husband subsequently prepared a fraudulent agreement whereby he forced his wife, Alice, for £1,000 to waive her right to £40 per month, to any alimony, and to any right to reside in the house in Blackrock, as well as compelling her to support and maintain any children under 17. This agreement was signed in April 1964, and the husband in fact paid his wife only £600.

The husband resided with his second wife in Ireland, until he died of a swimming accident in Spain in April 1972. There were no children of the second marriage, and the husband died intestate. The first wife now claims a declaration that she is the widow of the husband for the purposes of succession, who is alone entitled to obtain a Grant of Administration. The second wife has lodged a Caveat to contest this. It is clear that, as the husband and the first wife were domiciled in Ireland, and as neither of them had ever resided in England, the High Court in England had no jurisdiction to grant a divorce. It is established that a marriage may be declared null, if it is entered into because of duress, and a similar principle must apply to an application for divorce. It is *not* the law that, before the Irish Courts can refuse to recognise a divorce granted by the Courts of another country and obtained by fraud or duress, an application must be made to the Courts of that country to discharge or vary the decree. The question whether a spouse domiciled in one State, who obtains an invalid divorce in another State, is estopped in the State of the domicile from establishing that the divorce is invalid, and that she should be regarded as the spouse for the purposes of succession, must next be considered. If the husband had been prosecuted in Ireland for bigamy, and the invalidity of the English divorce had been established, he would have been convicted. In order to avoid absurd consequences, it follows that in principle the doctrine of estoppel does not normally apply to the question of the existence of a valid marriage. Nevertheless a spouse who has obtained an invalid decree of divorce in another State, is not estopped in the State of the domicile from establishing the invalidity of the divorce and of her status as a spouse, for there can be no estoppel of any kind as to whether a marriage has been validly dissolved or not.

Accordingly the plaintiff Alice is entitled to a declaration that the divorce granted to her husband did not validly dissolve the marriage to the husband, and was accordingly of no effect. She will therefore be declared entitled to a grant of administration to her husbands' estate. The caveat entered by the second wife will be discharged.

[Re Henry Gaffney deceased—Alice Gaffney v. Lydia Gaffney—Kenny J.—unreported—21 June 1973.]

**If a husband leaves wife if told to do so by her, there is no constructive desertion, and an application for maintenance by her must consequently be refused.**

The husband and wife were married in December 1954 in Dublin; they were both Irish citizens, and the husband has at all times been domiciled in Ireland. They lived at first in Blackrock until 1956, when, as a result of money difficulties, the husband was compelled to sell the house, and take up a position in Monaghan; he was unable to provide a house there, and the wife

then insisted upon living with her parents until 1957, before going to the U.S.A. until 1959, when, at the husband's request, she returned to Sandymount to live with him for a few months. The husband's financial position was still precarious, so that he had to subsequently go to the United States for a few months. Their only child, a son, was then born, and, while the husband accepted a post in Omagh, the wife remained in Raheny. Eventually, after his mother's death, having obtained some money, he bought a bungalow in Dundrum. While retaining his position in Omagh, he used to come there at week-ends. This arrangement continued until the final separation in August 1965.

From the beginning the husband was irresponsible about money matters, contracted large debts and gambled heavily. The strong-willed wife, who wanted financial security, was impatient of her husband's way of life, which finally led to her nervous break down. She insisted in August 1965 that the husband leave the bungalow and he has not lived there since. From 1965 to 1968, the wife was mainly supported by her father, and lived in a rented house in Foxrock. On 6 December 1968, the husband signed an agreement to pay £7 per week for the child, but nothing was provided for the wife. Payments were irregular.

In 1968 the wife went to England to get employment and resided there. In October 1971, she brought proceedings for a full divorce in the High Court in England, and obtained a decree nisi. No cause was shown by the husband, and the order dissolving the marriage was made absolute in January 1972. The petition contained the averment that the wife had been ordinarily resident in England for 3 years before presenting the petition.

The wife as plaintiff now seeks maintenance under the Married Women (Maintenance in case of Desertion) Act 1886. Husband's counsel has submitted that he did not desert his wife, because she told him to leave, and he asked for a dismiss. The domicile of a wife is that of her husband until their marriage is legally terminated by a *divorce a vinculo*. As the husband was at all times domiciled in Ireland, the Irish Courts do not recognise the divorce in England, as having the effect of dissolving the marriage, because a divorce granted to a wife resident in England against a husband domiciled in Ireland will not have that effect in Ireland, as that jurisdiction did not exist in England before 1922. Consequently the husband and wife are still legally married under Irish Law.

There can be no estoppel between husband and wife as to the existence of a valid marriage between them. The wife's application to the English High Court for divorce does not prevent her claiming to be the husband's wife in Ireland.

It is claimed that the wife has been deserted by her husband under the Act of 1886. It has been held that a married woman who leaves her husband, because he has been guilty of cruelty to her, has been constructively deserted, and may claim a weekly payment. In order to constitute constructive desertion, an intention to disrupt the marriage or to bring cohabitation to an end must be proved. But no such intention is here manifested by the husband; folly about money by itself does not justify the wife from leaving her husband. The separation was by consent, and did not amount to constructive desertion. The wife's application for maintenance is dismissed but there will be no order as to costs.

[Counihan v. Counihan; Kenny J.; unreported; 27 July 1973.]

**Certificate issued to be deemed conclusive evidence that the concentration of alcohol in the blood of a person from whom specimen is taken is deemed to be the specified concentration of alcohol—S.44 (2) (a) of the Road Traffic Act 1968 providing for this is unconstitutional.**

On 23 September 1971 plaintiff convicted of attempting to drive while excessive concentration of alcohol in his blood, under S.49 of Road Traffic Act 1961, as amended by S.29 of Road Traffic Act 1968. In the High Court, before O'Keeffe P., plaintiff had issued proceedings seeking a declaration that S.44 (2) (a) of the Act of 1968 was unconstitutional inasmuch as it proposed to prove that the certificate issued by the Bureau be conclusive evidence that at the time it was taken or provided, the concentration of alcohol in the blood of the person from whom the specimen was taken, was the specified concentration of alcohol. The President refused to grant this declaration.

Plaintiff alleges that the procedure by which the Certificate is obtained is contrary to the following articles of the Constitution :

**Article 34** (1)—Justice to be administered by Judges established by the Constitution.

**Article 38** (1)—No person shall be tried on a criminal trial save in due course of law.

**Article 37**—Limited functions and powers of a judicial nature in criminal matters can only be exercised by Judges under the Constitution.

In order to be convicted, the amount of alcohol present in a person's body, within 3 hours of driving, must exceed 125 milligrammes of alcohol per 100 millilitres of blood. If a District Justice is not satisfied beyond reasonable doubt of this fact, he must acquit; the Justice must arrive at a conclusion upon the matter based on his own judgment of the evidence. As the certificate is deemed to be conclusive evidence of the specified concentration of alcohol at the time, it precludes the Justice from forming any judgment on this matter. In effect an accused person is not free to contest the determination of alcohol set out in the certificate. Although S.45 of the Act of 1968 provides for a second analysis of the blood in the presence of the accused if he requested it, nevertheless the evidence provided by the Certificate from the Bureau is ultimately incontestable, therefore the Justice cannot exercise his judgment upon the matter.

The administration of justice in criminal matters is confined exclusively by the Constitution to the Courts and Judges set up by the Constitution. Consequently it is for such Judges alone to determine the essential ingredients of an offence charged against an accused. Insofar as statutory provision purports to remove such determination from the Judges established by the Constitution, it is an invalid infringement of the judicial power. Here the offending element is the evidential conclusiveness of the certificate. If the word "conclusive" had been omitted, the certificate would have been valid.

There remains the declaration that the whole of S.44 (2) (a) of the 1968 is unconstitutional, now that the word "conclusive" evidence is omitted. The Court was asked to sever the word "conclusive" to give the paragraph constitutional validity. Article 15(4) of the Constitution declares that any law repugnant to the Constitution invalid only to the extent of such repugnancy. This is essentially a matter of interpreting the intention of the Legislature, particularly in view of Article 15(2)

which declares that "The sole and exclusive power of making laws in the State is vested in the Oireachtas". It follows that the usurpation by the Judiciary of an exclusively legislative function is no less unconstitutional than the usurpation by the Legislature of an exclusive judicial function. In the Road Traffic Act 1968, the main recommendations of the Report of the Commission on Driving while under the influence of drink and drugs (1963) were followed. But the Commission recommended that proof, that an accused person's blood-alcohol level exceeded the permitted level should merely be *prima-facie* evidence, and this was not accepted. If the word "conclusive" is omitted, the certificate would merely be deemed evidence; this would set up as law something which the Legislature had deliberately and unambiguously rejected. The Legislature, on trying to make the certificate "conclusive" evidence had not directed its attention to what would happen if it were not conclusive. It follows that S.44 (2) (a) is declared unconstitutional as totally invalid. The plaintiff's appeal will accordingly be allowed, and his conviction will be declared invalid.

[Maher v. Attorney-General and Murphy; Full Supreme Court per Fitzgerald C.J.; unreported; 16th July 1973.]

**Supreme Court calls for rules of co-operative Societies to be revised.**

The Supreme Court commented on the rules governing co-operative agricultural societies throughout the country and called for an up-to-date revision of them "in the interest of the members of the societies and of the public in general."

The Court was giving its decision in an appeal from Kenny J. in an action arising out of a dispute between members of the Kantoher Co-operative Agricultural and Dairy Society Ltd., with registered office at Killeady, Ballagh, Limerick.

By a two-to-one majority the Supreme Court reversed the ruling of Mr. Justice Kenny in the High Court and held that the 15 members of the society who brought the action were not properly removed from the committee of management of the society by the general meeting held on May 23, 1972. Costs were awarded against the chairman and three other members of "the new committee" of management, who were named as defendants in the action.

The Chief Justice (Mr. Justice Fitzgerald) said that a number of the rules of the Kantoher society as printed were quite meaningless and also inappropriate to a society which had been in existence for 11 years before the rules were adopted in 1915.

*Rules first issued by I.A.O.S.*

Mr. Justice Griffin, who agreed with the judgment of the Chief Justice, said that the rules of the Kantoher society were in the standard form published and issued by the Irish Agricultural Organisation Society Ltd. and they were informed that almost all co-operatives in the country operated under similar rules.

"In view of the fact that a large number of co-operative societies operate under similar rules, and of the fact that some of these societies nowadays own very substantial assets, it appears to me to be imperative that in the interest of the members of the societies and of the public in general, up-to-date revision of the rules should take place."

The plaintiffs had claimed that at a special general meeting of the society on 23 May 1972 a resolution that the original committee of management, composed of 36 members, including the 15 plaintiffs, be removed from office was proposed by the chairman, Michael McEnery, Ballintubber, Newcastle West, Co. Limerick (a defendant in the action), and was carried by a simple majority by a show of hands. The number voting in favour of the resolution was less than two-thirds of the members present. The defendant, Michael McEnery, then purported to conduct the election of a "new committee" of management and elected a "new committee" consisting of Mr. McEnery, the three other defendants and 32 other members of the society.

The Chief Justice in his judgment said that the plaintiffs challenged the validity of the resolution on the ground that it was invalid as it was not competent for the society to pass such a resolution without a majority of two-thirds. The defendants, other than the society, contended that the resolution was valid in-asmuch as it had the approval of a simple majority of those present at the meeting. In his opinion the resolution required a two-thirds majority, and might not even with such a majority be effective to remove the whole committee, as this resolution purported to do.

Mr. Justice Griffin, in his judgment, said that these proceedings were commenced on 21 July 1972 and the pleadings were closed on 29 November 1972 but notwithstanding the fact that the action was pending in the High Court, the new committee purported to have called a special general meeting for 16 December 1972 for the purpose of authorising the formation of two new societies which would have the effect of transferring the creamery business from the existing society to one of the new societies and the remaining business and assets of the existing society to another new society, and then to dissolve the society.

This, said the judge, was a rather high-handed action of the defendants pending the determination of this action and it was not surprising that an interlocutory injunction was granted by Mr. Justice Kenny restraining the passing of any such resolution pending the determination of the action. The action came for hearing before Mr. Justice Kenny on 3 April last and was dismissed.

In his judgment, the intention of the draftsman of the rules of the Kantoher society and of the members in adopting them was that Article 40 (election of committee and officers) was to be construed as requiring a two-thirds majority of the members present at any special general meeting duly called for that purpose, for the removal of the members of the committee of management or the public auditor. The plaintiffs were not properly removed from the committee of management by the general meeting of 23 May 1972, and he would allow the appeal.

Mr. Justice Budd who, in his judgment, agreed with the decision of Mr. Justice Kenny in the High Court, said the resolution passed at the meeting in May 1972 by a simple majority removing the plaintiffs was a good and valid resolution.

He stressed that the words used in Rule 40 were to the effect that the members of the committee first elected were to continue in office until the next annual general meeting of the society unless "previously" removed by a resolution passed by a majority of two-thirds of the members present at any general meeting called for that purpose. The word "previously" in his mind referred to a period previous to the next annual

general meeting and these words were in his opinion, incapable of being extended to cover the position as to the majority required for removal beyond a period up to the the next annual general meeting.

Stack and others v. McEnery and others; Supreme Court; unreported; 8 February 1974.]

**Extradition Order deemed void—wrong venue.**

In the High Court in Dublin Mr. Justice Pringle held that an extradition order made by District Justice O'Donovan in Cork on November 7 last was made without jurisdiction and was null and void.

The order had been made in respect of Brian McDonald (36), of Newry Road, Dundalk, on foot of a warrant charging him with obtaining £3,025 by false pretences from the Ulster Bank, Bradbury Place, Belfast, between June 7 and July 8, 1971.

In his action he had claimed a declaration that the provisions of Part III of the Extradition Act, 1965, were inconsistent with, and repugnant to the Constitution, and he had challenged the order on other grounds.

He was arrested by Detective Garda Michael Joseph Scanlon in Cork on November 24 and remanded by a Peace Commissioner until November 27, or until the warrant from Northern Ireland, duly endorsed, was produced to the person having his custody, whichever was the earlier. He was lodged in Limerick Prison.

On November 25, Detective Garda Scanlon went to Limerick Prison with the warrant and the Governor of the prison released Mr. McDonald.

Mr. Justice Pringle said that Garda Scanlon had said that he explained to Mr. McDonald the procedure which would have to be gone through and told him that he could if he wished, drive with him to Cork and be arrested there (where he had arranged for someone to go bail for him) and that Mr. McDonald had agreed to this.

Mr. McDonald had accompanied the Garda to Cork and was arrested there. The Garda had said, however, that if Mr. McDonald had not agreed to go with him he would have arrested him in Limerick, so it was clear that his movements were restricted.

Mr. Justice Pringle said that Mr. McDonald must be deemed to have been arrested in Limerick and he should thereupon have been brought before a justice of the District Court for the Limerick District in accordance with Section 45 (2).

Having regard to his decision as to the invalidity of the order of November 27, said Mr. Justice Pringle, it was not necessary for him to deal with any of the othe matters argued before him, including the question as to the constitutionality of Part III of the Act so far as it applied to Northern Ireland.

[The State, Brian McDonald, v. Attorney General; Pringle J.; unreported.]

**50-year ban on drink driver who could not recall killing woman.**

A 24-year-old Co. Cork man was banned from driving for 50 years and sentenced to 12 months' imprisonment for what the judge described as the worst case in his 33 years' experience.

"A more grisly case was never disclosed to the Court, in my opinion. It is the kind of conduct people are calling out against—and it is the kind of conduct that is going to stop," said Judge Neylon when Brendan Kelly of Tullough, Cloyne, pleaded guilty to dangerous driving, causing the death of Margaret Healy on February 24 at Loughatalia, on the Midleton-Whitegate road.

Cork Circuit Court was told of a chase by a Garda car after Kelly—who was said to have been drinking—had been seen to "narrowly miss" the gardai.

Garda John Burke and Detective Garda Patrick Murphy turned their car and followed the defendant's car, signalling it to stop several times. Eventually, they passed out the car, but Kelly continued driving.

He was said to have veered towards a group of women walking on their correct side, but at the last moment pulled out, narrowly missing the woman on the outside. The car then struck a parked car and an oncoming motorcyclist—the deceased, Margaret Healy.

After the impact, the car continued to push the motorcycle in front of it and came to a halt after hitting a ditch, the court heard.

Kelly was, in Garda opinion, under the influence of drink. While being taken away in a patrol car he did not remember anything about the accident and burst into laughter several times.

Garda Inspector Maurice Murray of Midleton, said Kelly had been charged with dangerous driving in 1967 and convicted of a lesser charge of careless driving.

Denis Bernard told the court he had been driving the car earlier in the day when going to a funeral, accompanied by Kelly. They drank in several public houses and he asked Kelly to drive him home. He dozed off in the car and knew nothing about the accident.

Accused said in evidence he was used to driving a motorcycle, or a tractor. On the day of the funeral he drank whiskey and beer, but had no idea he would be driving later. Denis Bernard had said he was tired and asked him to drive him home.

At the time, said Kelly, he did not realise he was not fit to drive and had no recollection of what happened after that.

When the Gardai stopped him he had no idea he had killed somebody and he had not driven a car since.

Said Judge Neylon: "It is appalling, and that is the only way to describe it. A man drives a car and he cannot remember driving and, even when driving does not remember what he was doing because he was drunk."

There was no excuse for a man coming out of a pub and driving when he knew he was not capable of driving, no matter who suggested or invited him to drive, added the Judge.

The only fortunate feature of the case was that more people had not been killed, the man was a menace to his fellow citizens and should never be allowed to drive a mechanically-propelled vehicle again.

[People (Attorney General) v. Kelly; Cork Circuit Court (Judge Neylon); unreported; 3 November 1973.]

**Loophole found in Fishery Law—French skipper cleared.**

The High Court in Dublin found a loophole in the Fisheries (Consolidation) Act, 1959, relating to fishing inside the territorial waters of the State.

As a result of the decision of Mr. Justice Gannon, the skipper of the French trawler, Caprice Flow, had quashed the conviction and £100 fine against him under Section 221 of the Fisheries (Consolidation) Act, 1959, of fishing inside the territorial waters of the State,

and the order forfeiting his fishing gear.

The skipper, Emil Coyan, was convicted by District Justice O'Donovan in Cork City Court on 3 November 1972. He had ordered the detention of the trawler pending the payment of the fine, but on the payment of £11,000 bail, the boat was released.

In February of this year the High Court granted a conditional order against the District Justice to show cause why the conviction should not be quashed.

Mr. Justice Gannon, in a reserved judgment, made absolute the conditional order and quashed the order of the District Justice.

It had been submitted on behalf of the French skipper that the conviction or order of the District Court was bad on its face in that it purported to convict him of an offence unknown to the law and that the consequent order of forfeiture of fish and gear was also bad.

The judge held that having illegally entered the territorial waters of the State, there was no offence under Section 221 of the Fisheries (Consolidation) Act, 1959, as amended, of unlawful fishing.

The section did, however, make unlawful entry to territorial waters an offence and the foreign trawler had also been fined £100 for illegal entry.

[State (Coyan) v. Attorney General; Gannon J.; 21 January 1974.]

**Father of 8-year-old loses action—Boy singer controlled by Act.**

In a reserved judgment delivered in the High Court, Dublin, Mr. Justice Finlay refused to make a declaration that certain sections of the Prevention of Cruelty to Children Act, 1904, were unconstitutional.

A Co. Kildare Army sergeant who claimed that his eight-year-old son had been prevented by the provisions of the Act from pursuing his career as a professional singer and musician, lost his action, but Mr. Justice Finlay held that the decision to test the constitutionality of the sections had been responsibly taken and he made no order as to costs.

The action had been taken by Thomas Landers, of Kilcullen, Co. Kildare, against the Attorney-General. Sergeant Landers claimed a declaration from the court that sub-section (b) and (c) of section 2 of the Act were inconsistent with the Constitution; that they were not carried forward by Article 50 of the Constitution and they were no longer part of the law of the State.

Sergeant Landers pleaded that Michael Landers, the youngest of his six children, had a singing voice of unusually pleasing quality and a great talent for learning, understanding and singing songs, and a great capacity for entertaining young and old.

Both Sergeant Landers and his wife considered offers and opportunities for their son having regard to his natural requirements; his physical, mental, emotional, moral and educational development; the great enjoyment which performing in public brought to him; his natural talents for entertaining, and they also considered the advantages likely to accrue to Michael if money, otherwise unobtainable, could be put by for his later advancement in life.

**Conditions of Contract examined**

In the end both they and their children decided that Michael should accept engagements for singing so long as the terms and conditions, including conditions as to payment, were suitable.

The Attorney-General pleaded that a judgment or decision regarding Michael's activities as a singer or entertainer or otherwise were not matters within the religious and moral, intellectual, physical or social education of Michael.

At the trial of the action earlier this month, it had been stated that in the nine months of his career the boy had become widely known as a singer and that £800 had been put into the bank for him. Prosecutions had been instituted, however, in respect of public performances by the boy and his career had had to be abandoned.

In the course of his judgment, Mr. Justice Finlay said that the boy still had the right to perform in many different types of place and in many different circumstances provided they did not include the places specified, in the Act, between the hours of 9 p.m. and 6 a.m. He could prepare for a career which could commence as a professional singer with relatively minor restrictions when he reached the age of 10 and with minimal restrictions when he reached 11.

[Landers v. Attorney General; unreported; Finlay J.; 21 January 1974.]

**Court may not interfere with Government in its executive functions—Sunningdale Conference.**

The circumstances in which the courts may or may not interfere with the Government, in the exercise of its executive functions, were discussed by the Supreme Court in Dublin, when the court gave its reasons for dismissing the appeal brought by Kevin Boland, the leader of Aontacht Eireann.

Mr. Boland, an engineer and farmer, of Red Gap, Rathcoole, Co. Dublin, had appealed against a decision of the High Court dismissing his action in which he had sought that a declaration that any agreement signed by the Government in the terms set out in the Sunningdale communiqué would be repugnant to the Constitution.

Murnaghan J. had made an order for costs against Mr. Boland and the Supreme Court ordered that the costs of the appeal also be awarded against him.

The appeal was heard by the Supreme Court last week and the court dismissed the appeal when the argument had finished. The Chief Justice said that the reasons for the court's decision would be given later and these were announced yesterday.

**Functions of Dail**

In the course of his judgment, the Chief Justice (Mr. Justice Fitzgerald) said that in the High Court Mr. Justice Murnaghan had decided that Paragraph 5 of the agreed communiqué did not acknowledge that Northern Ireland was part of the United Kingdom; that the clause was no more than a statement of policy, and that the court should not purport to usurp the functions of Dail Eireann in seeking to control the Government in the exercise of its functions.

It appeared to him (the Chief Justice) that the following matters had to be determined by the Court: (1) the meaning and effect of clauses 5, 6 and 20 of the agreed communiqué, and (2) the jurisdiction of the High Court or the Supreme Court, in the existing circumstances, to intervene or seek to control the exercise of the Executive of its functions.

The Chief Justice said that the authorities cited by Mr. Seamus Sorohan, S.C. (for Mr. Boland), in so far

as they were relevant, not only failed to substantiate the appellant's claim that the Courts had authority to intervene or restrain the Government in the exercise of its executive function, but led to quite the contrary conclusion. In the absence of any authority to support his contention that the courts had jurisdiction to intervene, Mr. Sorohan had submitted that this power, while not stated in the Constitution, was to be implied. "I can find no basis upon which such a provision should or could be implied," said the Chief Justice.

**Clause 5 of communiqué not an agreement**

The Chief Justice said that in his opinion the courts had no power, either expres or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances were such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution.

Continuing, the Chief Justice said that in his opinion, Clause 5 of the communiqué was not capable of being construed as an agreement. Clauses 2, 3 and 4 of the communiqué made it perfectly clear that the three parties to the conference were stating their respective distinctive positions in relation to the question of the unity of Ireland.

Clause 5 contained declarations by the Irish and British governments which were clearly distinct and in no sense an agreement on fact or principle. The only words common to both declarations were "the status of Northern Ireland". If any interference was to be drawn from the method of printing the declarations side by side instead of consecutively, it must be to emphasise the distinction between them. The "status of Northern Ireland" and the acceptance of it was, to his mind, a reference to the *de facto* position of Northern Ireland and nothing else and the respective declarations were no more than assertions of the policies of the respective governments, matters clearly within their respective executive functions.

**Plaintiff's action misconceived**

"Consequently Clause 5, in my opinion, is not capable of being construed as any action by the Government which would bring it within the jurisdiction of the courts to supervise or restrain", said the Chief Justice.

Clause 6, while expressing agreement for the making of a further formal agreement between the British and Irish governments, was confined to the incorporation of the declarations already expressed in clause 5.

Clause 20, while expressing agreement to hold a subsequent formal conference for the purpose of considering reports and the signing of the agreement reached, must be dependant upon the formal Conference in fact reaching an agreement He could find nothing in this clause which in any way modified the clear positions under clauses 2, 3 and 5 as to their declarations in relation to Northern Ireland.

"I am, consequently, of the opinion that the plaintiff's action was misconceived; that the decision of Mr. Justice Murnaghan was correct; and that this appeal should be dismissed", said the Chief Justice.

**Clause 5 merely represents de facto position**

The President of the High Court (Mr. Justice O'Keeffe) agreed with the judgment of the Chief Justice and said that an acknowledgment by the Government that the State did not claim to be entitled as of right to jurisdiction over Northern Ireland would, in his opinion, not be within the competence of the Government having regard to the provisions of the Constitution. He could not presume that the Government would consciously make an acknowledgment of that kind. Accordingly he accepted the view of the Chief Justice that clause 5 represented no more than a reference to the de facto position of Northern Ireland coupled with a statement of policy in regard thereto.

Mr. Justice Budd said it was to be particularly noticed that the Taoiseach had stated that none had compromised and none had asked others to compromise in relation to basic aspirations. The whole tenor was that the principal object of the conference was to see what measure of agreement could be secured. The declaration would appear to be a statement on a matter of policy and it was for the Executive to formulate policy.

If the Courts were to pronounce adversely or otherwise on what the Government intended to do on any matters of policy which it was in the course of formulating, that would be an attempted interference with matters which were the functions of the Executive and no function of the Judiciary.

**Court can only interfere if Government action unconstitutional**

Mr. Justice Griffin said that the Government was, by the Constitution, made responsible to Dail Eireann. Mr. Liston (for the Government) had argued that in no circumstances might the Court interfere with the Government in the exercise of its Executive functions. For the purposes of this action it was not necessary to determine this question in the form in which the argument was made as the defendants needed only to show that the Court could not and should not intervene having regard to the circumstances of the present case.

In the event of the Government acting in a manner which was in contravention of some provision of the Constitution it would in his view be the duty and right of the Courts, as guardians of the Constitution, to intervene when called upon to do so if a complaint of a breach of any of the provisions of the Constitution was substantiated in proceedings brought before the court.

In his opinion any attempt to restrain the Government from entering into the agreement contemplated by the communique would be an unwarranted and unjustifiable interference by the courts with the organ of State to which, under Article 29 of the Constitution, the power to enter into international agreements was given.

In his judgment the plaintiff had shown no cause of action. In the event it was not necessary to interpret paragraph 5 of the communique.

Mr. Justice Pringle said he was satisfied that the Courts had no power to interfere with the exercise by the Government of its executive functions.

[Boland v. An Taoiseach and others; Supreme Court; unreported; 1/3/1974.]

**High Court gives verdict against stockbroking firm.**

In a judgment delivered by Mr. Justice Pringle in the High Court, in Dublin, a Dublin firm of stockbrokers were found to have been "guilty of certain breaches of their duty" to a client. In the course of his judgment, Mr. Justice Pringle said that the duty of a stockbroker was the same as that owed by any other professional person.

He was giving judgment in a counter-claim brought by Francis Cruess-Callaghan, a management consultant,

of 30 Morehampton Road, Dublin, against Bewley Ryan and Co., of 8 Anglesea Street, Dublin. Bewley Ryan and Co. had sued Mr. Cruess-Callaghan for £5,662, the balance due for money paid for him at his request and for commission.

Any misrepresentation to the client, *whether fraudulent or innocent, as to a material fact would constitute a breach of duty on his part.* He must, of course, carry out any instructions given to him to the best of his ability, but he was not bound to give advice to his client unless he was asked to do so, but if he did give advice, he must do so honestly, and to the best of his ability.

Judgment for the full amount with costs was given in favour of Bewley Ryan and Co. by Mr. Justice Henchy in 1972, but execution on foot of the judgment was stayed in the event of Mr. Cruess-Callaghan lodging that amount and delivering a countercclaim within seven days of the order.

Mr. Cruess-Callaghan complied with that order in regard to the lodgment and delivered the counter claim in which he claimed damages for breach of contract, misrepresentation, negligence and breach of duty by Bewley and Co., as his stockbrokers, in relation to the purchase of certain Australian mining shares.

**Stockbrokers' Duties**

In a long judgment, Mr. Justice Pringle dealt in detail with the matters which gave rise to the dispute and then went on to refer to the duties of a stockbroker.

A stockbroker, he said, was bound to exercise the skill and competence of an ordinary competent practitioner in that profession. He was bound at all times to act fairly and honestly in the interest of his client.

Judged by these tests, said Mr. Justice Pringle, he was satisfied that Bewley Ryan and Co. were guilty of certain breaches of their duty to Mr. Cruess-Callaghan.

In the first place, in the light of what he (the judge) had held to be the contract between the parties, Bewley Ryan and Co. had wrongfully claimed payment in full for Whim Creek shares and represented that most of them had been delivered when they had not received delivery of or made payment for any of them, thus misleading Mr. Cruess-Callaghan into assuming that such delivery had been made.

Secondly, they failed to deliver the bonds to the bank as soon as they arrived. Thirdly, they failed to inform Mr. Cruess-Callaghan on September 10 that only 1,000 of the Whim Creek bonds had then been delivered and paid for at a time when they knew or ought to have known that he urgently contemplated selling them and was under the misapprehension that they were all available. And fourthly, they failed to inform Mr. Cruess-Callaghan's agent, when he contacted them that 4,000 bonds were then available for sale for cash.

Mr. Justice Pringle said he would not accept the submission that Mr. Cruess-Callaghan's failure to pay what was clearly due by him on the purchase of Westfield shares constituted such a breach of contract by him as to entitle Bewley Ryan and Co. to treat the agreement in regard to the payment for the Whim Creek Shares as repudiated. In his opinion each transaction must be regarded as a separate transaction.

Section 34 of the Civil Liability Act, 1961, provided for the apportionment of degrees of fault between a plaintiff and a defendant who were each responsible to some degree for the loss owing to their negligence or want of care, or that of one for whom they were responsible, and this Section applied to any wrongdoers, including those guilty of breach of contract.

Mr. Justice Pringle said that he considered that Bewley Ryan and Co. and Mr. Cruess-Callaghan (through his agent) were equally at fault and he therefore, awarded Mr. Cruess-Callaghan £1,320 damages on his counter-claim, that sum to be set off against the amount of the judgment earlier obtained by Bewley Ryan and Co.

[Cruess-Callaghan v. Bewley, Ryan & Co. Ltd.; Pringle J.; unreported; 15/1/1974. ]

# ENGLISH DECISIONS OF PROFESSIONAL INTEREST

**Regina v. Muncaster**

Before Lord Justice Edmund Davies, Mr. Justice MacKenna and Mr. Justice Boreham.

The Court of Appeal found it impossible to understand how a sentence of 20-year disqualification could have been justified, even for an offence of driving while disqualified.

Their Lordships allowed an appeal by Allan Muncaster, aged 39, a plumber, against a sentence of 12 months' imprisonment imposed on him at Middlesex Crown Court (Judge Edie), last October after he had pleaded guilty to a charge of driving a motor vehicle while disqualified. They ordered his immediate discharge.

**Morley London Developments Ltd. v. Rightside Properties Ltd.**

Before Lord Justice Edmund Davies, Lord Justice Stephenson and Mr. Justice Bagnall.

A plaintiff in the High Court who claims various heads of relief, as opposed to asserting several causes of action, may abandon any head of relief without notice to the defendant. If the only claim left is for unliquidated damages and no defence has been entered he may enter judgment in default of defence under Order 19 rule 3 of the Rules of the Supreme Court. Election to seek damages only necessarily involves withdrawal of an alternative claim to specific performance.

The court dismissed an interlocutory appeal by the defendants, Rightside Properties Ltd. from a judgment of Mr. Justice Templeman on March 20 whereby he ordered that a final judgment for damages to be assessed which had been entered in favour of the plaintiffs, Morley London Developments Ltd. on November 22, 1972, in default of defence, be set aside on condition that the defendants paid £23,000 into court within seven days. The defendants on the appeal contended that the judge should have granted them unconditional leave to defend.

Order 19, rule 3, provides: "Where the plaintiff's claim against a defendant is for unliquidated damages only, then, if that defendant fails to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fired ... for service of the defence, enter interlocutory judgment against that defendant for damages to be assessed and costs. ..."

Order 21 rule 2 (1) provides: "The plaintiff in an action begun by writ may, without the leave of the court, discontinue the action, or withdraw any particular claim made by him therein, ... at any time not later than 14 days after service of the defence on him ... by serving a notice to that effect on the defendant. ..."

# LEGAL EUROPE

# THE PLACE OF EUROPEAN LAW IN UNDERGRADUATE CURRICULA*

By PROFESSOR DOMINIC LASOK† (Exeter)

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The lecturer stressed that in academic work there can be few more exciting things than planning a new course, especially when that course has to be charted without precedents and without acknowledged textbooks. You are apparently on your own. But in the fairyland of academic freedom one is subject to limitations, not only of one's own intellect and conscience but also the discipline one serves and hopes to promote. One is also subject to the exigencies and purposes of one's job. On the teaching side of the legal profession one is paid to do a job which consists of the advancement of scholarship and the dissemination of knowledge.

With these thoughts in mind I will endeavour to map out one job—the job of teaching European Community law. I will consider it from a practical point of view: that of the head of a department (the person in authority who bears the ultimate responsibility); that of the lecturer who does the job, and that of the student who ought to profit from the exercise. The head of department, whether he initiates the course or is persuaded to authorise one, ought to be quite clear of the commitment and deployment necessary, not only from the point of view of the personnel but also from the point of view of the library resources and the general pattern of instruction in his institution. It is no good advertising for a young man or woman straight from university to perform the triple task of teaching comparative law, Community law and all the commercial law relevant to both. Such a task is beyond the beginner: it would take a very accomplished scholar and a seasoned campaigner to pull it off.

Looking at it from a lecturer's angle, the challenge is quite exhilarating. But one must not be carried away by enthusiasm into the world of fantasy, as seemed to be the young man who wrote to me some time ago saying that he wanted to write a textbook on European Community law. He was dissatisfied with the standard of teaching, with the fossilised minds of university teachers (though he was discreet enough not to reveal the name of his *alma mater*) and he wanted to fill the gap with a book every student was waiting for. Having heard that we teach Community law in Exeter, he merely asked for our syllabus, the reading list, the list of cases, the bibliography and any other matter which might be relevant to his task. Clearly enthusiasm is not enough.

And now the student. We all are perpetual students and throughout our lives accumulate useless knowledge, but the one who is under our care for a short period only must be given the benefit of our experience. We must tantalise his thirst for knowledge and tax his intellect, but above all we must make him realise that what we are doing makes sense and that the drudgery to which he is often subjected in the study of law is relevant to a career. But to what career?

I for one would object to the law school being treated merely as a preparatory school for the legal profession, but I would with equal conviction deplore the study of law for its own sake at the taxpayer's expense. Ours is an applied discipline and its practical application ought to be reflected in the syllabus.

Turning to Community law, it is, at least as far as this country is concerned, largely a branch of the law in books and not, as yet, in actual practice. Our practising lawyers have yet to learn how to earn their European fees. The professional know-how will follow. The greatest challenge to our system since 1066, and all that, has to be met first in the class-room as we have to contribute to the education of a new generation of lawyers skilled in three fields of activity: Civil Service, commercial and legal practice. The teaching of Community law has to be geared to these three areas of application.

**Lawyers in the Communities**

The three Communities (Coal and Steel, Euratom, and the Common Market) were brought about by unique treaties of a self-executing character. They were drafted by continental lawyers and their institutions were fashioned and worked by civil servants drawn from the member States. Since legal studies are regarded on the Continent as the most appropriate background for the Civil Service, it is not surprising that lawyers form a considerable proportion of the European bureaucrats and technocats. These lawyers have managed to overcome the language barriers and, through working together with those who initiate and carry into effect the various projects and policies, have developed their own style. They also perfected their skill of working with non-lawyers and this is of prime importance as they, together with the policy makers, shape the Secondary Law of the Community. Like all the continentals they share the common legal philosophy and heritage of Roman law in their national variations. Their legal training is focused not merely on the law as a craft in a narrow technical sense but on the law as a regulatory force operating in the economic and social life of the society. A lawyer who has not studied economics and sociology is potentially a social menace.

We shall not re-write the Treaty of Rome, as suggested by a flamboyant politician in a moment of foolish oratory, but we may contribute to the drafting of Community laws by the institutions in Brussels if we send able lawyers over there. However, they have to be trained before they can make their impact. From a national as well as a Community point of view this is extremely important because of the law-making potential concentrated in Brussels.

The commercial world seems better prepared as we have many lawyers working in commerce and industry

*An address given to the Annual Conference of the Association of Law Teachers, April 6, 1973.

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as managers, administrators and legal advisers. Their task is different from that of the Community lawyer and their skills needs little adaptation. Large corporations, already straddling several countries, can look after themselves though they could certainly do with people versed with expertise in the European commercial law. This expertise consists of the knowledge of the economic directions of the Community and their impact on the member States, as well as the economic and fiscal laws of the member States.

A fair proportion of legal business will be conducted on home ground and in this respect no difficulty should arise, given a knowledge of the Community law and its effect in this country. A Community element may well disturb the placid existence of a solicitor practising in a rural area where his clients feel the pinch of the Community Agricultural Regulations, or where migrant workers seek enlightenment in a matte of our industrial relations law or social welfare.

**Advising clients on Community Law abroad**

Far more challenging is the prospect of advising clients on Community matters abroad, because in addition to strictly Community law the domestic law of the member States may be involved. Specialisation will be needed and firms of solicitors venturing into these areas will establish close relations with foreign practitioners. At the initial stage of such cases somebody will have to diagnose the problem and carry on the liaison work.

Article 55 of the EEC Treaty gives the "right of establishment" on the basis of free movement within the Community. So far this freedom has not resulted in a migration of lawyers within the six original members of the Community and the legal profession will probably remain home bound. However, foreign lawyers may avail themselves of this opportunity if our own profession is unable to cope. By the same token our lawyers are entitled to set up in practice abroad on an equal basis, their success depending upon their proficiency in foreign and Community law, not to mention linguistic aptitude.

**Practice in Community Courts**

Practice before the Community Court presents its own problems. The Court was set up largely upon the pattern of the French *Conseil d'Etat*. Its jurisdiction includes supervision of the execution of the Treaties, adjudication of disputes between member States and between member States and the Community institutions, and the interpretation of the Treaties and Community legislation. Its procedure is French with some German elements imported recently. In the main the proceedings are conducted in writing—hence the art of "written advocacy". As it is unlikely that the existing practice will be changed to accommodate British lawyers, new skills will have to be learned and unusual difficulties overcome, unless we prefer to leave it to others.

It can be seen that in these three areas knowledge of Community law and of the laws of the member States is only a modest beginning. Any self-respecting teacher must take these matters into consideration when embarking on his new venture, and the head of the department may well ponder the nature and dimensions of the task as well as the potential of the lecturer.

So far it has been assumed that there is a consensus as to the meaning and scope of the Community law. In fact this is not so and indeed it would be unprofitable to attempt a comprehensive definition. Instead it seems more appropriate to consider the dimensions of Community law in the light of the three basic areas of its application, *i.e.* in the field of the Community bureaucracy (civil service), the commercial world and professional legal practice. Each of these is a kind of specialisation but all have a common core and this common core may be regarded as an introduction to the Community law.

**Primary, Secondary and Tertiary Sources**

Another way of looking at the dimensions of Community law is through the eyes of its sources. The primary sources are the Treaties and Conventions which set up the institutions and which lay down the obligations of the member States. The secondary sources consist of the law-making acts of the Community institutions which result in a body of law generated by the Community itself in its quasi-autonomous capacity. These include the regulations, directives and decisions made by the Council or the Commission in the execution of their duties and powers under the Treaty, as well as the judgments o fthe Community Court which, though not binding in the sense of our doctrine of precedent, have a persuasive authority and are respected as an authoritative exposition of the law. The third source is the sovereign legislative power of the member States which, in accordance with the Treaty, are bound to effect approximation and harmonisation of their domestic law.

Thus Community law defies the accepted classifications of law; it is both international and municipal, public and private, enacted and formulated in precedents. It is a *sui generis* law and must be treated as such. Therefore it has to be studied in its international setting with due attention to its impact upon the laws of the member States and the quasi-autonomous law-making capacity of the Community Institutions. Although by virtue of the European Communities Act 1972, Community law has become at a stroke, as it were, incarnated into our system, it remains in many respects a distinct legal order.

How do we put all these things into a workable syllabus? There are, I suppose, various ways and, within the bounds of academic freedom tempered by the respect for the subject and one's students, one would concentrate on the core, and ration details according to one's interests and inclinations. I suggest that it can be done as follows.

**The European Communities and Community Law**

We begin with the concept of the European Communities and Community law. Without overdoing the historical and political aspects, the student must be brought face-to-face with this unique phenomenon, its philosophy, its purpose, its ideology and its reality. We proceed straightaway to the legal status of the European Community as a blueprint of federal organisation, but, more importantly, as a legal person both in international law and the domestic laws of the member States Having defined the Community we turn to its legal order. We analyse the concept and the scope of Community law, its sources, its binding power, implementation and enforcement.

At this stage the student will have a fair idea of what is involved and this will enable him to study in depth the constitution of the European Community. This is a very essential part of the course as he must know how the Community is governed and how the sovereign member States fit into the picture. He will then appreciate the special relationship between the Community and its members, between the Community law and the laws of the member States. The student will learn that

there are linguistic and conceptual problems, that unfamiliar doctrines and legal techniques have to be understood in order to master the subject. All this, in my view, is sufficient to make a respectable course of forty to forty-five teaching hours. This, it will be appreciated, is only one side of the picture.

**The Law of the Economy**

The other side is the economic side, for the EEC is not in vain called the European Economic Community. Here we start with the concept of the law of the economy—so un-English, so unfamiliar and so, it seems, non-legal. But this is the clue to the commercial, as distinguished from the constitutional, law. The EEC is the result of interaction between politics, economics and law. **The function of the law is quite clear: to define the economic policies, in terms of rules of law and legal obligations, in accordance with the Continental legislative techniques, and to provide machinery for their implementation, policing and enforcement.** Some of the provisions of the EEC Treaty are directly enforceable while others are not, and so we have a system which is partly controlled by the Community and partly by the member States under the guidance of the Community. One has to understand the relationship between law and economics, and especially the role of the state in dirigist concept of market economy. Here we can either follow the EEC Treaty or simply select areas for special treatment. I favour a combined operation which gives the student a complete picture of the Community setting up the Common Market and operating it across national frontiers. Certain areas of fundamental practical importance for the lawyer in commerce and practice have to be singled out. These include the concept of economic freedom so fundamental to the Common Market resulting in the freedom of movement of persons, goods, services and capital coupled with the right of establishment and the principle of non-discrimination; the approximation and harmonisation of laws; transport; the rules of competition involving the law of restrictive practices and monopolies so important to commercial enterprise agriculture so paramo;unt in the economy of the Community and the member States; the state involvement in industry through subsidies and aids; company law, and one could add for good measure conflict of laws and recent developments in international bankruptcy and industrial property, as well as the social aspects of the law of the economy. Quite a formidable task, especially if you link economics with law. Even if executed selectively it will occupy forty to forty-five teaching hours.

By now it will be appreciated that starting with an idea of a course I have, by false pretences, devised two courses. The two can, of course, be compressed into one, but only at the expense of either principle or detail. If you sacrifice principle, you will diminish the student's understanding of the subject and his appreciation of the law in its political, economic and social setting. You will make the subject rather dull. If you sacrifice the detail, you will be accused of being a hot-air merchant. As in everything else, one has to strike a happy medium. Where should the subject be placed in the curriculum of an undergraduate course? Clearly in the third year, as a sound background of English law is necessary to understand Community law and its relation to our domestic law.

**Methods, Material and Personnel**

Turning now to methods, materials and personnel. Community law can be taught as a separate subject preferably as two separate, but related, subjects. There is a great deal to be said for this approach, for what I have termed the **Community constitutional law** reflects the nature of public international law and constitutional and administrative law together with elements of the philosophy of law and the techniques of public law. What I have termed the **Community law of the economy** is a different thing altogether as far as its nature and content are concerned. The exigencies of these two areas of the law may even call for two different types of instructor.

By now it may be thought that I have been blinded by a kind of messianic zeal and have forgotten altogether the alternative method—the teaching by injection of the appropriate topics into cognate, already existing, courses in law. Frankly I do not like this method and here an analogy to the teaching of conflict of laws comes to mind. It has been suggested from time to time, I dare say by amateurs, that Conflict, being a hybrid subject, can best be taught in small doses as an appendix to each particular subject. In this way the Law Society has effectively killed conflict of laws as part of the basic training of the solicitor.

Apart from the question of balance between the established courses of English law and the corresponding portion of the Community law, there is the question of the sources and nature of the two disciplines. A healthy respect can best be maintained for both if they are treated separately. Disregarding the problem of bulk, the mixing of disciplines leads in practice to a superficial treatment of one, if not of both.

However, the teaching of Community law as a separate subject will not absolve the subject instructors from noting the impact of Community law in their respective fields and injecting its elements into their courses. This is particularly vital for courses in constitutional and company law. The latter has to be considered as both domestic and community law until a uniform system emerges within the Community. One should not be afraid of overlaps.

Turning now to materials, the primary source of the Community law are the Treaties, the secondary sources are the administrative and judicial acts of the institutions as well as the relevant state legislation. Subsidiary materials are those which enable us to study the Community law in its international and national setting, *i.e.* the texts of public international law, state constitutions and the relevant portions of municipal laws. Basically, therefore, the texts of the Treaties and Community legislation form the backbone of the course. Commentaries and learned treatises, as well as the reports of the judgments of the Community Court, provide the supporting materials. The cost of the library should also be borne in mind. Since most of the commentaries and monographs are written in foreign languages, the knowledge of at least one major West European language would be a considerable asset to a student. I assume, as a matter of course, that the instructor has an adequate linguistic background as he must be able to handle original texts.

I imagine that instruction would be carried out in the well-tried manner by lectures and tutorials/seminars. The latter, in particular, would acquaint the student with the variety of materials and test his ability of assimilating source knowledge against the background of the taught course.

Finally, the personnel. In the absence of specialists there is this great opportunity of embarking on an

exciting venture. Who should do it? There is no monopolistic claim and one should avoid regarding the subject as a kind of theology. Obviously an interest in international and comparative law coupled with commercial law is a natural starting point, but since Community law embraces such a variety of subjects instruction lends itself to team work, to the pooling of knowledge and experience, as it can be regarded simply as an extension, an extra dimension, of one's own specialisation. This is not inconsistent with my aversion to instruction by injection.

It would be unwise to look for a superman, especially if he were to have no more than the minimum qualification and no experience abroad. The head of department should look for a team rather than a single wizard. As for the instructor, he would do well to remember that understanding of the law is far more important than encyclopaedic knowledge for, as comfortingly remarked by Celsus, "*scire leges non hoc est verba earum tenere, sed vim 'a cpotestatem*" : To know the laws is not to observe their mere words but their force and power. (Dig. 1, 3, 17.)

# EEC migrants entitled to pension benefits

**Between Bestuur der Sociale Verzekeringsbank (board of the Social Insurance Bank), Amsterdam, and Mrs. B. Smieja Es:en-Kuepferdreh (Federal Republic of Germany) referred for preliminary decision by the Centrale Raad van Beroep (Netherlands).**

**Before the President,** Judge R. Lecourt, and Judges A. Donner, M. Sorensen, R. Monaco, J. Mertens de Wilmars, P. Pescatore, C. O'Dalaigh.

**Facts**

Article 8 of Council Regulation No. 3 (social security of migrant workers) and Article 3, paragraph 1 of regulation 1408471 provide that migrant workers shall enjoy the benefits of social security legislation of Member States to the same extent as nationals.

Article 10, paragraph 1 of both Regulation No. 3 and Regulation No. 1408/71 provide, in substance, that pensions, benefits and allowances acquired under the legislation of one or several member states shall not suffer reductions on account of the beneficiary's r-i dence in another member state.

From 1 January 1957 the sickness and old-age insurance scheme in the Netherlands was replaced, as regards old-age pensions, by a general old-age insurance scheme extended to all residents. Since this Act (in short AOW) extended the benefit of old-age pensions to non-wage earners and since the amount of pensions granted to wage-earners under the old scheme was not very high, the AOW provided for transitory arrangements under which whoever was aged 15 but les than 65 on 1 January 1957 was held to have been insured from the age of 15 to 1 January 1957 provided he had resided in the Netherlands during the six years preceding the date on which he became 59 years old. Article 44 of the AOW lays down that these provisions shall apply to Dutch nationals habitually residing in the Netherlands. Article 45 provides that these conditions may be waived or amended by administrative regulations.

Mrs. Smieja, a German national re-iding in the Federal Republic of Germany at the time she became 65 and still residing there now, obtained, by decision of the Sociale Verzekeringsbank dated 10 December 1970 an old-age pension in respect of periods of affiliation in the Netherlands amounting to 45.6 per cent of the pension she would normally have enjoyed under the AOW. The Verzekeringsbank had established this amount in accordance with the Dutch-German convention of March 1961, made pursuant to Article 7 of Council Regulation No. 3.

Mrs. Smieja appealed against this decision before the Dutch administrative court (Raad van Beroep) in Amsterdam. In the course of proceedings the Verzekeringsbank changed its legal submissions and argued that, inasmuch as Articles 8 and 10 of Council Regulation No. 3 were applicable, it had erred in calculating the appellant's pension. It accordingly requested the court to rescind its decision of 10 December 1970.

The Raad van Beroep held that the Verzekeringsbank had been right in its original decision, and was wrong in its argument produced in the course of proceedings. It upheld the bank's original decision.

The bank then appealed to the Centrale Raad van Beroep in Utrecht on the ground that doubts persisted as to the proper interpretation of Articles 8 and 10 of Regulation No. 3. The Centrale Raad van Beroep referred the case for interpretation to the European Court.

The Centrale Raad's specific question submitted to the court at Luxembourg concerned the meaning of such terms as ". . . social secutuiry legislation of all member states" in Article 8 of Regulation No. 3. ". . . legislation of all member states" in Article 3, paragraph 1 of Regulation No. 1408/71; ". . . pursuant to the legislation of one or several member states" in Article 10, paragraph 1 of Regulation No. 3, and ". . . under the legislation of one or several member states" in Article 10, paragraph 1 of Regulation 1408/71.

In other words, "should these various rules be held to complement each other so as to liberalize conditions of nationality and residence to a degree corresponding to a Community citizenship and a Community territory? Or were these rules completely unrelated?"

**Judgment**

The court held that the provisions should be viewed in the light of such Community law rules as the principle of non-discrimination between nationals of member states. In particular the term "acquired", appearing in Article 10, paragraph 1 of both Regulation No. 3 and No. 1408/71 should be deemed to mean that the protection allowed shall include benefits granted under national schemes, and increases of such benefits.

(*The Times*, 12/11/1973)

# European Commission Posts in Brussels

During 1973 the regulations governing the recruitment of staff to the European Institutions were suspended so as to permit Irish, British and Danish citizens to be appointed to all career levels. This exercise has now been completed and citizens of the three new countries have been slotted into posts ranging from Director-General downwards.

Since 1 January 1974 the Personnel Statute is fully functioning again which means that entry to the middle grade posts is by promotion from within the service and that candidates from the three new countries will compete equally with candidates from the six old countries in the competitions for joining the service.

The staff establishment of the Commission is divided

into four categories :

*Category A* : officials with university education, exercising administrative duties.

*Category B* : administrators, documentalists, technical assistants.

*Category C* : secretaries, clerical officers, laboratory attendants.

*Category D* : filing clerks, drivers, messengers.

*Linguistic card* : officials with specialised university training, working as translators or interpreters.

*Scientific and technical cadre* : officials of categories A, B or C, generally exercising scientific and technical functions.

Entry to all grades is by means of competitive examinations. These are held at regular intervals and consist of a submission of qualifications, written and oral tests (including a test in one of the following languages—French, German, Danish, Italian or Dutch), and a medical examination.

Early in 1974 advertisements will be placed in the Irish newspapers inviting applications for A, B, and C categories. The practice followed is that after the examinations a reserve list is established and appointments to vacancies are made from this list. Not all the candidates placed on the reserve list will necessarily be offered a post.

The Commission has the biggest translating and interpreting services in the world. Each year it recruits many linguists as translators and interpreters. In this area of recruitment there are two particular difficulties.

First, in requiring a linguist to have a university education, the Commission is seeking above all someone with linguistic knowledge applied to the task of translating and the task of interpreting—jobs, which, although apparently similar, are in fact two quite different disciplines. Candidates for the competitive examinations will, therefore, have graduated from a translator's or interpreter's school or university level, and of these there are very few.

The second problem in the recruitment of linguists is the kind of tests they must pass : these are exclusively linguistic, except for an oral test of a candidate's general knowledge. Knowledge of three Community working languages (English, French, German, Italian, Dutch or Danish) is required—one active language, this being the candidate's mother tongue, and two passive languages. This requirement severely limits the scope for recruiting, especially where interpreters are concerned.

The Commission is, however, prepared to provide training for promising candidates who have not the opportunity of obtaining a qualification at a translator's or interpreter's school.

# Irish Appointments to the Commission

The following appointments have been made to senior posts in the Commission of the European Communities :

Director General, Directorate-General for Information (DGX).

**Sean G. Ronan** formerly Irish Ambassador in Bonn and Assistant Secretary, Department of Foreign Affairs.

Director, Directorate-General Internal Market (DG XI) (right of establishment; freedom to supply services; harmonisation of commercial and economic legislation).
**Dermot Devine** formerly senior lecturer University of Capetown.

Director, Directorate-General Competition (DG IV) (general policy of competition).
**Vincent Grogan, S.C.** formerly Director, Statute Law Reform and Consolidation Office.

Director, Directorate-General Regional Policy (DG XVI) (analyses, documentation and objectives).
**Joseph Oslizlok** formerly Chief Economist, Central Bank of Ireland.

Principal Adviser, Directorate-General Agriculture (DG VI) (measures concerning the sociological structure of the agricultural population; land tenure).
**John Scully** formerly Senior Inspector, Department of Agriculture.

Director of the Dublin Office (DG X)
**Denis Corboy** formerly Director of the Commission's Information Centre and the Irish Council of the European Movement.

Head of Division, Directorate-General Agriculture (DG VI) (Milk products division)
**Thomas O'Dwyer** formerly Head of marketing research, Agricultural Institute.

Head of Division, Official Publications Office (Publications)
**Fergus FitzGerald** formerly Chief editorial branch, FAO, Rome.

Head of Division, Directorate-General Economic & Financial Affairs (DG II) (methods of analysis and economic trends).
**Thomas F. Hoare** formerly Head of Division, Central Bank of Ireland.

Head of Division, Directorate-General Industrial and Technological Affairs (DG III) (small and medium enterprises; crafts).
**Peter J. Lennon** formerly Adviser with a firm of Management Consultants.

Head of Division, Directorate-General Transport (DG VII) (competition and special tariff arrangements).
**Kevin Leydon** formerly Chief Economist, C.I.E.

Adviser, Directorate-General Competition (DG IV) (cartels; abuse of dominant positions).
**Conor Maguire, S.C.** formerly Judge of the Circuit Court.

Head of Division, General Secretariat (general report and other periodical reports).
**Andrew Mulligan** formerly Journalist and BBC Producer.

Head of Division, Administration of the Customs Union (customs value and charges having an effect equivalent to customs duties).
**Michael Mullins** formerly Principal Officer, Office of the Revenue Commissioners.

Head of Division, Directorate-General Regional Policy (DG XIV) (regional development).
**Brendan McNamara** formerly Principal Officer, Department of Finance.

Head of Division, Directorate-General Social Affairs (DG V) (European social fund; administration finances).
**Jeremiah P. Sheehan** formerly Chief Executive Officer, Dublin Vocational Education Committee.

Adviser Legal Service.
**John Temple Lang** Solicitor.

# Incommunicado

(With the compliments of the *Journal of the Law Society of Scotland*)

### THE PRINCIPLES OF ENCLOSURE AND OTHER COMMUNICATION HINTS

(1) Fold any document small enough to be easily lost well inside larger documents where it may remain safely concealed for years. Imagination can usefully be applied to the selection of short urgent documents, particularly those of a financial character, to be linked in this way with long documents of a less urgent nature, unlikely to be processed for several weeks and preferably being dealt with by a different partner or, where possible, by a different office of the same firm.

(2) All existing folds are probably in the wrong place, so why not make some new ones?

(3) Pins, paper clips and staples should be so placed as to ensure that no document can be read or signed without taking the whole assembly to bits.

(4) Concentration by the recipients can be further assisted by placing the occasional document upside down or back to front, and a useful variant is to put some pins or stapling clips at the bottom and the sides as well as the top. Carefully ensure that dates, reference numbers, addresses and other particulars to which people are likely to wish to refer are efficiently masked. Real experts will plan at an even earlier stage the positioning of such particulars in the layout of their documents where they are most likely to be obliterated or clamped out of sight by all well-known punching, filing and binding systems.

(5) Additional employment can be generated for the profession by ensuring that all letters and memoranda (whether produced for use within the office or to pass between different solicitors) are prepared in a form, or spiced with the odd phrase, which will render them unsuitable to be copied and passed to the clients concerned, without editing and retyping.

(6) The profession have attained a high standard of economy in preparing drafts in very close spacing without any wasteful margins or gaps between the paragraphs. Economy apart, this is a useful deterrent against superflous and impertinent amendment.

(7) The profession have attained a high standard of economy in preparing drafts in very close spacing without any wasteful margins or gaps between the paragraphs. Economy apart, this is a useful deterrent against superflous and impertinent amendment.

(8) **Telephone hints:**

(a) The grandeur of a tycoon can be calibrated by the number of consecutive women employed to tell his victims, after appropriate pauses, "Mr. X would like to speak to you. Will you hold the line, please?" Three is a good score, but additional points are conceded for long waits, impressive background noises and heavy breathing.

(b) Few solicitors can afford more than one such acolyte, but we compensate for this by the length of the pauses and the triumphant announcement that the originator of the call has "gone out for a coffee".

(c) After a long run of such telephone assaults, one can be bold enough or angry enough to say: "Don't put any more calls through unless the caller is actually on the line himself." If by any ill chance such an instruction is remembered or observed, it is almost certain to lead to an immediate and ill-tempered confrontation with a client who is old, deaf, rich, obtuse or important (or all of these things) whom one had intended, but had forgotten, to exclude from such an instruction.

(d) This admonition is not widely required, but it is anti-social to cheat the post office of telephone revenue by responding to a single request to phone a caller back; make him phone at least four times to prove his sincerity.

(e) Some saboteurs, foiled of immediate access, attempt to leave, or even dictate, a message indicative of the subject matter of the call in the illicit hope that the respondent might just conceivably apply his mind to the message, phone back with the relevant file handy, or even read it up. The post office has, however, little cause to worry—few respondents ever get such a message. Fewer still react to it. If and when they return the call, it is just: "They told me to phone you."

(f) Another fraud on the GPO revenue which evokes an equally negative response is to exploit the economic weakness of STD by ringing a distant office, and saying: "Your reference is ABC, please tell whoever is dealing with this that I will phone him in ten minutes and that I want to ask him about Z." The damsel thus approached will prove entirely uncomprehending and obstructive, and will deploy every wile within her repertoire to induce you to "Hold on" while she conducts a chatty, lengthy and fruitless canvas of all the departments and extension numbers she can think of, most of which will prove to be disorientated, unconcerned, hostile, or out for lunch.

(g) The imperious ring of the telephone and the thought that it is consuming electricity and costing money exert an inexplicable magic upon us all. A client may have risen at dawn to travel hundreds of miles to honour a long-prearranged appointment, yet his claim to our attention can be disrupted or delayed by a talkative hobo, reversing the charge and discoursing on trivialities which he is too idle and inefficient to commit to paper.

# Administrative Law and the Rights of the Citizen

**Contributed and revised by the Editor**

Administrative Tribunals in modern times have become more frequent and tend to effect to a greater extent the rights of the citizen in the modern Social Welfare State. In many instances, the decision of these Tribunals is the subject of appeal not to the Courts, but to an Appeals Officer or to the Minister. The system operative in the hearing of grievances on the part of persons effected is not very encouraging to the professional lawyer who normally operates through the Courts supervised by an independent judiciary. This is

not to say that the personnel sitting on the Minister's tribunals are invariably partial as in many instances, they are not. However, the system does leave itself open to criticism on many grounds, not the least being that justice may not appear to be done. In that regard, an Appellant may find himself dealing with an invisible "prosecutor" whose case is never really heard but the existence of which certainly discloses itself from confidential papers held in the case by the Officer in whose hands the decision lies. This is an unsatisfactory accepted situation within the system.

By reason of these matters, many persons resorting by way of Appeal to an Administrative Tribunal approach the matter with some scepticism. It is often thought that the only right of Appeal is to another person within the system, but it should be fully understood that on a question of law at least, there is a right to Appeal to the High Court under Section 45 of the Social Welfare Act of 1952 in the case of unsatisfactory decisions by an Appeals Officer or a Chief Appeals Officer under the Social Welfare Acts. This matter is of some consequence and may assist in remedying a situation which might otherwise go unaffected. (See *McLoughlin v. Minister of Social Welfare*—(1958) IR 1.)

Section 45 came to the aid of John Joseph Wrynn, a Plaintiff in High Court proceedings issued against the Minister for Social Welfare by a Special Summons dated 29 May 1973. John Joseph Wrynn was employed by an Ecclesiastical Supplier on certain days of the week in respect of the period from 2 November 1970 to 29 November 1970. Four Social Welfare Insurance Stamps were affixed to his Insurance Card in respect of that period. At all events, Mr. Wrynn ultimately received a notification that it had been decided by a minor civil servant called a deciding officer (appointed under Section 41 of the Act) that the employment was not insurable. At that stage, he appealed to a higher civil servant called an Appeals Officer appointed under Section 43 of the Act. This Appeals Officer, after an oral hearing in which he heard Mr. Wrynn himself and in which he also heard the Employer who was summoned as a witness by the Minister, decided to uphold the decision of the Deciding Officer, as usual, without giving valid reasons. At the hearing of that appeal, all of the evidence established that Mr. Wrynn was genuinely employed in employment under a Contract of Service such as would fall to be considered as Insurable employment under the Act. The decision of the Appeals Officer was most extraordinary as not being in accordance with legal principles by reason of this, it was pointed out to the Department that the decision was not supported by proper evidence and that, therefore, an Appeal to the Chief Appeals Officer was sought. The then Chief Appeals Officer, lacking the requisite legal knowledge, in turn, indicated that he saw no reason for altering the decision of the Appeals Officer.

Thereafter, the matter was pursued on the basis that proceedings would be issued in the High Court having regard to the fact that the decision of the Appeals Officer was not supported on the evidence. Application was made for a copy of the note of the evidence taken by the Appeals Officer, but, of course, this was illegally with-held notwithstanding that several requests were made for it and further notwithstanding that these requests were based upon the most learned decision of the Supreme Court in the case of *Murphy v. Dublin Corporation* (1972) IR 215. Consequently no copy of the note was furnished. Ultimately the proceedings issued were based simply upon the contention that upon all of the evidence furnished at the Hearing, none of it justified the view taken by the Appeals Officer and that, therefore, he had arrived at a decision which was not supported by evidence as a matter of Law.

Notwithstanding the unsatisfactory stand taken earlier, the State was ultimately compelled to indicate that the Chief Appeals Officer was prepared to alter his decision! There was then the very neat question as to whether the Chief Appeals Officer could do this or not, in view of the fact that he had already given his decision, and the point might be taken that his decision could not be altered and that he could not in effect, reverse himself. Ultimately, at all events, Mr. Wrynn was happy to have a new Chief Appeals Officer find in his favour and the State, of course, submitted to the costs of the proceedings in an Order ultimately made by Mr. Justice Kenny by consent on 21 December 1973.

This particular case, is therefore of importance to show that in any case where the evidence tends to support the applicant the Appeals Officer is not entitled in those circumstances in his decision to adopt a contrary view because as a matter of law, he is not entitled to do so, if the evidence does not support it.

# SOLICITORS WANT SUITORS' FUND TO PREVENT INJUSTICE

The establishment of a public fund to save litigants having to pay Appeal Court costs from their own pockets because of mistakes by judges or uncertainties in the law is urged today by the Law Society.

In a memorandum to Lord Hailsham, Lord Chancellor, the Society, which is the solicitors' governing body, backs a proposal made four years ago by Justice, the all-party law reform group, for the establishment of a suitors' fund.

The need for such a fund arises from the injustice that can follow the general rule in civil litigation that the eventual loser is ordered to pay the costs of the winner, including his own.

This means that although a plaintiff can succeed at the trial and be awarded costs, if the defendant then appeals and wins, the plaintiff can be faced with a much larger bill for costs because of the wrong decision of the trial judge.

**Aggravated further**

The situation can be aggravated still further, if, for example, there is a second appeal from the Court of Appeal to the House of Lords. Under the proposals for

a suitor's fund, the costs of the appeals would come from public money.

The Law Society, which was asked by Lord Hailsham for its views on the Justice proposals, says the fund should cover costs incurred in obtaining an Appeal Court decision reversing or varying a lower court judgment which was wrong in law or fact or both.

Initially payments from the fund should be limited to proceedings in the House of Lords, the Court of Appeal and the Divisional Courts.

Like Justice, the Law Society says the fund would be available in cases where a judge finds himself bound by judicial precedent even though he might wish to give a different decision.

It would also indemnify parties for the costs of a trial which had to be abandoned because of the illness or death of the judge before he had time to give his decision.

**Present system leads to hardship and injustice**

At present in long and expensive cases, litigants might take out insurance against such risks but this was not an expense a litigant should be required to incur, says the Law Society. Independently of any suitor's fund, the Treasury should accept costs thrown away in these circumstances.

There was no doubt, says the Law Society, that the present "winner takes all" costs rule could result in real hardship and injustice, particularly to those not rich enough to absorb the cost nor able to take advantage of the social and protective benefits of legal aid.

Some complex legal issue might arise requiring judicial interpretation of a new statutory provision, but the risk of liability for costs at the trial and on possible appeal prevents recourse to the courts which should be available.

"This situation is exacerbated where the issue involved, is of public importance and the result would benefit the community generally."

It is suggested that finance for a suitors' fund should come from a levy on court fees but no estimate of the cost is made by the Law Society.

**Prior assurance required of appellate costs**

While Justice proposed that the court after a hearing of an appeal should decide whether costs should be indemnified from the suitors' fund, the Law Society feels that an appellant should have a prior assurance of having his costs covered before bringing an appeal.

It suggests that a prospective appellant should be able to apply to an independent national committee for a certificate for payment of his costs from the fund. Even if refused by the committee, the Appeal Court would have to grant a certificate retrospectively.

Both individuals and corporate bodies would be able to apply for certificates.

Criminal cases should not need to be covered by such a fund, says the Law Society, because of the recent direction to the courts by Lord Widgery, the Lord Chief Justice.

Under this an accused, acquitted on trial or on appeal, and whether legally aided or not, should be able to recover his costs out of public funds except in certain circumstances.

# Notice—Solicitors may take additional Apprentices

The Society is conscious of the difficult problem of intending apprentices in obtaining masters. In these special and exceptional circumstances, the Court of Examiners is prepared as a temporary measure, to consider applications for second apprentices from Solicitors generally. The Society is also prepared as an exceptional measure to consider applications from solicitors of 5 to 7 years standing to take apprentices.

James J. Ivers (*Director General*)

# BOOK REVIEWS

**Mellows (Anthony R.)—The Law of Succession.** Second edition; 8vo.; Pp. xcix, 729; London, Butterworth, 1973.

Dr. Mellows, a solicitor, is Director of Conveyancing Studies in King's College, London. The fact that this learned work has necessitated the publication of a second edition in three years speaks for itself. We were fortunate in having to a large extent a unified Succession Act 1965, but the position is not so simple in England. Some provisions of the out of date Wills Act 1837 still apply there. Many of the provisions of the Administration of Estates Act, 1925, have been re-enacted in our Succession Act, but the system of applying to the Courts under the Inheritance (Family Provisions) Act 1938 is inapplicable. The rules relating to *donationes mortis Causa* are broadly similar, and the Rule in *Parker v. Felgate* (1883) presumably applies. In this rule, if a competent testator gives instructions to a solicitor to prepare a will, and the will is duly prepared in accordance with instructions, then the will is deemed valid, even if, at the time of execution, the testator is no longer competent to make a will; this is most useful in the case of dying testators. The rules as to revocation and alterations, re-publication and revival of a will which is revoked, are very similar.

Part II of the learned work deals with the construction of wills. If the Court cannot deduce the rules of construction from the will itself, then the numerous rules of construction apply, but of course they cannot provide for all contingencies. Such matters as the general intent of the will, the meaning of specified words and phrases and even the Golden Rule, by which the Court will try to admit a sensible meaning to the will in order to avoid intestacy apply. Under the Armchair Rule in construing a will, the Court has the right to ascertain all the facts known to the testator when he was making his will.

Part III, dealing with Intestacy, has to be read with care, as the rights of the spouse and of the issue are different under Irish Law. Under the Australian case of *Schaefer v. Schuhlmann* (1972) A.C.—the testator, who wishes to defeat his dependants, has now great scope for doing so, as the Privy Council held that legacies to daughters could not be charged on the matrimonial home. Part V is applicable insofar as it deals with grants and the general powers of executors and administrators, including revocation of grants. Part VI deals in great detail with the position of the personal representative. While many of the broad principles apply, such as those relating to *executor de son tort* and *devastavit,* care should be taken not to read references to land legislation and to taxation, which are different.

Part VII deals at length with the position of the beneficiaries, including disclaimer, lapse, *commorientes,* ademption, satisfaction, and legacies generally. It will be seen that throughout Dr. Mellows in his learned treatise has been most thorough, and has tackled all difficult problems with erudition and clarity. The lay-out and printing are up to the ususl high standard. English practitioners are fortunate in having such a treatise readily available. It is to be hoped that, as the last comprehensive Irish textbook on Probate law by Maxwell was published as long ago as 1900, some Irish lawyer will consider writing an up to date textbook on the subject. Nelson can only be considered as a practical practitioner's handbook.

**Munkman (John)—Damages for Personal Injuries and Death.** Fifth Edition; 8 vo.; Pp. rxxii, 292; London, Butterworth, 1974; £4.00.

Mr. Munkman was invited as long ago as 1953 to write a book upon this intricate subject, and the first edition of this book appeared in 1956 with the aim (1) of giving a complete statement of the principles of law on the assessment of damages for personal injuries including death, and (2) to frame a broad classification of the types of cases that arise, and to offer typical illustrations of awards. That this double aim has been amply achieved is illustrated by the fact that there have been no less than five editions in a space of little more than twenty years, and that the material between the 3rd and 5th editions has been extended by 60 pages. Following the Report of the New Zealand Royal Commission, which recommended a state insurance scheme covering all injuries where the injured would be adequately compensated, the British Government has also established a Royal Commission. It would indeed be interesting to hear the comments of the average barrister if such a scheme were ever adopted here.

The chapter headings indicate the contents and, in considering damages generally, the Author points out that two main elements are personal loss and pecuniary loss, loss of earnings, loss of career, and medical and nursing and convalescence expenses are fully considered. Pensions, accident insurance, free sick pay, and national insurance benefits are deemed to be possible deductions and set-offs against pecuniary loss. Pain and suffering, nervous shock, disfigurement, discomfort and disease are set out as special headings for damages for personal loss, while damages arising from death are dealt with separately. Perhaps the most important part of the book, is that dealing with illustrations of the Quantum Damages whether in relation to Total Wreck, Eyes, Deafness, Head Injuries, etc.; there is however no precedent as to the Quantum of Damages, and each case can only be determined according to guide lines. As far as total wreck cases involving total paralysis are concerned, one can only say broadly that Irish juries are much more generous in their awards than English juries; exceptionally, in *Povey v. Rydal School*—(1970) 1 All E.R. 841—a quadriplegic youth of 19 obtained general damages of £75,000. However, in respect of single organs, like ear or neck, the damages tend to be rather low in England.

The immense industry and erudition of the learned author in compiling decisions even from English provincial papers is of great advantage as guide lines to be studied, and the volume, in expressing clearly the general principles, as well as stating examples in detail, has proved itself as most useful. It is to be highly recommended.

In the Preface to the Third Edition, the learned author has expressed admiration for the intrinsic merit of the separate judgments of the House of Lords, who are thus given a wider opportunity to look at old principles from a fresh angle. It is to be hoped that the

single judgment provisions in Irish constitutional cases affecting Statutes after 1938 and in the Irish Court of Criminal Appeal will receive a fresh appraisal, if the opportunity arises to enact a new Constitution.

**Kapteyn (P. J. G.) and P. Verloren Van Themaat—Introduction to the Law of the European Communities after the Accession of the new Member State.** Royal 8vo.; Pp. xx, 433; London, Sweet & Maxwell, 1973; £10.00.

Practitioners will doubtless be aghast that yet another volume on Common Market Law has been written by two Dutch Professors of Utrecht University. Professor Mitchell in his Foreword has emphasised the utility of this "Introduction" insofar as it relates the legal, political and economic aspects of the Community. All developments relating to the accession of Ireland, Britain and Denmark up to 1 April 1972 are included in what the authors call "a concise introduction". The authors admit that the volume is primarily written for officials rather than for lawyers. But they have mainly based their argument directly on primary Community Law, the innumerable cimplementing rules, the administrative practice of the Community, and the bulky jurisprudence of the Court of Justice.

The book starts with the Schuman plan leading to the European Coal and Steel Treaty of 1951, and eventually to the Treaty of Rome of 1958. In considering general aspects of the Communities it is emphasised that, while objectives and principles are formulated in the Treaties, it is left to the institutions to work out these principles and objectives in concrete measures; these are essentially rules of conduct for the national governments in the form of injunctions or prohibitions —yet the general objectives are largely identical. This is reinforced by the Merger Treaty of April 1965, which instituted a single Council of Ministers and a single Commission, and by the fact that the Treaties are treated as Primary Law, while the rules of the Community institutions form the basis of Secondary Law. But *Institutional Law* is said to relate to the application and revision of the Treaties as well as the legal personality, regime and immunities of the Communities.

Community Law, involving the maintenance of a common market, is a common Internal Law in the Member States, which is provided for by extensive organisational and procedural provisions, rather than vague dieta of International Law. The sources of Community Law seem to be the importance of the acts of the institutions, as well as general legal principles. German and Italian Constitutional law is rightly praised as it applies automatically the written rules of international law to national law. The European Court has wisely decided in many cases that some provisions of the Treaties are *self-executing,* and are consequently binding on the municipal law of the Member States. No mere domestic law, however far-fetched, can be adduced before a municipal Court as against Community Law. Subject to the internal Constitution of the State, the municipal Court should give to the rules of Community Law the effect desired by the European Court.

There is then a learned but diffuse chapter on the Socio-Economic principles of the Community, which considers in detail the basic objectives of Article 2, and the basic principles of Articles 5, 6 and 7. The relationship between the Council of Ministers and the Commission is fully set out in the chapter on "Institutional Structure". While the Commission serves the general interests of the Community, there is close collaboration with the Council. The restricted powers of the European Parliament are rightly criticised. The manner in which the European Court may act either as an administrative Court, an international Court, or a Constitutional Court, is fully debated.

In the chapter on Policy-Making and Administration, it is emphasised that the principal legal instruments for the application of Community Law are the official acts of the Council and of the Commission, as well as international Treaties and agreements, and regulations, directives and decisions. The budgetary procedure, as well as the decision-making procedure in the Council is then fully explored.

The chapter on the Administration of Justice will be of special interest, as it considers the various functions of the European Court, such as (1) actions for Treaty infringements, (2) annulment of regulations and directives; and (3) inaction in specified cases by the Council or the Commission. However the role of the national Court is still paramount as, in the first instance, an individual, who wishes to contest the legal validity of acts of national bodies as being contrary to Community Law must apply first to the National Court, which can if necessary ask the European Court for a preliminary ruling. Undoubtedly the *théorie de l'acte clair* lays down that the obligation to refer does not apply, if the Supreme Court holds that there cannot be any doubt about the answers to the questions raised. The Four Freedoms—relating to Goods, Persons, Services and Capital—are then fully described. The Competition Policy is then considered; this includes the problem of harmonisation of laws, as well as the distortion of the conditions of competition under Articles 101-102 and 92-94, and also the rules of competition for undertakings under Articles 85, 86 and 90. This is followed by a chapter on Economic and Social Policies, as well as Sectorial Policy, which includes Agriculture, Transport, European Coal and Steel, and Atomic Energy. The problem of external relations is explored under the heading of common commercial policy. Finally the details of the Treaty of Accession are fully explained, as well as the changes due to the non-accession of Norway.

It will be seen that the learned authors have covered very much ground in their "Introduction". From the innumerable footnote references, it is obvious that they are masters of their subject. It follows that the practitioner, who takes the trouble to study it in depth, will derive much benefit from it. The publishers are to be congratulated upon their usual high standard of general presentation and fine printing.

# COURSE IN CIVIL AND COMMUNITY LAW, BRUSSELS

The Institute of European Studies, attached to the Faculty of Law of the University of Brussels, as well as the Wiener-Anspach Foundation, intend to hold a course in Civil Law (Commercial Law, Civil Judicial Procedure, Property Law and Administrative Law), as well as in Community Law. (The Institutions of the Community—Juridical Methods within the Community—Competition Law—Establishment Law—Social Law and Tax Laws) in the French language at the Institute of European Studies, 39 Franklin Roosevelt, Brussels 1050, Belgium, from 5 August to 30 August next. The course will be delivered by Professor Ganshof Van Der Meesch and other well known professors. The admission fee is 2,000 Belgian francs (about £22 at current exchange rates) which includes all notes. A number of scholarships amounting on an average to 20,000 Belgian francs (£220) to cover fees and maintenance expenses will be awarded. Candidates are expected to attend 4 lectures per day from Monday to Friday. The Course is designed for law graduates and Solicitors or Barristers coming from countries whose system of law is based on the Common Law; applicants will be expected to have a good oral and written knowledge of French to follow the course. As no arrangements have been made, as in England, that specified Professors of Law should recommend candidates, graduates of the National University should apply to Professor Geoffrey Hand, Dean of The Faculty of Law, University College, Belfield, Dublin 4 and graduates of Trinity College should apply to Senator Professor Mary Robinson, of the Faculty of Law in the college for a certificate of suitability. Forms of application can be obtained from Mr. Gavan-Duffy in the Library.

It seems very strange, but applications for this August course are expected to reach Brussels before **15 April 1974.**

# HAGUE ACADEMY OF INTERNATIONAL LAW

The first period of lectures on Private International law will be held in the Peace Palace, The Hague, from 8 to 26 July 1974. The General Course will be given by Professor Kahn-Freund and Professor Vischer (Basel) Droz (The Hague) and Graveson (London) are amongst the lecturers.

The second period of lectures will be held from 19 July to 16 August 1974. The general course in Public International Law will be given by Professor Mosler, now a Judge of the European Court of Human Rights in Strasbourg. Amongst the Lecturers will be Professors Cahier (Geneva), Floz (Axix), Vasok (Strasbourg) and Judge Cassin. Registration for each period is subject to a fee of 50 Dutch Florins (£8). The price of a room in a private house with breakfast is 13 Guilders (£2.30) per day. Living expenses are estimated at 35 Guilders (£6) per day—total of £8.30 per day. Registration, which is open to law graduates, barristers and solicitors, should be made as soon as possible to the Secretariat of the Academy, The Peace Palace, The Hague, Netherlands.

# LEYDEN-AMSTERDAM-COLUMBIA SUMMER PROGRAMME IN AMERICAN LAW

This Course in American Law will be held at Leyden Law School from 1 to 26 July 1974. Each participant must take the courses in (1) Legal Method given by Professors Oberer (Cornell) and Smit (Director of European Legal Institutions); (2) Constitutional Law by Professors Goldschmidt (Columbia) and Lusky (Columbia); (3) Civil Procedure by Professor Smit; and (4) Administrative Law by Professor Strauss (Columbia). Two optional courses must be selected from (5) Antitrust Law (Professor Schmidt); (6) Contract (Professor Oberer); (7) Corporations (Professor Cary of Columbia; and (8) Trusts (Professor Lusky). The fee for tuition is 250 Dutch Guilders (£40), which covers tuition, all study material, and all administrative expenses. Accommodation is provided in single rooms in the Students Residence Buildings at 8½ Guilders (£1.35) per night; lunch will be provided for 7½ Guilders (£1.15). A limited number of scholarships is available. The form should be returned if possible before 31 March 1974, to the Secretariat, Juridesch Instituut, Hugo de Groat Straat 27, Leyden, Netherlands.

# INTERNATIONAL CONGRESS OF JURISTS OF PAX ROMANA

The 8th International Congress of Jurists of Pax Romana, open to all lawyers, will be held in Detroit, U.S.A., in July 1974. The theme of the Conference will be: "The contribution of Christian lawyers to social justice in International Society" it is to be covered in nine sessions. A special *Air France* charter flight will leave Paris, Orly, for New York on Thursday, 18 July. The Congress will be held in various centres in Detroit from Saturday, 20 July to Friday 26 July, and participants will then visit Washington. The return flight will arrive in Paris on Monday, 29 July. The price for the complete trip from Paris to Paris including insurance is 2315 French Francs (£212). Single Room Supplement —100 Francs (£9). Accommodation will be provided in the University Campus in Detroit and Washington. Hospitality to Irish participants is assured, as many American Lawyers of Irish descent are attending. Application forms can be obtained from Mr. C. Gavan-Duffy and should be sent as soon as possible to Maitre Pettit, 4 Square La Bruyere, 75009, Paris.

# CORRESPONDENCE

The Law Society,
113 Chancery Lane,
London, W.C.2.
...12 February 1974

James J. Ivers, Esq.,
Director General.

Dear Director General,

The Law Society's Annual Conference this year will be held in Harrogate from the 17th to the 20th October. It will be somewhat shorter than usual, but we are hoping to produce a really interesting programme for our members. Several of the Conference sessions will take the form of a debate on a motion which is of general interest to the profession. In particular, the subject of "Fusion" between the two branches of the legal profession has been selected, and it is likely that there will be other debates on the operation of the Legal Advice and Assistance Act, and on current proposals that are being made for no-fault compensation from a central fund. During the Conference there will also be an opportunity for members to discuss topics that are of particular interest to them, because we are going to hold a series of sectional meetings. Among the selected topics are:

1. The New Companies Act.
2. Estate Duty Planning.
3. Divorce—the Division of Property.
4. Property Development and Tax.
5. Time Costing and the use of Computers.
6. Consumer Credit.

Altogether apart from any official invitations which are being sent to Presidents or Secretaries of the Law Societies of Scotland, Northern Ireland and Ireland, the Council have on this occasion decided to throw the Conference open to members of each of these three Societies, just as if they were members of The Law Society in this country. In other words there will be a warm welcome to any members of your own Society who would like to attend the Conference and I shall be grateful if you will give general publicity to this in your own professional journal.

Yours Sincerely,
Harold Horsfall Turner
*Secretary-General*

# THE REGISTER

**REGISTRATION OF TITLE ACT, 1964**
**Issue of New Land Certificates**

An application has been received from the registered owner 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 is in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 15th day of March 1974.

DESMOND L. McALLISTER,
Registrar of Titles

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

**Schedule**

(1) Registered Owner: Kathleen Brady; Folio No.: (1) 21286; Lands: (1) Cloonboyoge; Area: (1) 5a. 3r. 32p. Folio No.: (2) 21286; Lands: (2) Lurgan; Area: (2) 2a. 0r. 30p. Folio No.: (3) 21286; Lands: (3) Lurgan; Area: (3) 4a. 0r. 30p. Folio No.: (4) 21286; Lands: (4) Cherryfield or Drishaghan; Area: (4) 0a. 3r. 20p. Folio No.: (5) 21286; Lands: (5) Cherryfield or Drishagan; Area (5) 0a. 0r. 22p.; County: Roscommon.

(2) Registered Owner: Victor O'Shea; Folio No.: 5627; Lands: Bannixtown; Area: 27a. 2r. 10p.; County: Tipperary.

(3) Registered Owner: Mary Ann Geraghty; Folio No.: 2977r; Lands: Killaloonty; Area: 0a. 1r. 35p.; County: Galway.

(4) Registered Owner: Thomas O'Shea; Folio No.: 16600; Lands: Ardclone; Area: 14a. 3r. 13p.; County: Kilkenny.

(5) Registered Owner: Colm Corless; Folio No.: 18460; Lands: Retreat; Area: 0a. 0r. 21p.; County: Westmeath.

(6) Registered Owner: Alice Reid; Folio No.: 16198; Lands: Dromore (parts); Area: 2a. 0r. 5p.; County: Donegal.

(7) Registered Owner: Patrick Jenkinson; Folio No.: 2260; Lands: Lusk (part); Area: 7a. 2r. 12p.; County: Dublin.

(8) Registered Owner: William Vance; Folio No.: 2676; Lands: Ballinascorney Upper (part); Area: 76a. 1r. 5p.; County: Dublin.

(No. 9) Registered Owner: Cornelius P. Bourke; Folio No.: 15125; Lands: Cloghkeating; Area: 16a. 3r. 10p.; County: Limerick.

(10; Registered Owner: Kate Ann Naughton; Folio No.: 10583; Lands: Creagh; Area: 9a. 1r. 0p.; County: Galway.

(11) Registered Owners: (1) His Lordship, Most Rev. Doctor John D'Alton, (2) The Right Rev. Archdeacon John F. Stokes, (3) The Very Rev. Patrick J. Downey; Folio No.: 3514; Lands: Stormanstown; Area: 6a. 2r. 21p.; County: Louth.

# OBITUARY

**Mr. Patrick T. Monahan** died in Sligo County Hospital on 30 January 1974. Mr. Monahan was admitted in Michaelmas Term, 1936, and practised under the style of O'Doherty and Monahan in Stephen Street, Sligo.

**Mr. James Kennedy** died in Spain while on holidays on 16 March 1974. Mr. Kennedy was a brother of District Justice Eileen Kennedy, and was admitted as a solicitor in Hilary Term 1942. Mr. Kennedy was senior partner of the firm of Messrs. P. J. Kennedy & Sons and practised in Carrickmacross, Co. Monaghan.

**Mr. Ronan Ceannt,** who was the only son of Eamonn Ceannt, one of the signatories of the 1916 Proclamation, died in January 1974. Mr. Ceannt was admitted in 1936, and practised for some years in the Law Agent's Department of Dublin Corporation.



# APPOINTMENT

Mr. Eamonn Hanley has been appointed Secretary of the European Communities Section of the Department of Justice.

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# EDITORIAL

# The Proposed Planning Board

Members are doubtless aware that, under the proposed Local Government (Planning and Development) Bill, 1973, it is proposed to establish a new Appeal Planning Board in substitution for appeals to the Minister for Local Government directly, as provided by the Act of 1963. The former procedure undoubtedly led to a great many abuses, and one had assumed that the new Planning Board would be an improvement. But when one reads that the Minister may appoint the full-time Chairman for a three-year period, and no specified and detailed qualifications are laid down for the appointment, one begins to wonder. Furthermore the Government may remove him at any time, if his removal appears to be necessary, and the Dail and the Seanad are merely informed by a statement in writing of the reasons for the removal; no parliamentary motion need be passed. There are also two other members of the Board, who may be civil servants; they are appointed and removable by the Minister at will. Needless to say, no member of the Board can be a member of the Oireachtas or of a Local Authority.

It would be hard to devise a less independent tribunal, who must keep in the good graces of the Minister in order to remain members of the Board. The only puny restriction appears to be that a member may not act in relation to any matter in which he has a financial or beneficial interest. The Board must keep itself informed of the policies and objectives of the Minister, as well as of the planning and local authorities, and is subject to any general ministerial policy directives. It is difficult to see how such a Board, hedged in with so many restrictions, could act independently. In one section, the High Court may prohibit unauthorised development or use of land, but otherwise apparently Constitutional arguments will have to be found in order to sustain a High Court declaration of unconstitutionality.

# THE SOCIETY

# Proceedings of the Council

**7 MARCH 1974**

The President in the chair, also present: Messrs William B. Allen, Walter Beatty, John F. Buckley, John Carrigan, Anthony Collins, Gerard M. Doyle, Mrs. Felicity Foley, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, Nicholas S. Hughes, Thomas Jackson, jnr., Francis J. Lanigan, John Maher, Ernest J. Margetson, Patrick Moore, Patrick McEntee, John J. Nash, Peter E. O'Connell, Patrick F. O'Donnell, James W. O'Donovan, Rory O'Connor, John A. O'Meara, William A. Osborne, David R. Pigot, Mrs. Moya Quinlan, Brian W. Russell, Robert McD. Taylor, and Ralph J. Walker.

**Public Relations Leaflets**

The Council decided that leaflets should be prepared and issued by the Society on the following topics:

1. Buying a house.
2. Making a will.
3. The Incorporated Law Society of Ireland.

**Abortive Mortgage Transaction**

Members wrote to the Society concerning an opinion published in the June 1972 *Gazette* which was to the effect that a mortgagor's solicitor is not entitled to claim costs from a mortgagee in an abortive mortgage transaction. Members pointed out that an agreement made between the two parties prior to loan would be binding upon the parties and would supersede the ruling of the Council.

The Council considered this matter and agreed that such an agreement would supersede the Council's ruling.

**The 18th Interim Report of the Committee on Court Practice and Procedure**

This report deals with the execution of money judgments. The Committee recommended that money judgments in the District and Circuit Courts should be of the same status as High Court judgments and that the lower Courts should have similar jurisdiction as the High Court has in making the various forms of execution orders, stop orders, etc. The Council on consideration of this aspect of the report saw no reason why the lower Courts should not have such similar jurisdiction.

A more radical proposal in the report was that judgment mortgage system should be replaced and in its place a central judgments registry should be attached to the High Court wherein all judgments for £100 or more should be registered. The registration would operate as a legal charge and all interests of the judgment debtor in immovable property vested in him at the date of registration or vesting in him thereafter during the lifetime of the judgment. Mr. Justice Kenny, a member of the Committee, strongly dissented from this recommendation which he believed would cause considerable delay in the conclusion of all sales of land, e.g. a registration of a mortgage against one Sean Murphy would mean that all purchasers from any person bearing the name Sean Murphy would have to be conclusively satisfied that the person from whom they are buying is not the person against whom the judgment has been registered. The Council on consideration of this matter felt that the Society should write to the Department of Justice supporting the dissenting view of Mr. Justice Kenny.

# UNREPORTED IRISH CASES

**High Court refuses injunction by director against his removal by company.**

In the High Court, Dublin, the President, Mr. Justice O'Keeffe, refused an application brought by a Cork company director for an interim injunction restraining Capwell Investments Ltd. (formerly John Sisk and Son Ltd.) from removing him, at a meeting due to be held today, from his position as surveyor director of the company.

The plaintiff was James P. McGrath, of Belfort House, Montenotte. Mr. Justice O'Keeffe said it was not a case for an interim injunction.

Mr. McGrath, in an affidavit, stated that he was appointed a technical director of the defendant company on 3 August 1966 and on 13 November 1967 he was elected a full ordinary director of the company and given charge by the board of the surveying department and the jobbing and small contract section. On 1 March 1963 he became a member of the company's pension and life assurance scheme with provision for normal retirement on the sixtieth anniversary of his birth. In 1969 it was agreed at a meeting of the directors of the company that the non-shareholding directors of the company would continue as such directors and in the employment of the company until each reached retirement age.

As such company director, he became entitled to a larger share in the profit-sharing scheme. He became entitled to a share of the profits calculated in proportion to twice his annual salary. His salary for the year ended December 31 last was £5,800. In addition, he was entitled to a Christmas and summer bonus of £90, and to have provided for him a Mercedes car for use both on the company's business and on his private affairs as well.

**Company reorganisation arranged**

At a meeting of S/SD Holdings on 8 May 1973 at Wilton Works, Naas Road, Co. Dublin, he and other directors were given a company memorandum under the heading "Company Reorganisation". The directors were told at the meeting that each would be informed individually within a week or ten days on how the company reorganisation would affect him.

On July 31 last he was interviewed by John R. Sisk, Martin Quirke and Kevin Callan, at Capwell Works, Cork, and he was given a very general review in connection with the proposed company reorganisation, to the effect that it was intended to centralise the building company in Dublin and that a divisional board of directors for the southern region was to be appointed. He was offered a position as a regional director on the southern board. He was told he would receive the same salary, but that a new bonus or profit-sharing scheme was to be introduced.

**No particulars given**

Mr. McGrath stated that he asked for particulars of the new bonus scheme, but was informed that they could not be given to him for possibly three or four months. He was given three weeks to consider the proposed new position and was refused an extension of time to consider the position pending the availability of the new bonus scheme to him.

On 31 August 1973 John R. Sisk and George Sisk requested his reply to the offer and he told them he was not accepting it as it resulted in a reduced status for him from a full ordinary director of the company to a director of a regional board of a new company and because no details of the bonus scheme were furnished to him. He said he was then told that he should be able to get fixed up with alternative employment within three months or by the end of the year at the latest and also that details of the financial offer of compensation to him would follow.

Negotiations involving payment of a substantial amount of money by way of compensation, together with a proposal that he should be given the Mercedes car, followed. Agreement was not reached on the terms on which he should leave the company and surrender his position as surveyor director.

**Resolutions approving reorganisation and wrongful dismissal**

At a series of board meetings of the company on December 19 and 20 last, resolutions were passed purporting to approve of, and give effect to, the scheme of company reorganisation, notwithstanding his opposition to it pending finalisation of the negotiations between him and the company. In the afternoon of December 20 John R. Sisk, managing director of the company, wrongfully purported to dismiss him from all positions he held in the company and ordered him to leave the premises.

Mr. McGrath stated that he commenced proceedings in the High Court on January 8, which were served on the company the following day. Since December 20 no further effort had been made on behalf of the company to reach agreement with him on the terms on which he should give up his position in the company.

On February 13 he received a letter and notice of an extraordinary general meeting of the company to be held on March 12 (today) to consider and, if thought fit, to pass a special resolution that he be removed from his office of director of the company. His solicitors had sought particulars of the ground or grounds which would be relied on as warranting his removal from his position and an assurance that the resolution would not be proceeded with pending the determination of the proceedings. The requests were refused.

[McGrath v. Capwell Investments; O'Keeffe P.; unreported; 10 March 1974.]

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**Minister's decision in granting planning permission for housing development in Killiney *ultra vires* and void.**

The plaintiff is a registered friendly society of residents in Killiney and Ballybrack; it claims that a decision of the Minister for Local Government made in August 1972 pursuant to the Planning Act, 1963, granting permission subject to conditions for housing development at Hackettsfield, Killiney, by the defendants is

null, void and *ultra vires*. When the defendants applied to Dun Laoghaire Corporation for housing development at Hackettsland, their application was opposed by the plaintiff. Permission subject to conditions was granted in the first instance by that Corporation on 20 April 1971 and the plaintiff duly appealed against that decision on 4 May 1971, requesting an oral hearing. This oral hearing was duly directed, and held before a Departmental Inspector named Mr. X, in April 1972; the plaintiff and the defendants duly called witnesses at this hearing. Mr. X made a written report on 9 May 1972 and a copy of the report and of the Ministerial decision were presented to the High Court.

The main submissions made on behalf of the plaintiff were as follows:

(1) That the Minister, in exercising the right to decide an appeal from the decision of the planning authority in accordance with Section 26 (5) of the Planning Act, 1963, is performing a function of a judicial nature.

(2) In performing functions of a judicial nature the Minister must act in accordance with the principles of Natural Justice by (a) acting only on the evidence which has been made known to the other party and giving that party an opportunity of refuting it; and (b) making findings of fact or raising inferences from facts which are duly supported by evidence.

(3) A corollary to this is that the Court must set aside the Minister's decision if the Court finds that the Minister has not complied with (1) and (2) above.

(4) A further corollary is that, as the Minister does not need to have any reasons for decisions under the Planning Act, if the Inspector's report contains evidence which was not made known to the plaintiff, then the Court must presume that the Minister acted upon that evidence until the contrary is proved.

In *Murphy v. Dublin Corporation*—(1972) I.R. 215—a clear expression of view was held by the Supreme Court as to the control which the Courts are bound to exercise in proceedings so close to that of the Minister under the Planning Act, 1963, as to be a binding precedent for this case. At page 238, Walsh J. examines the functions of the Inspector as follows: "By statute the Minister is the one who has to decide the matter, not the Inspector. In doing so, the Minister must act judicially and within the bounds of constitutional justice. ... Insofar as the conduct of the inquiry is concerned, the Inspector is acting as recorder for the Minister. ... If the Inspector's report takes the form of a document, then it must contain an account of all the essentials of the proceedings over which he presided. It is no part of his function to arrive at any conclusion. If the Minister is influenced in his decision by the opinions or the conclusions of the Inspector, the Minister's decision will be open to review. It may be quashed and set aside if it is shown to be based on materials other than those disclosed at the public hearing." There is no distinction in principle between the procedure under the Housing Acts in Murphy's case, and the procedure under the Planning Acts in this case.

It is first asserted on behalf of the plaintiff that there was no evidence contained in the report of the public hearing to support the contention that the development proposed would not, by reason of the demand made upon it by the existing sewerage facilities and the inadequacy of those facilities, cause pollution on the seashore at Killiney. It is then argued that, without a finding based on such evidence, pollution would not be caused, the Minister could not make a valid decision under the Planning Acts to grant the requisite permission. Finlay J. stated he was not concerned with the weight of evidence produced at the inquiry, either for or against any particular issue arising there. It is therefore only necessary to seek in the report evidence upon which the Minister could conclude that the development for which permission was being sought could be carried out without polluting the adjoining area; the defendant's architect stated he had visited the site about twenty times, and had often walked on the foreshore, and on no occasion had he seen any evidence of pollution, or been conscious of any undue smell. In reaching any decision with regard to sewerage and pollution the Minister would be concerned not only with the existing situation but with the probable future development or expansion of sewerage facilities in the area. On the facts submitted, there was evidence at the public hearing upon which the Minister was entitled to reach a decision that pollution could and would be avoided. This first contention must therefore fail.

Secondly, it is asserted that in two instances the report of Mr. X contains a reference to facts and evidence which was not presented at the oral hearing, and which must be presumed to be based on materials other than those disclosed at the public hearing.

The first instance reads as follows: "It has been clearly accepted at the oral hearing that the works are overloaded. It has also been suggested that new provisions for sewerage disposal are imminent. I have discussed this with our own sanitary inspectors, and indeed have made inquiries with the relevant local authority. There is no doubt that the works are now coping with a vastly greater load than originally envisaged." The plaintiff contends that this constitutes the relating by the Inspector of some discussion he had outside the public oral hearing with local authority officials. In reality this cannot be said to constitute any fact upon which the Minister might act or which might influence his opinion.

The second instance reads: "I have recently and carefully walked along the line of the river and the foreshore for about half a mile, and can state that I have seen no evidence of raw excreta present. Both the stream and the river do indicate substantial discolouration and there is evidence in the river ... which appears to be organic debris." This undoubtedly constitutes a statement of fact by Mr. X of the result of a visual observation by him of the area in respect of which the issue with regard to pollution and sewerage arose. There is no indication that this visit nor these observations were disclosed by the Inspector at the public hearing. *Prima facie* therefore this falls within the definition of material not disclosed at the hearing.

Professor Fitzgerald, as an expert witness for the plaintiff, had stated that there were signs of raw sewerage and of rubbish along the beach—but this was rebutted by the architect for the defendants. There was thus a direct conflict of fact in regard to this question. Counsel for defendants contend that by virtue of Section 82 (5) of the Planning Act, 1963, there is a direct statutory power in the person directed to hold the oral hearing to visit the site. It was merely a statutory endorsement of his right to have so visited it to report the result of that visit to the Minister. Unlike the arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919, referred to in *The State* (Hegarty) *v. Winters*—(1956) I.R. 320—the Inspector

in a planning appeal is not a person deciding the case; he does not appear to have the ordinary powers or functions of an assessor. The Minister is bound in the exercise of his powers under the Planning Acts to act within the bounds of constitutional justice. It is quite reasonable that Section 82 (5) should be construed as providing a right of inspection for any person holding the oral hearing so that he would be in a position fully and clearly to understand the evidence which was given before him, and appreciate the nature of the submissions being made, and thus faithfully and accurately report on both those matters to the Minister. If the defendant's contention were to be followed then the Minister, in considering the report of a visual inspection, would be acting on what is in fact evidence not disclosed at the oral hearing which the other party had no opportunity to refute or challenge. In the particular context of what is not an unduly strongly worded report, where there was a direct clash of evidence between two of the witnesses called as to whether raw sewerage was to be found or seen in the foreshore, a factual account by Mr. X of what he saw and did not see is capable of influencing the Minister.

It is clear that if, in a criminal or civil case, there has been admitted evidence which an Appellate Court holds to be inadmissible, and, if that evidence was capable of being acted upon by the jury, the Court must set aside the verdict of the jury. I see no reason why a different principle can apply to the review of the decision of the Minister carrying out a function of a judicial nature in this case. Accordingly the inclusion of this account by Mr. X in his report on the result of his visual inspection of the area adjoining the land to be developed is fatal to the validity of the Minister's decision. Therefore the plaintiff is entitled to succeed on this point, and the declaration sought to rescind the Minister's order will be granted.

[Killiney and Ballybrack Development Association Ltd. v. The Minister for Local Government and Templefinn Estates Ltd.; Finlay J.; unreported; March 1974.]

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**Court injunction about sign in Glasnevin window fails. Owner's protest at mortgage delay.**

The President of the High Court (Mr. Justice O'Keeffe) refused an application for an interlocutory injunction brought by Claremont Homes Ltd. against Fergus Quinlan and Carmel Quinlan, of 17 Claremont Court, Glasnevin, Dublin.

In an affidavit read by Mr. Aengus O Brolchain, Liam O'Donnell, sales manager for the plaintiffs at their housing estate at Claremont Court, said that the defendants had purchased the house. Claremont Homes Ltd. had an arrangement with the Provident Building Society whereby clients purchasing premises at Claremont Court were referred to the society by the plaintiffs. He said that in or about September 1973 a sign was exposed in the front window of the defendants' premises. He did not recollect the exact wording of the sign. The sign was removed by the defendants at his request.

On or about February 24 he was informed that a sign bearing the words: "Loan arrangements by Claremont Homes Ltd.—no cheque for 20 months", was exposed in the front window of the defendants' premises. He saw that sign on the following day. He believed that the sign was still publicly exposed to view. He said that the sign was injurious to the plaintiffs' business, and that the matter referred to in the sign was not connected with acts performed by the plaintiffs.

Mr. O Brolchain said it was admitted that there had been delays from the society in furnishing the defendants with cheques to pay off their bridging loans. One of the difficulties was one in which there was some question about the title.

He asked for an injunction restraining them from exposing to public view offensive or injurious signs.

Mr. Ercus Stewart (for the defendants) presented an affidavit by Fergus Quinlan, who said that he was an architect and that he had bought the house in June 1972 for £6,995. He paid £500 deposit and obtained a bridging loan of £5,900 from the Bank of Ireland. He bought the house only on the understanding that he would be granted a loan by the society. The interest on the bridging loan was originally 12 per cent. This had been increased to 15½ per cent and the bank had indicated its intention to increase the rate to 17 per cent. Already he had paid about £825 interest and there was a further sum of £425 due, making in all the sum of £1,250 to date.

Mr. Quinlan said that the notice he placed in his window read: "Loan arrangements by Claremont Homes Ltd.—No mortgage after 20 months". He had replaced this with a new notice which read: "No mortgage after 20 months".

He said that he never had any intention of injuring the plaintiffs, he merely wanted to bring this very worrying matter to their attention as nothing seemed to be happening and he was paying about £18 a week interest to the bank with a possibility of even further increases.

Mr. Stewart said that the plaintiffs had not alleged that the words on the sign were untrue. It was Mr. Quinlan's window and he was entitled to put the sign in it.

The President said he did not think this was a case for an interlocutory injunction. He awarded the costs of the application to Mr. and Mrs. Quinlan.

[Claremont Homes Ltd. v. Quinlan; O'Keeffe P.; unreported; 11 March 1974.]

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**Plaintiff awarded £500 damages for "scurrilous references".**

A Circuit Court Judge in Cork awarded a West Cork shopkeeper £500 for "scurrilous references which amounted to criminality and which could not be tolerated by any decent community" as a result of a libel action brought against Sunday Newspapers Ltd. of Botanic Road, Dublin, publishers of *The Sunday World*

Plaintiff in the case was Liam O'Dwyer, of Ardgroom, Bantry, who sought £2,000 damages. The case arose after Mr. O'Dwyer, a newsagent and general merchant, wrote to the editor of *The Sunday World* saying it was a pity that the paper had unearthed "so much dirt in public affairs and now appeared with a setback in sales and popularity". Mr. O'Dwyer in the letter claimed that women had been seen slamming *The Sunday World* back on the counter after seeing a front page picture of Maeve Goldin showing "not alone her bathing nakedness but half of one of her nipples exposed and a side of the other".

"Do you think that this sex stuff will help sell your paper in Christian Ireland. It will finish it off. Please stop it before it is too late. Whatever member of your staff is the master sex minder should get the door," continued Mr. O'Dwyer's letter.

On June 3, *The Sunday World* in its letters column published two letters, one in the name of Rev. Francis O'Doherty, Clonskea, Dublin, said :

"Where the comments of Mr. L. O'Dwyer of Bantry are concerned, he obviously must have enlisted the aid of a magnifying glass in order to ascertain what could or could not be seen in the photograph ..." the letter added.

The second letter in the name of Richard Power, M.Sc., of Trinity College, Dublin, said that Mr. O'Dwyer's letter had promoted a discussion involving five post-graduates of psychology in the college library and the conclusion unanimously was that Mr. O'Dwyer "suffers from a form of sexual aberration which, unfortunately, is too often seen in the country areas of Ireland where sex education in schools is so sadly lacking."

**Fictitious letter writers**

Mr. O'Dwyer stated that to the best of his knowledge and belief there were no such persons as Rev. Francis O'Doherty of Clonskea, or Richard Power, an M.Sc. of Trinity College. He claimed that he had been greatly prejudiced and injured in his credit and reputation and had been brought into public scandal, contempt and ridicule by the letters.

Sunday Newspapers Ltd., in defence, claimed that by writing to *The Sunday World* the plaintiff impliedly invited other persons to reply to his letter and invited the defendants to publish such letters.

The defendants had no reason to believe that the letters were not authentic and had no duty to the plaintiff to investigate the authenticity of letters in reply to his.

They held that the words in the letters were true in substance and in fact and were fair comment made in good faith without malice.

**Bogus Letters**

Mr. O'Dwyer said that after the publication of the two letters he felt very embarrassed and deeply insulted and his wife and family had similar feelings. He was suspicious that they were genuine letters and investigated both of them and found they were, in fact, bogus.

Rev. James Murray, C.C., Clonskea, said there was no such person or clergyman of any other denomination in the parish as "Rev. Francis O'Doherty".

Dermot Sherlock, assistant secretary of records at Trinity College, said there was no person of the name of Richard Power either as a student in the college or as a graduate holding a degree.

Kevin Marron, deputy editor of *The Sunday World* and responsible for the letters column in June last, said he passed Mr. O'Dwyer's letter for publication. It would not be practicable for a newspaper to check the identity of all persons who wrote letters to the editor.

Mr. Noel Peart, S.C., for the defendants, submitted that although the letters complained of might be defamatory of Mr. O'Dwyer, they were not actionable because he had brought them on himself.

**"Scurrilous references are criminal"**

Judge Neylon said it had to be accepted that a person writing to a newspaper would probably receive a lot of replies and the paper was entitled to publish the replies even though they might be critical in form but still within the law. "But what is not acceptable is that a person should go outside the bounds of a proper reply and make accusations of a very anti-social, criminal and degrading nature. Newspapers are not entitled to indulge in that kind of a reply.

"In this case I think the replies were made by anonymous people whose identity was not checked by the paper. Those identities were followed up by the plaintiff and found to be bogus people masquerading in the paper under respectable titles.

"The plaintiff is, in my opinion, entitled to recover damages and recover such damages as to show that those scurrilous references which amount to criminality cannot, and will not be tolerated by any decent society," he concluded.

[O'Dwyer v. Sunday Newspapers Ltd.; Judge Neylon; unreported; 29 February 1974.]

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**Court frees Belfast woman after five-month extradition case.**

A young Belfast woman was freed by District Justice Carr in Bray (Co. Wicklow) Court yesterday, when he refused an application for an extradition order against her. She is Marguerite O'Hare, of Andersonstown, Belfast.

Mrs. O'Hare first came before the Court in Bray last September and two days were fixed in the following month to hear legal arguments on the question of the validity of the Royal Ulster Constabulary warrant for her arrest. On the face of the warrant she was charged with shooting with intent to murder Warrant Officer Fraser Patton at Andersonstown, Belfast, on 25 October 1971.

At the close of the arguments the hearing was adjourned to give the District Justice an opportunity to consider his decision. In the meantime, he took ill so the matter was adjourned and it was further adjourned on various dates until yesterday, again before District Justice Carr.

**Seven reasons for refusing extradition**

Reading his judgment, he set out seven reasons for refusing the application. He held that the first requirement of a valid arrest warrant was that it should show jurisdiction on its face. The warrant in the present case was issued at Belfast on 11 May 1973 and in his opinion it was not a valid warrant for a variety of reasons, the more obvious being that it failed to charge the respondent with any offence or crime; it only recited that a complaint had been made which alleged a crime by the respondent. It failed to disclose to whom such a complaint was made. It failed to disclose that authority, he was of the opinion that the respondent was arrested, but the recital of a remand on recognisance on 3 Dec. 1971 implied that the respondent had been taken into custody. The right to issue an arrest warrant for a prisoner breaking bail did not survive after the date to which the person was remanded or the case adjourned.

The District Justice pointed out that there was nothing to show that any jurisdiction existed on 11 May

1973 to issue the warrant now before the Court. The affidavit of Sergeant John Caskey endorsed on the warrant, purported to identify the signature of the resident magistrate who issued the warrant. But there was no statutory or other presumption that the party purporting to identify the signature was competent. The warrant purported to be issued by a resident magistrate. It was nowhere shown or alleged that he was assigned to a place which would entitle him to issue the warrant or indeed that he was a resident magistrate.

**Warrant bad on its face**

District Justice Carr further pointed out that, taking account of the absence of a proper affidavit, the lack of candour and lack of authority, he was of opinion that the warrant was bad on its face. He also formally held those and related matters to be good reason to exclude the presumptions contained in Section 55, if that be necessary. Other documents and steps taken here (the Republic) were also fatally defective.

The respondent, in District Justice Carr's view, was wrongly remanded to the Bray Court. Also an effective remand order was not made; the recognisance was on the wrong form; was taken by a member of the Garda Siochana, which was an illegal procedure.

The respondent, he concluded, was unlawfully arrested, unlawfully detained and unlawfully remanded, both by the peace commissioner and by this Court. Accordingly he refused the application and ordered Mrs. O'Hare's discharge.

[The People (A.-G.) v. O'Hare; District Justice Carr; unreported; 1 March 1974.]

# A Consideration of Company Law: Capitalism—Acceptable at Law?

**Auditorial Address of GERARD CUMMISKEY**

**delivered at the Inaugural Meeting of the 63rd Session of the Law Society of University College, Dublin, held on Thursday, 29th November 1973.**

Capitalism in whatever euphemistic way you wish to consider it is the system of economics which governs us, and its precocious child, the limited liability company is one of the main forces in our society.

The question I hope to put to you is whether capitalism is acceptable at law, and if not whether the law or the basic foundation of capitalism needs to be changed.

Initially, however, I shall deal with the rather sketchy development of company law in this country. Up to the establishment of the Irish Free State companies in this country and in Britain have a common development. Since then we have been less than urgent in our desire for reform. In 1927 the Doyle Commission was set up to consider the reform of the law relating to bankruptcy and winding-up in Ireland. This Commission reported in 1930 and was ignored.

Company law touches on all aspects of our society and law; and there are numerous statutes which, although not dealing expressly with companies, have had a considerable effect on them. Undoubtedly the legislation introduced during the de Valera administration in 1932 typifies the most retrograde step in the development of our company law. This legislation ensured that virtually no foreign capital would be invested in Irish industry.

The two Coalition Governments (1948-51 and 1954-57) did nothing about amending this legislation although they might have scored a political advantage by doing so, not to mention the economic advantage to the country. However, with the changing political attitude towards foreign investment and the search for new industry which developed in the 1950s, this restrictive legislation was ultimately amended.

So it took twenty years, an economic depression and a world war (since the previous report) before the Attorney-General in 1951 set up a Commission to investigate Company Law in Ireland. This Commission in its thorough report, which had Mr. Justice Kenny as its Secretary, suggested reforms on traditional lines similar to those adopted in England in 1948; although modified and altered to cater for our less complicated economy, it did however take seven years to report. This Report of the Company Law Reform Committee eventually led to the 1963 Companies Act which repealed the legislation that governed our company law during the changing period of our independence, two world wars and a completely different economic philosophy—I refer of course to the Act of 1908, which itself was merely a consolidating Act. Small wonder that Senator Alexis Fitzgerald should exclaim in *The Irish Jurist* that "Truly, whatever else we wanted independence for, it was not for company law reform!"

**Fundamental principles of company law**

Side by side with the statutory law, the Courts developed a series of fundamental principles which were to assume great importance in company law. This is exemplified by the House of Lords in *Ashbury Carriage Co. v. Riche* which established the *ultra vires* rule in 1875, and modified and developed it in a number of subsequent decisions.

The *ultra vires* doctrine states that companies are only empowered to act in the manner expressly or impliedly authorised by their memoranda of association. Unhappily the rule has outlived its usefulness and has survived merely as a trap for the unwary third party. Originally its purpose was to protect investors and creditors, but due to businessmen not relying on a conservative bench interpreting what objects would be reasonably incidental to specific objects, investors have had their memoranda written so wide as to cover every

conceivable business in which the company might engage. The Company Law Reform Committee agreed with the English Cohen Committee, and proposed that the *ultra vires* rule should be reformed. This proposal led to the enactment of Section 8 of the Companies Act which allows a third party to enforce a contract against the company if it cannot be shown that he had notice that the contract he entered into with the company was *ultra virew.* Senator Fitzgerald has praised this section from the professional standpoint—as I quote: "one of the real innovations in the Act". Undoubtedly Section 8 does modify the hardships which the rule could cause to outsiders dealing with the company—although it does nothing for the coke merchant as exemplified in *re Jon Beauforte* (London) *Ltd.* (1953) Ch. It is my conviction that this section and its further modification in the form of the recent E.E.C. Directive only serves to grant companies wider powers to alter their stated objects. I would be inclined to give companies the normal capacity of individuals by abolishing the objects clause, and, with it, the *ultra vires* rule, so that even if authority is initially lacking, it could be granted by subsequent ratification. In this way a grey area of the law would be eliminated as also Senator Fitzgerald's possible objection to the extension.

The Companies Act 1963 is a highly technical piece of legislation consisting of 399 sections and 13 lengthy schedules. Bulky though the Companies Act undoubtedly is, it deals mainly with details, and many of the fundamental principles of company law are nowhere enshrined in it.

It is now a decade since that Act was passed. Britain has acknowledged in its recent White Paper, in Mr. Heath's reference to the "unpleasant and unacceptable face of capitalism" and in the Queen's Speech at the opening of the present session of Parliament, the urgent need for the reform of company law. Specific gaps in the law at present which could be filled by reform here in Ireland are those relating to "insider dealings" and "warehousing".

**Insider dealings**

Insider dealing is the practice of speculators of using inside knowledge, not generally available to the investor, to make a quick profit. There are many difficulties of definition in the control of insider trading. There is a danger that people may not know whether they are breaking the law or not, which, like so many modern laws, produce a situation that inhibits the honest and cautious but can leave room for the sharp operator to keep much of their activities going and gain a further trading advantage.

Without implying that malpractice has been substantial, abuses such as these may discourage the investor from going into the market; and the feeling that the ordinary shareholders are bound to lose to the insider must eventually lead to a loss of confidence in its fairness. Moral pressures seem of little value when money is the ultimate goal; and market forces, alone, are hardly enough to give shareholders adequate protection. Wise legislation is, therefore, necessary, and overall I believe if the Jenkins Committee proposals were imolemented, then the required balance, between the need of private freedom for the directors to manage the company effectively and the need to protect the members of the company, would be achieved.

For it is time that what is now merely considered unethical practice was made the subject of a criminal sanction. There should also be a civil remedy for persons who can establish that by reason of the misuse of materially significant information they have suffered an identifiable loss. Similarly, the law should preserve the present position whereby an insider may be accountable to the company for his profit. Normally dealings are wholly innocent, and publicity is the best means of ensuring that this is so; for the efficient operation of the market depends on all relevant information being fairly available.

Apart from insider trading it is probably "warehousing" and the associated surprise bid, often the prelude to a nasty asset stripping job, that has caught the public's imagination as the main defect in need of legislative reform. This is a crucial matter because a large minority is often powerful enough to determine the destiny of a company, and may do so not only to the detriment of employees, but also of shareholders. A means should be found whereby the compulsory disclosure of significant shareholdings acquired through the nominees in a company could be enforced, rather than abolish nominees altogether, for in many circumstances it is convenient on both commercial and personal grounds to hold shares in this way. This could be achieved by legislation which compelled disclosure a t a low t hreshold percentage; which percentage, when achieved, should be indicated to the company in the quickest practicable time. Furthermore companies feeling that a warehousing situation wasdeveloping ought to have the right to inquire as to the real identity of its shareholders.

**Disclosure essential**

If one word were to be used as the key to how these specific lacunae in our law were to be filled it would be "disclosure". Disclosure is also the means whereby the more radical reform necessary for company law can be achieved. For private enterprise must keep in touch with contemporary conditions and ideas in some way that leaves its dynamism unimpaired while becoming more readily accountable for its activities.

The purpose of the company is to fulfil the fundamental aspirations of those who devote their efforts to it. This is a right of participation based on natural law, necessarily linked with the right to found a company. The underlying theoretical philosophy of British and Irish company law is that disclosure of all matters will prevent abuse. Justice must not only be done, it must be seen to be done. This is supported by the recent White Paper in Britain, which states: "Disclosure of information is an essential part of the working of a free and fair economic system ... the bias must always be in favour of disclosure, with the burden of proof thrown on those who defend secrecy."

In their capacity as shareholders, subscribers to a company have a fundamental right to information, and a very full disclosure is needed to steer real resources to the points of highest prospective return. The usual argument against disclosure is that it gives competitors an unfair advantage. However, to quote the Cohen Committee: "We do not believe that publication would have so completely one-sided consequences. In any event, stimulation or elimination of the inefficient is desirable. Moreover, if the disclosure be made general by making it obligatory the objection is overcome."

We must realise that limited liability is a privilege conferred by the State upon companies and directors. This specific privilege, grants the company certain

rights but these rights must be matched by their corresponding responsibilities, which require company directors on behalf of their shareholders to discharge their social responsibilities as well as to protect their legitimate interests. Disclosure, as the price of limited liability must today be discussed throughout by reference to a multiciplicity of criteria. To the needs of creditors and investors must be added those of the consumer, the public interest and especially the hitherto ignored employee.

Regarding creditors and investors, the balance of power within the firm has become very different from that envisaged by company law since the shareholders meeting became a mere formality. We must balance the need to protect shareholders with the need to give directors sufficient power and freedom to manage the company efficiently. Indeed, the problem of maintaining control of management by shareholders is a point where the crisis of modern company law becomes apparent. To say that it is useless to provide investors with further safeguards which they would not use is a counsel of despair. Nationalisation would not seem to solve the problem as power is not more widely shared in the public rather than in the private sector and in many cases the converse is true. The public corporation solves the problems of the relations between the shareholders and managers by abolishing the former, but this does not solve the problem of controlling managers. We should, perhaps, aim at greater training for management so as to make directors more aware of their responsibilities to shareholders. I admit no easy solution is possible.

Greater disclosure here would make it possible for the financial press to analyse the performance of companies and this would give further protection to members. However, journalists are thwarted in their valuable role and feel inhibited by the law, in particular the law of defamation, which is such that any error, however slight can lead to heavy damage regardless of the good faith of the publisher as exemplified by *Lewis v. Daily Telegraph* (1964) 2 Q.B. 401, where a jury at first instance awarded £100,000 compensation for libel arising merely by innuendo! Disclosure would therefore have to be buttressed by an extension of privilege which could provide that a publisher who acted in good faith and without malice or negligence would not be liable; and in view of the services rendered by the press, this would seem but a slight concession. As company accounts are difficult for a layman to understand, additional disclosure supported by privilege would provide more information for the press to use as a basis for comment.

**Relationship between management and employees**

If the relationship between management and shareholders gives rise to problems which company law has not satisfactorily solved, the relationship between management and employees presents problems which company law has not even recognised as being its concern.

This vexed question is, in fact, a dominant theme in the current debate which flows over from company to labour law. It is generally accepted to be unreal for company law to ignore the fact, as at present it largely does, that the workers are as much, if not more, a part of the company than the shareholders. For example Irish law imposes the duty on directors to accept a higher offer, in the interests of shareholders, from an asset stripper who would close down a business, rather than a lower bid from a buyer who would keep the business open, regardless of the interests of employees. In this area it could be stated that company law, which looks at the entire management structure from a capitalist viewpoint, has been largely overtaken by events. The new outlook of the second half of the twentieth century would stress the importance of the people who devote the greater part of their lives to the company that employes them and would change the law accordingly. The structure of the firm can no longer be determined by a *laissez faire* approach to economic matters. A company must now reconcile the interests of capital, labour and the community, which may be in conflict.

Two obvious arguments can be advanced in favour of employee recognition by company law. The first is that industrial relations would improve as a result, which would lead to greater productivity. At present it is believed that much industrial unrest is caused by the lack of communication between the employees and the management. Secondly as a matter of social justice, the fact that the employees contribution to the well-being of the company takes the form of labour is not sufficient justification from even recognition by company law. Unlike shareholders who can spread their capital through several firms and reduce their risks, an employee cannot easily divide his labour between several employers so that his welfare may be more closely linked with the success of the company than is the case with average shareholders.

At present the directors may legally act only for the benefit of employees only when this would be for the benefit of the company.

As Mr. Justice Plowman stated in *Parke v. Daily News* (1962) Ch.: "The view that directors are entitled to take into account the interests of the employees is one which may be widely held, but such is not the law."

The duties of the directors are to the company "as a whole" and it is improper for a director to act solely in the interests of a particular member or group of members. Therefore, it is wrong for a director to act solely for the benefit of employees. This is the place where I believe capitalism is unacceptable at law, and it is where I believe the law should be amended so as to bring it more in touch with reality. Surely a company cannot be allowed to go on pretending that the worker is not there.

Proposals for fundamental change in the interests of employees and the community, are now taken more seriously by more people. These proposals have, of course, given rise to much controversy as well as being the outcome of it. It is however, noteworthy that pressure for change has come from many different circles —lawyers, economists, employers, trade unions and even the Church. The Church, however, while taking up quite progressive attitudes on these issues has not gone further than stating broad principles. What may finally emerge may be the progressive adaptation of business to the actual logic of a mixed economy in which many interests have to be reconciled.

No one can take exception to this "liberal" aim which begs favours from no party or ideology. For the company is a human community and as such should ensure the well-being of those who take part in its activities.

The Minister for Justice as the representative of the present Coalition Government should not miss the opportunity to amend our Company Law, so as to make capitalism acceptable at law.

It is a cause of some surprise how little impression socialist tendencies have made on company law over the last half century.

In conclusion we should cut away the "dead wood of socialism" for the time has come when the needs of all those who partake in a company's activities will be better guaranteed by the dynamism of capitalism than by traditional socialist techniques.

The **Minister for Justice,** in proposing the vote of thanks, said that company law was an area of considerable importance to our economic and social way of life; it was an area which will be the subject of substantial, if not radical, change as the programme of harmonisation of company law progresses within the Community. It is a subject which has not, perhaps, received the degree of discussion and debate that its importance deserves.

While he finds himself in general agreement with much of what the Auditor has said, he must take issue with him on some of his opening comments. He thinks it is putting rather a harsh interpretation on things to suggest, as he seems to suggest, that we have been less than urgent in our desire for reform of company law. It is fair to say that the former Companies Act of 1908 remained in existence for so long a period because there was, as stated in the 1958 Report of the Company Law Reform Committee, no evidence of any very substantial abuses of the law of companies as it existed at that time. The Committee went further and stated that it was a system of company law well understood by, and familiar to the public and that only necessary changes should be undertaken. Accordingly, when the Companies Act, 1963, was enacted, it repeated in essence many of the provisions of the 1908 Act and embodied new provisions only where inadequacies were found to exist in the law as it stood. Indeed, the Act of 1963 is a piece of legislation which has well fulfilled its purpose.

**Growth of Irish companies**

But, of course, it is inevitable that laws become overtaken by events and Company Law is no exception. As economies develop, and as the ways of trade and commerce become more complex and sophisticated, provisions which were previously regarded as balanced and equitable may no longer meet the demands of change. Since the current Act was enacted there has been a significant increase in the growth of companies in this country. In 1963, the number of Registered Companies having a share capital was a little more than 12,000, today it is in excess of 27,000. Over the same period the rate of registrations has increased from about 1,000 per annum to almost 4,000 per annum. This means that the number of companies registered has more than doubled in the past decade and the rate of new registrations per annum has quadrupled. This would suggest that the time may now be ripe for a review of the present legislation.

In calling for a reform of company law the Auditor has mentioned such matters as insider trading, warehousing, nominee shareholding and greater disclosure by companies and by directors. It is obvious that no review of company law would be complete without consideration of these matters. That is not to say that he would venture to pre-judge such vexed and complex issues. He had a feeling, nevertheless, that public opinion now tends to favour a change in the law on many of these issues which represent only a small segment of the total issues which might appropriately be examined. The field for examination is quite formidable ranging from issues such as increasing the limit on the number of partners in professional partnerships to a consideration of permitting the issue of shares with no par value.

As part of any review of company law it has been the practice to look at what is happening in the same field in other countries. The recent British White Paper on company law reform is therefore of considerable interest to us. However, it should be remembered that legislation and proposed reforms in other countries are not always those which are best suited to our situation.

**Harmonisation of Company Law**

One of the most important factors which must inevitably influence us in considering reforms is the process of harmonisation of Company Law within the European Community. This process is already manifest in the form of the *European Communities* (Companies) Regu*lations, 1973,* which came into operation on 1st July 1973 and gave effect to the First E.E.C. Directive on company law. This Directive was adopted in 1968, before the enlargement of the Community, and consequently we had to accept it as it stood, apart from minor modifications. While the obligation which this has imposed upon us in relation to the publication of notices in Irish Oifigiuil, of documents filed with the Registrar of Companies, may be regarded as an onerous requirement which we might have well done without, nevertheless, the Directive has its positive aspects. For example, it has been necessary to provide in these Regulations a provision which further modifies the *ultra vires* rule. It has now been provided that a person dealing with a company in good faith is not prejudiced by the fact that the board of directors or other person authorised to bind the company acted *ultra vires* their powers as imposed by the memorandum and articles of association or otherwise as, for example, by the general meeting.

Other Community proposals for Harmonisation of Company Law are still in the draft stage, however. Many features of these proposals, although new in the context of Irish Company Law, are, nevertheless, acceptable in principle. Indeed it may be true to say that the process of harmonisation will have the beneficial effect of requiring us to look compulsorily at issues which we might otherwise be tempted to put on the long finger. Pending the outcome of negotiations between the Council and the nine member States it is not possible to say what form the various proposals will finally take. It seems certain, however, that, for example, a minimum paid-up capital for large companies, disclosure and publication of accounts in some form by private companies and worker participation in the affairs by the larger companies, will become features of our company law in the years ahead.

Most proposals for harmonisation were formulated before the enlargement of the Community and some of them may not be appropriate in their present form to the situation existing in the new member States. It is essential therefore that, without sacrificing the principle of harmonisation, there should be a degree of flexibility to accommodate the situation in the individual member States.

This is particularly important, for example, in the field of worker participation to which the Auditor has rightly attached such importance. As you know, the

draft Fifth Directive on company law contains proposals for a three-tier structure of management, namely, the members in general meeting, the Management Board and a Supervisory Board which oversees the activities of the Management Board. Provision is made for worker participation in the Supervisory Board in companies employing over 500 persons. It may well be that this kind of arrangement may not be very appropriate in the Irish context. While there now seems to be widespread support for the concept of worker participation in this country it is important that there should be sufficient latitude in EEC proposals so that the concept can be adopted and implemented in a manner best suited to our way of life.

**Draft Bankruptcy Convention**

Mention of harmonisation would be incomplete without reference to the draft Bankruptcy Convention. I should mention—and this is very important in the Irish context—that bankruptcy in Europe covers the insolvency of companies as well as the insolvency of individuals. The distinction that we make between the bankruptcy of a person and the winding-up of an insolvent company is unknown on the Continent. Consequently, the draft Convention on Bankruptcy deals with the winding-up of companies as well as with bankruptcy of individuals and the administration of insolvent estates of deceased persons.

The experts who prepared the draft Bankruptcy Convention recognised at an early stage that a complete unification or harmonisation of the relevant legislation of member States would be impracticable. The draft Convention does not aim at creating a "European" type of bankruptcy nor does it seek to modify in principle the basic rules of internal law. It does aim, however, at establishing the principle of the unity and universality of bankruptcies, so that there will be only one bankruptcy, recognisable throughout the Community and it proposes that the bankruptcy will apply to all the property of the bankrupt no matter where it is located within the Community.

Adoption of the principle of the unity and universality of bankruptcy necessitates the adoption of standard rules of jurisdiction. The draft Convention incorporates standard rules accordingly, by virtue of which jurisdiction in any particular case would be granted to the Courts of a particular State. The draft Convention also proposes standard rules to resolve conflicts of laws in relation to matters within the scope of the Convention. For those cases in which it has not been possible to resolve satisfactorily the conflicts of laws, the draft Convention proposes a Uniform Law to which all the member States will be expected to adhere.

To illustrate the effect of the draft Convention, I should like to give examples of provisions which will affect our company law. The Companies Act, 1963, at Sections 297 and 298, refers to the case where, in the course of the winding-up of a company, it appears that persons were concerned in the fraudulent trading of the company, and to the case where directors have misapplied company funds, and provides that the Court may take the persons concerned personally responsible for the monies involved. Article 1 of the Uniform Law in the draft Convention goes further, however, and provides that persons who have wrongfully used the assets of a bankrupt company may themselves be declared bankrupt. This would be a new provision in our law.

By virtue of Section 286 of the Companies Act, 1963, certain acts done by or against a company within six months before the commencement of its winding-up are deemed to be a fraudulent preference of its creditors. Under Article 4 of the proposed Uniform Law, this period of six months would be extended to one year.

By virtue of Section 250 of the Companies Act, an Order of a foreign Court may be enforced by the High Court in the same manner as if the Order had been made by the High Court itself. Our High Court must, however, make a specific Order to give effect to this enforcement. The provisions in Article 50 and 43 of the draft Convention envisage that there will be a change in that situation, so that judgements relating to the institution and prosecution of bankruptcy proceedings would take effect, as of right, and would obviate the necessity for the making of a special order in the contracting State in which they are being enforced. This would be an example of the effect of the unity and universality of bankruptcies within the Community.

While the provisions of the draft Bankruptcy Convention are not yet in final form, I think I have said enough to indicate that the Convention, when it has eventually been ratified by the member States of the EEC, will have a considerable effect on our law in relation to the winding-up of companies, as well as on our bankruptcy law generally.

In any review of company law at national level we must, of course, be mindful of harmonisation proposals at EEC level. It would be wasteful and time consuming to indulge in reforms which later on might need to be abolished or substantially revised in the light of EEC legislation. On the other hand EEC proposals and harmonisation are generally in the form of minimum requirements and individual member States, if the situation demands it, are free to take legislative measures which go beyond what EEC proposals envisage.

But, be it at national or international level, making the right decisions in the reform or harmonisation of company law calls for continued consultation and debate especially between those who, through experience of the practical aspects of the law, are best in the position to suggest remedies for the inadequacies of the law which the passage of time reveals.

The **Hon. Mr. Justice Kenny** also spoke.

# LEGAL EUROPE

# The Fifth EEC Company Law Directive and Removal of Directors

by JOHN TEMPLE LANG

The draft Fifth EEC Directive on Company Law would require Irish and British public companies and the equivalent types of company in the other member States to adopt a two tier management structure. The draft Directive specifies that the members of the Management Board, normally full-time executives, shall be appointed by the Supervisory Board. Subject to any national law under which the appointment or removal of any member of the Management Board cannot be carried out against the wishes of the workers' representatives, or the shareholders representatives, on the Supervisory Board, it is the function of the Supervisory Board to remove members of the Management Board from office (Article 13 of the draft directive).

Assuming for the purposes of argument that the Fifth Directive was to be adopted in due course in its present form, the relationship between these provisions and Section 182 of the Companies Act, 1963 (or the corresponding provisions of the Companies Act (Northern Ireland) 1960), Section 175), requires consideration. These sections provide that a company may at any time by an ordinary resolution approved by 51 per cent of the shareholders present and voting remove any director from his office, irrespective of anything in his service agreement or in the Articles of Association of the company.

Section 182 of the Companies Act, 1963, is based on Section 184 of the U.K. Companies Act, 1948, which for the first time introduced into British company law the principle that shareholders can remove a director from office at any time without giving a reason for doing so, at the risk, at worst, of the company having to pay compensation. This section resulted from a recommendation of the Cohen Committee (Report of the Committee on Company Law Amendment, C m d. 6659 of 1945, par. 130). Although these provisions are therefore not of very long standing of Irish or English Company Law, they are justifiably regarded as the basis of shareholders' democratic control over the directors of their company, and where there is no provision corresponding to Regulation 80 of the Irish Table A, it is effectively the only basis for that control. It may well be that not many resolutions are passed under these sections, but the possibility of such resolutions presumably has a salutary effect in circumstances when it is needed.

It is therefore clear that the proposal in the draft Fifth Directive is a novel change in Irish and British company law and that it involves a reduction in shareholder democracy, because powers which since the 1948 and 1963 Acts had belonged to the shareholders (whether they exercised them often in practice or not) are now being given to part-time directors. It is, of course, important to remember that this change would affect only public companies and would have no application at all to Irish private companies, which presumably would remain subject to the provisions of Section 182. It should also be remembered that under the Directive it will become the duty of part-time Directors to meet at least once every three months to receive reports from the full-time Executive Directors and to supervise their activities and to decide on questions of policy. Under such a regime part-time Directors will have a much clearer role and more clearly-defined powers and responsibilities than they have under the existing practice in most companies, and they can therefore be expected to be in a better position than they are at present, and in any case in a better position than the shareholders, to judge when a full-time Executive Director should be removed from office.

The draft Fifth Directive does not expressly say that powers such as those given under Section 182 could not continue to be given to the shareholders. However, the spirit of the Directive is certainly against such powers being given. The principle behind the idea of worker representation is that a company is at least in some sense a partnership between its employees and its shareholders. Through the principle of worker representation on a two-tier board of directors, the employees of the company (the Fifth Directive requires employee representation only on companies with over 500 employees) are given a voice in the management of the company, or at least in the supervisory and policy-making aspects of management. It would be inconsistent with this principle, which is, of course, totally novel in Irish company law, that the shareholders should be able, without reference to the supervisory board or to the workers representatives on it, to remove one or all of the full-time executive directors from office.

An example may illustrate the thinking behind the Directive. Under the Fifth Directive the Supervisory Board must designate one member of the Executive Board to be responsible for personnel and labour relations. Such a director from the nature of his work might well tend to be more sympathetic to the views and the interests of workers than his colleagues on the executive board. It would quite clearly be contrary to the policy and spirit of the Fifth Directive that the shareholders should be free unilaterally to remove the personnel director from his position, without reference to the Supervisory Board which appointed him, and against the wishes of the workers' representatives on the Supervisory Board.

It will be seen that this conclusion is valid regardless of the method of appointment of the workers' representatives to the Supervisory Board chosen by the national government in accordance with the Fifth Directive.

However, the theoretical position would be slightly different depending on which of the two alternatives was adopted. Under the First Alternative the workers or their representatives directly appoint one-third of the members of the supervisory board, and the shareholders appoint the remainder (subject to the possibility of appointing a representative of the public or the consumer or some other outside interest). Under the Second Alternative the members of the Supervisory Board are agreed as a "slate" after negotiations between the shareholders and the workers or their representatives. Under the Second Alternative a member of the Supervisory Board can only be removed from office for cause. However, under the first system the body appointing the member whether the shareholders or the workers or their representatives, would have the right at any time to remove from office a member of the Supervisory Board appointed by them. It would, therefore, in theory be open to the shareholders to remove or to threaten to remove enough of the members of the supervisory board appointed by them, and to appoint others, to ensure that a majority of the members of the Supervisory Board were willing to remove the executive director whom the shareholders wished to be rid of. In practice, however, it is most unlikely that shareholders will be willing to take such extreme steps in order to gain their ends, except in circumstances in which it was clearly desirable that the executive director should be removed in any case. If the majority of the Supervisory Board could not be found to remove the executive in question without such extreme measures being necessary, the situation would be likely to be one in which the shareholders, perhaps due to a misconception of their own interests, were choosing to have a confrontation with the employees. In any case it seems in general that the circumstances in which this kind of situation would arise are most unlikely, and that the possibility of shareholders getting round the principle that it is the Supervisory Board and not the General Meeting which has power to remove executives from office in this way is unlikely to arise.

One further comment is called for. In a small business community such as that existing in the Republic of Ireland (and even more so in Northern Ireland) all of the part-time members of the supervisory board will be likely to know all of the full-time executives on the management board by their first names. In these circumstances it seems necessary that the duty of the Supervisory Board to remove from office any executive director who is unsuited for his position should be spelled out very clearly in the national law implementing the Fifth Directive. If this is not done, it seems to be in general at least no more likely that the Supervisory Board will remove an Executive Director who deserves dismissal than that the shareholders would do so.

It is clear that Section 205 of the Companies Act, 1963, applies to non-feasance by directors or others as well as to misfeasance. It follows that Section 205 would give shareholders in an Irish company a right to petition the Court if the members of the Supervisory Board were failing to exercise their powers to remove from office an Executive Director who deserves dismissal. The same situation would seem to follow from Section 201 of the Companies Act (Northern Ireland) 1960).

Clearly any measure such as a Supervisory Board which increases supervision over executives in a "stewardship" company is desirable. It may well be that the benefits of two-tier management combined with worker participation in management substantially outweigh the diminution of shareholder democracy resulting from the change in Section 182 described above. However, it would be important if it should prove unacceptable to the EEC Commission and the other EEC governments that the ultimate right of the Irish shareholders to remove executive directors from office, at least in certain circumstances (such as a deadlock on the Supervisory Board) should be retained, that consequential provisions clearly imposing on the members of the Supervisory Board the duty to remove unsatisfactory directors from office should be included in the national legislation implementing the Fifth Directive. This duty would bind the employees' representatives as well as the other members of the Supervisory Board.

# I.B.A. International Code of Ethics

(1) This Code of International Ethics in no way is intended to supersede existing national or local rules of legal ethics or those which may from time to time be adopted.

A lawyer shall not only discharge the duties imposed upon him by his own national or local rules, but he shall also endeavour when handling a case of an international character to adhere to the rules of this Code subject necessarily to the rules existing in those other countries in which he is active.

(2) A lawyer shall at all times maintain the honour and dignity of his profession.

He shall, in his practice as well as in his private life, abstain from any behaviour which may tend to discredit the profession of which he is a member.

(3) A lawyer shall preserve independence in the discharge of his professional duty.

A lawyer, practising on his own account or in partnership where permissible, shall not engage in any other business or occupation if by doing so he may cease to be independent.

(4) A lawyer shall treat his professional colleagues with the utmost courtesy and fairness.

A lawyer who undertakes to render assistance to a

foreign colleague shall always keep in mind that his foreign colleague has to dépend on him to a much larger extent than in the case of another lawyer of the same country. Therefore his responsibility is much greater, both when giving advice and when handling a case.

For this reason it is improper for a lawyer to accept a case unless he can handle it promptly and with due competence, without undue interference by the pressure of other work. To the fees in these cases Rule 19 applies.

**Written communications confidential**

(5) Except where the law or custom of the country concerned otherwise requires, any oral or written communication between lawyers shall in principle be accorded a confidential character as far as the Court is concerned, unless certain promises or acknowledgements are made therein on behalf of a client.

(6) A lawyer shall always maintain due respect towards the Court. A lawyer shall without fear defend the interests of his client and without regard to any unpleasant consequences to himself or to any other person.

A lawyer shall never knowingly give to the Court incorrect information or advice which is to his knowledge contrary to the law.

(7) It shall be considered improper for a lawyer to communicate about a particular case directly with any person whom he knows to be represented in that case by another lawyer without the latter's consent.

(8) It is contrary to the dignity of a lawyer to resort to advertisement.

(9) A lawyer should never solicit business and he should never consent to handle a case unless at the direct request of the party concerned. However, it is proper for a lawyer to handle a case which is assigned to him by a competent body, or which is forwarded to him by another lawyer or for which he is engaged in any other manner permissible under his local rules or regulations.

**Candour required**

(10) A lawyer shall at all times give his client a candid opinion on any case.

He shall render his assistance with scrupulous care and diligence. This applies also if he is assigned as counsel for an indigent person.

A lawyer shall at any time be free to refuse to handle a case, unless it is assigned to him by a competent body.

A lawyer should only withdraw from a case during its course for a good cause, and if possible in such a manner that the client's interests are not adversely affected.

The loyal defence of a client's case may never cause an advocate to be other than perfectly candid, subject to any right or privilege to the contrary which his clients choose him to exercise, or knowingly to go against the law.

(11) A lawyer shall when in the client's interest endeavour to reach a solution by settlement out of Court rather than start legal proceedings.

A lawyer should never stir up litigation.

(12) A lawyer should not acquire financial interest in the subject matter of a case which he is conducting. Neither should he, directly or indirectly, acquire property about which litigation is pending before the Court in which he practises.

**No conflicting interests**

(13) A lawyer should not represent conflicting interests in litigation and should only do so in other matters where he considers to do so is in the best interests of both clients and they do not object. This also applies to all members of a firm or partnership of lawyers.

(14) A lawyer should never disclose, unless lawfully ordered to do so by the Court or as required by Statute, what has been communicated to him in his capacity as lawyer, even after he has ceased to be the client's counsel. This duty extends to his partners, to junior lawyers assisting him and to his employees.

(15) In pecuniary matters a lawyer shall be most punctual and diligent.

He should never mingle funds of others with his own and he should at all times be able to refund money he holds for others.

He shall not retain money he received for his client for longer than is absolutely necessary.

(16) A lawyer may require that a deposit is made to cover his expenses, but the deposit should be in accordance with the estimated amount of his charges and the probable expenses and labour required.

**Interests of client paramount**

(17) A lawyer shall never forget that he should put first not his right to compensation for his services, but the interest of his client and the exigencies of the administration of justice.

His right to ask for a deposit or to demand payment for his services, failing which he may withdraw from a case or refuse to handle it, should never be exercised at a moment on which the client or prospective client may be unable to find other assistance in time to prevent irreparable damage being done.

The lawyer's fee should, in the absence or non-applicability of official scales, be fixed on a consideration of the amount involved in the controversy and the interest of it to the client, the time and labour involved and all other personal and factual circumstances of the case.

(18) A contract for a contingent fee, where sanctioned by the law or by professional rules and practice, should be reasonable under all circumstances of the case, including the risk and uncertainty of the compensation and subject to supervision of a Court as to its reasonableness.

(19) A lawyer who engages a foreign colleague to advise on a case or to co-operate in handling it, is responsible for the payment of the latter's charges except express agreement to the contrary. When a lawyer directs a client to a foreign colleague he is not responsible for the payment of the latter's charges, but neither is he entitled to a share of the fee of this foreign colleague.

(20) No lawyer should permit his professional services or his name to be used in any way which would make it possible for persons to practise law who are not legally authorised to do so.

# Wexford Seminar on Land Law—October 1973

The 17th Seminar of the Society of Young Solicitors was held in the Talbot Hotel, Wexford, on Saturday, 21st, and Sunday, 22nd October 1973, and attracted an attendance of more than 200 members.

The first lecture on "**The Sale of Flats**" was given by **Mrs. Blanaid O Brolchain,** Solicitor. She emphasised that by definition, a flat was an "independent" rather than a "self-contained dwelling". In order to effect a sale, a flat must either be conveyed in fee simple or leased, for a long term at a small rent, with a fine closely related to the market value of the vacant dwelling at the time of sale. The development of the land includes the whole of the land and building, including common areas, so far as a separate entity has been created; this development can deteriorate if no proper arrangements are made for its management. A scheme covers the whole method of sale, and should include management. The word "condominium", is used to describe both the development, and the management society itself. It is to be noted that, in relation to registered land, Rule 30 (1) (a) and (b) of the Land Registration Rules, 1972, provides for the freehold transfer of a flat, if the land is registered. As stated in Mr. George's book, arrangements can be made in regard to flats of unregistered land. In this case, the purchaser's solicitor's function of a flat in England is almost entirely confined to advising his client whether he can safely purchase. This is not the case in Ireland, where the advantages rests with the builder-developer, who can get an enormous return from a comparatively small site; the purchaser often relies on the agent's brochure, or even on a newspaper advertisement. When the contract is signed, the developer normally takes an interest which takes the form of profit without liability. The expression "service charge" which often includes annual payments for repairs, insurance, maintenance of common areas, etc., is often misunderstood by a prospective purchaser. There is little a purchaser's solicitor can do once the purchaser has signed the contract, which is the usual course.

A purchaser of a flat cannot get it out of his head that the landlord must be responsible for repairs, insurance, and maintenance of halls, gardens, stairs and other common areas. A purchaser of a house on the other hand is well aware of his liability to maintain his property. Unless a management society of all flat dwellers in the building is created, it is inevitable that ultimately the roof will fall into disrepair, the garden will run to seed, and the stairs and hall will become dirty and unlighted. This new responsibility for flat dwellers has only arisen within the last three years. If the contract is not signed, the solicitor for the flat dweller should not first investigate the title, but should look carefully at the scheme of management after completion, and advise his client not to buy if the scheme is inadequate or unworkable. This advice will not be welcome, and may lead to the client going to another solicitor. After settling in, the flat dweller will at first see the value of the property increasing month by month, but later the inevitable deterioration will set in. However, the rules of a management society should be as simple as possible, and easily understood. The essential matters to be undertaken by a solicitor in connection with the sale of a flat are :

(1) All documents of sale within the development must be identical, and this identity of documents must be clearly stated. No amendments can be accepted, unless they are applied to all the flats together.

(2) All the flat owners must have a common responsibility for repairs and insurance. This responsibility will be divided up according to the actual number of flats in a building.

(3) An administration or management society must be formed at the very beginning, and be ready to operate when the first sale of a flat takes place. Unless these conditions are fulfilled, difficulties are bound to arise.

Very often a great number of restrictive covenants are inserted in an original lease, as the drafters of the scheme do not realise that a sale is involved. These restrictive covenants should, however, in practice be limited in number as to the conduct of the flat dwellers in not causing annoyance to his neighbour, as restrictions which appear reasonable today may not be so in the future. The drafters of the lease find it difficult to forget that this is not a lease for a short term at full market value, but rather a development which should be administered by the flat dwellers themselves. A solicitor for a tenant purchaser is used to regarding the landlord as an antagonist, and then forgets that the purchaser of a flat will be both landlord and tenant, when the management society takes over. In drafting the rules, it is not necessary to produce a first class legal document; all that is required is (1) that the rules should be relevant, and (2) the language of the rules should be simple and accurate. It is definitely not convenient to adapt the rules called "Model A" either of a Friendly or of an Industrial and Provident Society; it is, however, possible with care to create a Private Company limited by Guarantee with appropriate memorandum and articles of association. The Law Society should undertake the drafting of a standard scheme for the sale of flats, including a straightforward document of sale, and a practical set of rules for the management society. This scheme would also be adapted for community associations.

Perhaps an interesting model to be adapted would be that of Scotland. Here the land is registered, and a standard Deed of Conditions is registered as a burden on the folio. The flats are sold in fee simple, subject to the conditions in the burden, which set out rights, easements, restrictions and management. The restrictions and the management is done by an Agent, called in Scotland a factor, elected by the majority vote of the owners. This seems ideal and straightforward if Irish house agents were willing to undertake these duties, and if the difficulties attendant on voluntary registration of land could be simplified.

In Italy, the purchaser of a flat is protected by the rules of the Civil Code. The Italian Civil Law contains a great number of regulations and restrictions protecting flat owners; it is based on the notion of "*condominium*" or common ownership. And this common

ownership is set out in the code in great detail. There is a presumption of condominium for areas or services not shown to be exclusive to the owner, or to one iart of the building as regards gas or electricity; furthermore, the plot of ground on which the building stands is in common ownership, and no change can be made save by unanimous consent of all the flat-owners. There is also an interesting scheme of transfer in New York State.

The major problems to be considered by the solicitor's profession are :

(1) The *attitude of the public* who dream of security without responsibility.

(2) The *attitude of the legal conveyancers,* who keep forgetting the difference between the "letting" and the "sale" of flats. As the sale is usually undertake by lease, the deciding factor will be the size of the fine, corresponding to the price of the sale.

(3) The *unknown future attitude of the Judiciary.* It is not possible to predict what decisions the Judges will give in the future in regard to conditions attaching to the ownership of flats, but doubtless eventually we shall be able to rely on some intricate principles enunciated by case law. The principle that the expense of any litigation involving common ownership should be a common charge should be accepted.

(4) The *attitude of the building societies.* It is far from clear whether building societies would be prepared to make advances towards purchase of flats, particularly if the flat could be forfeited for a trivial breach of over-elaborate covenants.

The second lecture was given by **Mr. J. Mac D. Broadhead,** M.A., F.R.I.C.S, M.I.A.V.I., on **"Property Redevelopment"** on Saturday afternoon. He emphasised that the basic assets of a nation were its land, and the energy which the people on it displayed in cultivating or using it. As regards land, the total amount of land available cannot be increased, and the prosperity of our community depends so much on agriculture that we cannot afford to waste land. The notion of *"development"* must arise from extending around and filling in existing urban communities. The notion of *"redevelopment"* involves demolition of existing buildings and their replacement—it is the constant renewal of individual structures or entire areas. Single building, or buildings in a historical street should be preserved, if the community pay the cost of preservation. If redevelopment is desirable, the only replacements acceptable would be those dictated by human motives, and not merely by economics of size and mass production.

A *Redevelopment Plan* is a co-ordination of advice applicable to particular circumstances, supplied by sociologists, builders and technicians. Inevitably applications for permission to redevelop areas of proven commercial, industrial or residential worth will be made; this redevelopment, which may be of national, social and economic necessity, may have to be made by means of persuasion against a given commercial trend. There may be financial inducements but the determining factor which will encourage people to return to the city centre will ultimately be the improvement of the physical environment. In considering development, there are three categories of clients who may be advised in regard to development :

(1) The *impossibles* are the people who do not understand what lies ahead.

(2) The *possibles* include the clients who have the personality to master the technique.

(3) The *probables* include the entrepreneur and the property owner.

It is essential for the client to be an unperturbable man of vision, a co-ordinator receptive to advice, and a decision maker who has finance available.

The professional team should consist of the property consultant and an architect as well as a quantity surveyor, and if necessary an economist. Of these, the property consultant is most important, as he should always be available to his client. The surveyor should ensure that the scheme is acceptable to potential tenants and supplies the maximum lettable facilities. The surveyor and the architect should also be easily available to the client. It is obvious that the property consultant should be the person with the most suitable experience and personality, be he architect or quantity surveyor. If the project is big, it is necessary to establish good public relations in order to satisfy all concerned.

Full planning approval, with all relevant documents, should be obtained from the Local Authority in the first instance. A financial analysis involving the whole project will have to be undertaken at every stage of the development, and more particularly at the proposal stage, during acquisition, at the planning stage and at the tender stage. The title should be a fee-simple one, and it would be wise to estimate the rent which will be current in two years by relating it to the current cost of building. The method of acquiring finance for the project, be it by means of short term loans, or of ground rents, should be considered. Furthermore all matters of transaction, such as stamp duties and value-added tax will have to be fully considered. It is, however, essential to acquire the premises speedily, even if they have to be let for temporary convenience. The contracts with builders with all its attendant complications have to be considered quickly, as well as the preparation of an agreement for a lease, and of the lease itself. The service charge insures that the rent received by the landlord is an absolutely net income, and is normally payable quarterly. The lease is often for 35 years, and there is a provision for rent revision every 5 years.

Messrs **John Buckley, Charles Meredith** and **Maurice Curran** gave respectively expert advice on the methods of transferring property by the sale of shares, as well as dealings with intricate questions of conveyancing work, on Sunday morning.

Mr. Buckley emphasised that there had been a great expansion in the purchase of investment properties by financial institutions recently and solicitors working in this field had grown. The notes are guidelines by a solicitor acting for a client who either owns property which is based, or is about to be developed and leased, prior to a sale to an institution.

As regards Title, special care should be taken in relation to Title attaching to an investment. Many of these spring from tax avoidance schemes, such as the location of a multilevel leasehold interest in property, with occasional options to purchase the leasehold interests in the case of registered land.

Despite the attraction of a substantial saving in stamp duties, financial institutions, which are also public companies, may hesitate to purchase property by means of the acquisition of all the shares in the owning company, because the owning company, when acquired, will be a wholly-owned subsidiary, and, save in the

event of a rapid liquidation, its accounts would have to be consolidated with the public company's accounts. Normally, in regard to the premises in course of completion an institution's solicitor is not too concerned to make any unusual queries about planning, provided that he is satisfied that the buildings have been built in accordance with the appropriate planning and building bye-laws.

As regards Office Buildings, the full premises including car parks should normally be held under full repairing and insuring leases. In the case of multi-lettings, arrangements by way of service charges should be imposed on all tenants, in order to make provision for the cost (1) of maintaining the structure of the building and (2) of replacing lifts, central heating system and essential machinery. Each tenant must contribute his share of the insurance premium.

There are more difficult problems to meet in the case of Industrial Buildings. One must ensure that the dividing walls are party walls in the case of large units and that liability for their maintenance has been shared equally between the tenants. The maintenance of private roadways on industrial estates will have to be considered, including the provision of a service charge amongst the tenants.

In the case of Shopping Centres, the landlord will have to decide at an early stage whether he will give exclusive franchises for particular trades to individual shop tenants, but the current trend appears to be for a free-for-all situation permitting traders to open up in direct competition with one another. It is also necessary in a sizeable shopping centre to establish a Tenants' Association similar to a co-operative to promote the centre as a whole in respect of problems like cleansing, car parking and security. In the case of Blocks of Flats, these may in general be looked upon as an office block occupied by a large number of tenants, as long as the leases are well drawn, and the owner chooses the tenants with care.

There are also many intricate problems possibly arising from value-added tax.

Mr. Meredith emphasised that he had drafted additional requisitions on title, mainly relating to the standard requirements raised by solicitors for mortgagees; these are fully set out in Appendix A. Mr. Meredith explained the necessity for these additional requisitions in detail.

Mr. Curran, in an Appendix, set out in an orderly fashion a useful check list of instructions in conveyancing matters, as well as the points of procedure to be noted in the case of a purchase and of a sale. He stressed that it would be most useful for solicitors to read Moeran's *Practical Conveyancing.*

On Sunday afternoon, **Mr. Thomas Fitzpatrick,** Solicitor and Minister for Lands, delivered a lecture on **"Present and Future Trends in Land Law in Ireland".** He said that the European Communities Acts of 1972 and of 1973 make provisions to enable Ireland to fulfil obligations arising from membership. The Treaty of Rome provides that the Council shall issue Directives to enable nationals of one member State to acquire and use land and buildings in another member State provided the common agricultural policy is not infringed. Since 22 December 1972 Regulations have been made bringing the various Directives relating to agricultural land into force. Broadly under the Land Act, 1965, permission will not be granted to foreigners to purchase land in order to engage in forms of production in competition with Irish farmers. There is a much wider draft Directive by which nationals of other member States would be allowed to purchase agricultural land on the same conditions as Irish citizens but we would try to enforce a lengthy transitional period before it comes into force.

As regards agricultural leases, this should present no problem, as the present tendency has been in favour of full ownership. Longer leases can be granted with the consent of the Land Commission, and the tendency towards granting long leases has grown considerably recently. There are two developments, however, which may tend to hinder this.

(1) It is intended to introduce legislation to implement a Directive which encourages farmers in the 55 to 69 age group, who wish to leave and sell their farms, to receive a special incentive for retirement.

(2) Macra na Feirme presented a Report of Farm Inheritance and Succession to the Minister last November. In this Report, it is suggested that the owner should lease part of the farm to his son for a minimum of 12 years, after which time legal ownership would be transferred to the son, who would receive the stock and machinery free.

Having traced briefly the history of land in Ireland the Minister emphasised that initially, after 1881, the Land Commission was (i) a rent fixing body later developed by law; (ii) a tenant-purchase agency for the conversion of tenants into proprietors, and (iii) a great purchaser and distributor of land in carrying out land reform. The total area distributed under all Land Acts to date exceeds 2½ million acres.

The Land Commission now consists of one Judicial Commissioner, and not more than four lay Commissioners. The Judicial Commissioner alone, as an Appeals Tribunal, deals mainly with price appeals; the Commissioners have sole power to determine matters relating to (i) the person from whom the land is to be acquired; (ii) the actual land to be acquired; (iii) the price to be paid; and (iv) the persons to whom the land shall be allotted. Since 1939, an attempt has been made to resettle 35,000 acres per annum amongst tenants. Since 1962, a sizeable farm unit consists of 40 to 45 acres of good arable land, as compared with 20 to 25 acres before that. More details are contained in the pamphlet *The Land Problem in Ireland and its Settlement,* prepared by the present Secretary, Mr. O'Brien.

As regards compulsory acquisition, the Land Commission has been invested with extensive powers to acquire lands for the purpose of relieving congestion, subject to the limitation that the determination as to the lands to be acquired is a matter exclusively within the province of the Commissioners. In order to overcome various legal decisions, the Land Act, 1965, introduced important new provisions aimed at strengthening the acquisition and resumption powers of the Land Commission. The area acquired compulsorily in recent times comes to about 10,000 acres per year. Land acquired compulsorily has to be paid in Land Bonds, but there has been much criticism recently of the fall in value of the Bonds due mainly to rising interest rates. There is no immediate prospect of an improvement in this regard.

# Committee of Court Practice on Desertion and Maintenance

## NINETEENTH INTERIM REPORT ON DESERTION AND MAINTENANCE (February 1974)

### Views submitted to the Committee

30. The legal remedies open to the deserted wife have been criticised by many of the bodies invited to submit their views.

Some thought that the existing legislation is outmoded and that the Courts should not have to resort to legal fictions to grant relief. Much of the evidence criticised the expense of Court procedures, having regard to the circumstances of the persons involved. It is urged that a scheme of free legal aid should be made available.

31. The difficulty of enforcing maintenance orders was stressed in much of the evidence. The sanction of imprisonment where a husband defaults in payment of maintenance was criticised for being one that did not really help the situation but rather aggravated it. Distraint of the husband's property, it was said, is not always helpful, as this is often the property out of which the family subsists.

The husband often delays in complying with the order made, causing grave hardship in a family which is completely dependent on receipt of the money due.

32. The number of deserted wife allowances in payment by the Department of Social Welfare is approximately 2,900, while the total number of claims received is approximately 4,500. The majority of deserting husbands abscond mainly to Great Britain. Many disappear leaving the families in ignorance of their whereabouts. Enquiries to the police authorities here and in Great Britain, the Irish Society for Prevention of Cruelty to Children and the National Society for the Prevention of Cruelty to Children, occasionally result in tracing the deserting husband, but such cases are exceptional. Even if steps to secure his return to Ireland are successful, that does not ensure that she will secure her maintenance.

33. In certain cases if the deserting husband obtains a divorce in England the Department of Social Welfare will discontinue payment of the deserted wife's allowance where the divorce is one which would be recognised in this State.

34. A deserted wife may face another problem where the family home is in the name of the husband. Having deserted his wife and family he may sell the house, or discontinue paying the mortgage payments, if the house is subject to a mortgage. The loss of the house to the wife and family may follow unless the deserted wife is in a position to meet the mortgage payments out of her own resources. When she does so the defaulting husband benefits by the reduction of his own debt to the mortgagee by the wife's payments.

If the house is rented, he may cease payment of the rent and so deprive the family of a home, unless the wife is able to pay the rent.

35. The District Court affords an inexpensive and speedy hearing of the deserted wife's claim. The District Justice who must assess the financial circumstances of the parties is often handicapped by being unable to obtain precise information as to both parties' earnings. The husband's employment may be seasonal, or he may receive as much again in overtime as he earns in basic pay, or his employment may be casual and with a number of different employers. The task of the District Justice, it is suggested, would be easier if he could require under penalty a full and accurate statement of earnings of the deserting husband from his employers.

36. There was almost unanimous support for the suggestion that portion of a deserting husband's income should be attached at source. Not all were agreed on how this could best be done. Some favoured attachment on a percentage basis. Others preferred it to be assessed by the Court, subject to alteration if circumstances changed and upon renewed application to the Court. It was suggested that real and personal property also be subject to attachment in the same way as the judgment mortgage system operates. Most of these suggestions were based on the assumption that the husband was the sole breadwinner of the family. This is not always the case in an age when the employment of married women is becoming more common and where their earnings contribute significantly to the family income.

37. Any system of attaching income, to be effective, should be simple and immediate. The consensus of opinion favoured attachment of a specified amount following an order of the Court. The order could be directed to the defaulting spouse's employer, and would require deduction and payment over to the other spouse or, in exceptional cases, to an official of the Court, e.g. the local District Court Clerk.

38. In the case of a self-employed spouse, the Court order could be directed to him or to her, requiring payment of the specified sum to the other spouse or to an official of the Court for the other spouse.

39. The hearing of maintenance cases in open Court is undesirable on the ground that they are of a peculiarly sensitive nature. It was argued that a less formal hearing away from the Courtroom atmosphere—such as in a District Justice's room—would be more appropriate.

40. The intervention of partisan "in-laws" in such cases has, at times, rendered their solution more difficult. It has been suggested that a District Justice ought to have power to exclude such persons from attending the hearing where they are not witnesses. It was also suggested that the District Justice be given power to exclude witnesses from the Court until their evidence is about to be tendered.

41. A number of bodies submitted arguments in favour of making free legal aid available. At present free legal aid is restricted to criminal cases. While the deserted wife with no private means is seen as being particularly qualified to receive free legal aid, it was

also suggested that it be made available to her husband if he can prove the insufficiency of his own resources.

42. Other proposals were as follows:

(a) service of documents by post to be permitted;

(b) certificate of wages be made admissible as evidence of earnings;

(c) the period of a child's dependence to be extended beyond the age of 16 years where the child continues in full-time education, and extended for life in the case of mentally handicapped child.

**Committee's Findings**

43. We are satisfied that there is a real need for a radical change in the legal provisions relating to the provision of maintenance for deserted spouses and families. We are also of opinion that failure to maintain, instead of desertion, should be the basis of the new jurisdiction.

The District Court should continue to be the principal forum to which the complaining spouse may have resort. In order to minimise the hardships which any delay might cause the deserted family, changes not only in procedural law but also changes in substantive law, will require to be made.

**The Committee's Recommendations**

44. The existing law should be amended to provide that a spouse may be ordered to pay to the other spouse by means of maintenance order for the support of that spouse and the dependent children such sum as the Court may order when it is satisfied that there has been a family default on the part of the spouse against whom the order is sought. Family default should be defined as

(a) actual abandonment of the family home, the other spouse and the dependent children and failure to maintain them; or

(b) such ill treatment, physical or mental, or other misconduct on the part of one spouse as would reasonably justify the other in leaving the family home and a failure by the spouse in the family home to maintain the other; or

(c) such ill treatment, physical or mental, or other misconduct on the part of one spouse as would reasonably justify the other in leaving the family home although she or he does not do so and a failure by the spouse who earns to maintain the other; or

(d) failure of the spouse who is responsible for the support of the family to provide a reasonable standard of living for them having regard to the means and earnings of that spouse.

45. In cases of actual distress, immediate relief for the deserted family by way of interim order is essential. This order should be addressed to and be payable immediately by the relevant local assistance authority. A copy of any interim order made should be served by ordinary prepaid post on the spouse alleged to be in default and on the local authority, and either should have a right to apply to the District Court to set aside the order or to vary it. A full hearing should follow as soon as possible. At this a Certificate of Earnings exhibited in an affidavit sworn by the employer should be sufficient proof of earnings, unless the Court orders otherwise. At the conclusion of the hearing an order for maintenance should be made if the evidence warrants it and should be served on both the defaulting spouse and his employer. It should require the deduction of the sums specified in the order from the defendant's income and its payment direct to the plaintiff by the employer without deduction of income tax. Any sum paid by a local authority on foot of an interim order should also be paid in the same way. Where the defaulting spouse is not within the jurisdiction, or cannot be traced, the orders of the Court should be directed to the appropriate local authority, which would be liable to pay the amount and would seek to recover any sums paid from the defaulting spouse. All such payments should be deemed a civil debt for which execution may be levied against the estate of the husband/defendant other than such part of it as consists of the family home and furniture in the actual occupation of the spouse who obtained the order.

The protection of the family home should be ensured, insofar as possible, when the defaulting spouse is the legal owner. The registration of the order as a *lis pendens* should be permitted effectively to prevent any attempt of sale. Thereafter, the sale of the home should be made possible only by leave of the Court. Where appropriate, the Court award of maintenance would take into account the necessary payment of mortgage instalments or rent. If the home is rented from the Corporation or a local authority, that authority may be ordered by the Court to transfer the tenancy into the joint names of the spouses for the period set out in the order.

46. If the Court finds on the evidence offered that a spouse has reasonable grounds for believing that the safety or welfare of the family requires it, the Court should have power to make an order prohibiting the defaulting spouse from entering or attempting to enter the family home "until further order" and from in any way molesting, annoying or putting in fear the family or any member of it.

47. The hearing of maintenance cases other than in public should not be a matter of discretion for the presiding Judge. All such hearings should be in private.

48. The Court should be given power to exclude witnesses until it is ready to hear their evidence.

49. The limits of £15 and £5 imposed by the Courts Act, 1971, in respect of a deserted wife and each child, should be removed insofar as the District Court is concerned. The Committee would favour an unlimited jurisdiction as to the amount being conferred on the District Court but because of the doubts as to the constitutionality of such an enlargement of jurisdiction it is recommended that figures of £40 and £10 be substituted for the time being, with power being vested in the Minister for Justice to alter these amounts in future by ministerial order as circumstances require.

50. Any attempt at resumption of cohabitation with a view to reconciliation by the parties should not affect the continuance or effect of the Court order; if it were allowed to do so, it would place the deserted spouse in an intolerable dilemma, and could well militate against eventual reconciliation. The order of the Court should run, therefore, until it is discharged by the Court itself. A successful reconciliation could thus lead to an application to the Court and the discharge of the Order.

51. A child's dependency should continue during such period as he is in receipt of full-time education after attaining the age of sixteen years. The Court should, however, take account of any earnings of which the child is in receipt, e.g. under an apprenticeship agreement, a scholarship or a secondary education grant.

Where the dependent child, upon attainment of the age of sixteen years, is mentally or bodily deficient in

such manner and to such degree as to render him totally and permanently unfit for employment of any kind, his dependency should continue for life.

**Legal Aid provisions**

The number of cases of desertion in the Dublin Metropolitan Area is sufficient to justify the whole-time attention of an official solicitor. It is recommended that such solicitor be attached to the Office of the General Solicitor for Minors and Wards of Court, Public Record Office, Dublin, and devote all his time to preparing and pursuing only default cases in both the District Court and the High Court. His services should be made available to all litigants qualifying under a free legal aid scheme and all social welfare and social services advice centres should refer such cases to him in the first instance.

In all areas outside the Dublin Metropolitan Area, a similar service should be provided by the local State solicitor.

**Addendum**

The present recommendations are made to meet the existing situation and are believed to be capable of rapid implementation. For the long term the Committee is of opinion that it would be more desirable that all orders for maintenance should be met in the first instance by the local authority or the Department of Social Welfare and so relieve the spouse obtaining the order from the worries and uncertainties often associated with the implementation of such orders. The local authority could look to the defaulting spouse for recoupment and by the information obtainable from Social Welfare and PAYE records would be in a better position to follow a defaulting spouse who changes employment or place of business, etc.

Brian Walsh, *Chairman*
G. L. Frewen, *Secretary*
12 February 1974

# ESTIMATES OF DEPARTMENT OF JUSTICE

(DAIL DEBATES—VOL. 270, No. 3)
12 FEBRUARY 1974

**Mr. Cooney, the Minister for Justice:**

I propose, as is traditional, to give a brief resumé in respect of the period since the last debate on the Estimates for the Department of Justice of the most noteworthy developments in the various services for which I am the responsible Minister.

My basic concern must be the security and safety of the State. Unless the State and its citizens and its institutions can be kept secure from attack no progress can be made in the fields of economic or social reform.

Unfortunately we have within our society at the moment a small group of organised subversives whose presence constitutes a threat to the security of the State.

I indicated that peace and security were necessary if we are to make progress in economic and social reform. I am charged as Minister for Justice with control over a great variety of social legislation—adoption, the whole area of family law, which raises the problem of deserted wives, their rights against their husbands and rights to the family home, annulments, guardianship of children and also the question of rent control, ground rents, landlord and tenant law, censorship of publication and films. There are other areas for which I have responsibility with a highly important legal content such as the Land Registry, Public Records Office, Charity Commissioners and the operation of the Courts themselves. Indeed, it could be said that these latter activities also have a high social content.

When one hears them listed out it will be noticed that some of these areas require legislative changes. Steps towards bringing in those changes have already been taken. What I want to emphasise at this stage is that while they are all urgent it is not possible to introduce all these reforms instantly. What is possible is a steady programme of reforming legislation right through my term of office. I intend to see that this programme is carried through to a successful conclusion and I want to emphasise that in drawing up the reforms I will be in touch with groups who have a knowledge or special interest in the particular area in question.

**Sunningdale Conference**

We are entering a particularly critical phase of Irish history with the Sunningdale communiqué, the formation of a power-sharing Executive in Northern Ireland and the approaching formal conference to confirm acceptance of the agreed communiqué that was signed at the end of the Sunningdale Conference. These events have within themselves the capability of achieving peace for this island and it is important for that reason and for the continued security and welfare of this State that these initiatives succeed.

I should like to refer very briefly to the agreed communiqué issued at the end of the Sunningdale Conference in December and, particularly, to two of the elements in the communiqué that concern me as Minister for Justice. First, there is the Law Commission that has been set up jointly by the Irish and British Governments to consider all the proposals that had been put forward at Sunningdale for dealing with the problem of bringing to trial persons who commit crimes of violence, however motivated, in this island and to recommend as a matter of urgency the most effective means of dealing with those who commit those crimes. Secondly, there is the police authority to be set up here, appointments to which will be made after consultation with the Council of Ministers of the Council of Ireland.

As the House will be aware, the Law Commission have already begun their work. As regards the setting up of a police authority enabling legislation will be necessary and initial preparatory work of gathering information and ideas has already begun. I will shortly be having consultations and discussions on the matter with the Garda authorities and the Garda Representative Bodies before bringing my proposals before the House. I fully recognise the importance of having their views on a matter of such fundamental importance to their Force.

**Control of explosives; General crime figures**

The stringent controls that have been in operation for some time now with regard to the use and storage of explosives are being continued. The controls which were extended during 1972 to certain ammonium nitrate mixtures, sodium chlorate and nitrobenzine are also being maintained. I am aware that this has caused inconvenience to commercial users of the materials concerned but I know that they will appreciate how necessary it is to have the existing security arrangements. The protection of life and property is of primary importance and, so long as the situation requires it, the Government will strive to ensure that materials for bomb making do not get into the wrong hands.

At the outset I should like to refer to the general crime situation. The crime figures increased again in 1972 but the rate of increase was much less than in 1971. These are the latest figures available. I am pleased to be able to say that the indications are that the steep upward trend of recent years may have been halted. In the year ended 30 September, 1972, 39,237 indictable offences were recorded as against 37,781 in the previous year, an increase of 3.8 per cent. Two thirds of these consisted of offences against property without violence, mainly larcenies, and I would remind the House that larcenies, generally, even where the value of the money or goods stolen is trivial, are indictable offences. In the vast majority of the cases of offences against property, either with or without violence, which were recorded during the year, the value of the property stolen was less than £50.

Offences against the person have been almost constant over the past four years, but offences against property showed a small increase of 4.4 per cent over the 1971 figure.

**Indictable offences**

Proceedings were instituted by the gardaí in respect of 15,705 indictable offences known to them or 40 per cent of the total. The overall detection rate fell to 43 per cent as compared with 46 per cent in the previous year. In the Dublin Metropolitan Area the detection rate was 34 per cent while in the rest of the country it was 58 per cent. For some of the more serious crimes, the detection rate was as high as 90 per cent while for certain categories of less serious offences against property it was as low as 37 per cent. I should mention

too that a significant proportion of some relatively minor offences are extremely difficult to detect. For example, in 1972, 2,271 bicycles were reported as stolen but proceedings were instituted in 131 cases only.

One has to be careful when drawing comparisons in the matter of detection rates but it may be of interest that the detection rate for England and Wales, exclusive of London, in 1972 was 50 per cent, while the rate for the London area was 30 per cent.

**Summary offences**

In the year ended 30 September 1972 the number of persons charged with summary offences was 190,152 as compared with 198,157 in 1971. Road traffic offences continued to constitute by far the greatest category—135,074 persons were prosecuted for road traffic offences in 1972 as compared with some 147,442 in 1971. The prosecution of these offences involves a tremendous amount of Garda time being spent in court and I am investigating the Report of the Committee on Court Practice and Procedurue which recommended the extension of on the spot fines to a wide range of motoring offences. More than 200,000 "fine-on-the-spot" notices were issued for contraventions of the parking by-laws and similar offences and in 82,443 of these cases there were prosecutions.

The Garda Síochána are in the front line of defence of our institutions and the laws which shape those institutions. Their task, in a modern society, is a difficult and complex task and I want to say, and I am sure I speak for everybody in this House when I say this, that they are doing a good job, and that their work is appreciated.

**Improvements for Gárdaí**

One of the most important ways in which the Government can make their contribution is, obviously, by providing the necessary financial resources for manpower increases, new equipment and so on. The Government have recently decided to increase Garda strength, and the necessary arrangements are being made so that the extra men may be recruited as soon as possible. I can state that a substantial proportion will certainly be assigned to Border areas and the remainder wherever the Garda authorities deem that the greatest need exists.

Generally, I see the use of computers by the Gardaí which is an inevitable development in this day and age, as an alternative means of storing information of the type which the Gardaí already acquire and file in the course of their normal duties. They will be used to provide a better information retrieval system.

**New Radio Control Centre in Dublin Castle**

Work is well advanced on the installation of the most modern equipment in the new radio control centre in Dublin Castle and it is expected that the complete scheme will be fully operational within the next three months. When completed, the centre will be among the most modern and sophisticated of its kind available. Radio communication is generally now at an acceptable level in most areas but the existing radio network is of a temporary nature. A permanent radio network is being planned in co-operation with the Department of Posts and Telegraphs and preliminary work has already been done in connection with a pilot survey in certain areas. This survey will be a joint project between the gardaí and the engineering branch of the Department of Posts and Telegraphs and work is expected to commence on the survey within the next month or so.

**Juvenile Liaison Officers**

The juvenile liaison officers' scheme continues to operate successfully and since the initiation of the scheme over 7,600 juveniles have come under the care and supervision of the juvenile liaison officers and only 13 per cent of these became involved in offences thereafter. One sergeant, 11 Gardaí and two Ban-Ghardaí are serving full-time as juvenile liaison officers in Dublin; in Cork one sergeant and two Gardaí are engaged full-time and one Ban-Gharda is engaged part-time on the scheme while in Limerick there is a sergeant full-time on juvenile liaison work. Waterford has one Garda full-time on these duties.

The function of a juvenile liaison officer is to maintain contact with any juvenile assigned to him. The juvenile may be one who has committed an offence and, having been warned, has been committed to the care of a juvenile liaison officer. The officer may also be given the care and guidance of a young person, who, though not known to have committed an offence, may be regarded as likely to get into trouble by reason of unsatisfactory behaviour, such as persistent truancy, running away from home, staying out late at night, being unruly at school or at home, behaving in a disorderly manner and frequenting undesirable places. These cases come to the notice of the officer through teachers, parents, school attendance officers or the gardaí.

**Law Reform**

Law reform is an aspect of my Department's work which is of special concern to me, and particularly so in the field of family law where there are many matters requiring urgent attention.

Because of my concern in this area I have, in consultation with the Attorney General, recently established an informal Committee for Law Reform, consisting of myself, as Minister for Justice, the Attorney General, Mr. Justice Brian Walsh of the Supreme Court and an Assistant Secretary of my Department. The purpose of the committee is to examine areas in which law reform —both on the criminal and civil side—is urgently needed and to establish working parties or groups to examine particular aspects of the law, concentrating at the outset on matters that are of a social as well as a legal nature. Each working group will, either at the end of their deliberations or from time to time, make recommendations to me as Minister for Justice.

The various working parties will consist of members of the Judiciary, of both branches of the legal profession, of persons engaged in social and charitable activities, of representatives of bodies active and knowledgeable in the particular field. as well as of officers of Government departments involved in the problems being examined. This is an experimental approach and I shall be watching it with the advice and assistance of the Attorney General. Should it prove successful, it can be continued and one could foresee it developing into a full blown Law Commission.

I attach great importance to this law reform programme and the implementation of it will proceed with all possible speed, subject to the limitation that the expert persons needed to translate proposals into legislation are thinner on the ground than I would like and this perhaps is the first problem to be overcome.

## Legal Aid

I would like to refer to legal aid. As Deputies will be aware, we have had since 1965 a statutory scheme of legal aid in criminal matters and for some years past legal aid has also been given in *habeas corpus* cases under an informal arrangement between the Attorney General and the Minister for Finance, where the High Court or the Supreme Court recommends the grant of legal aid. In the Criminal Procedure (Amendment) Act, 1973, I took the opportunity of extending the statutory scheme in two important respects—firstly, to make legal aid available for the hearing in the court of sentence where the accused has been sent forward for sentence—and for any subsequent appeal against sentence—and, secondly, to make legal aid available for all preliminary examinations in the District Court. Previously legal aid for preliminary examinations was restricted to cases of murder. Legal aid in civil as well as criminal matters is nowadays universally regarded as a fundamental human right and I have always felt that civil legal aid must come here sooner or later.

We are probably the only member of the Common Market which does not provide legal aid in civil matters and, indeed, our membership of the Community imposes obligations on us to introduce a measure of civil legal aid in certain areas. This is a question to which I have given much thought and I have decided to set up an informal committee to advise me on the introduction of a system of civil legal aid. The committee will consist of representatives of both branches of the legal profession, a representative of FLAC, officers of interested Government Departments and the chairman will, I hope, be a judge. The precise terms of reference and the membership of the committee are at present being settled but I expect to have the committee established and working very shortly.

This is an opportune moment to pay tribute to FLAC, the voluntary organisation of law students who, with some professional assistance, have been operating in recent years a legal aid and advice service. These students deserve the highest praise for the very valuable work which they are doing in an area of social need. As I stated in the opening part of this speech, a grant of £5,000 per annum to FLAC is now proposed as an earnest of the Government's recognition of their work.

## Recent Legislation

Recent legislation includes the Criminal Procedure (Amendment) Act, 1973, the Charities Act, 1973, the Auctioneers and House Agents Act, 1973, the Genocide Act, 1973, and the Courts Act, 1973, and I hope to be introducing several other Bills in the very near future.

The Committee on Court Practice and Procedure continues with its most valuable work, and I take the opportunity to thank its members. They could be forgiven for thinking that the lack of action in regard to so many of their reports denotes a certain ingratitude.

Reports of the committee not yet implemented deal with jury service, the criminal jurisdiction of the High Court, appeals from conviction on indictment, proof of previous convictions, the interest rate on judgment debts, the jurisdiction and practice of the Supreme Court, the organisation of the Courts, the liability of barristers and solicitors for professional negligence, the "fines-on-the-spot" system, court fees and the execution of money judgments, orders and decrees. The matters dealt with in these reports are being examined and I hope to introduce amending legislation, where necessary, in due course.

## Recommendations on Desertion

I extended the terms of reference of the committee to include such matters, including matters of substantive law, as the Minister for Justice might from time to time request the committee to examine and I asked them at their early convenience to examine and make recommendations on the substantive law as to the desertion of wives and children, the attachment of wages and the desirability of establishing special family tribunals. They were also asked to examine at the same time the legal procedure in regard to maintenance of spouses and children, affiliation, declarations of legitimacy and guardianship and custody of children. I am glad to say that the committee have completed their investigations and, as I said at the recent AIM Seminar, I expect to have their recommendations in the very near future. After publication I will be available to interested persons and organisations for discussions on the report. Drafting of amending legislation will then commence as a matter of urgency.

## Landlord and Tenant Commission

Two separate reports dealing with different subjects have been presented by the Landlord and Tenant Commission. The first report deals with the renewal of occupational tenancies under the 1931 Landlord and Tenant Act. The commission's second report deals with extensions of the rights of renewal and of outright purchase given by the Landlord and Tenant Acts of 1958 and 1967 to what may best be described as ground rent tenants. The second report covered *inter alia* the renewal of the tenancies of sports clubs in certain circumstances. Certain of the recommendations in the commission's second report, including those dealing with the grant of a new type of lease to sports clubs, have already been implemented, with some modifications, in the Landlord and Tenant (Amendment) Act, 1971. A comprehensive Landlord and Tenant Bill has been drafted on the basis of the two reports of the commission that I have mentioned. I hope shortly to be in a position to submit this Bill to the Government for approval with a view to its introduction.

In recent months I have had discussions with representatives of tenants in Cappoquin, County Waterford. I have also had representations from tenants in Marino Crescent, Clontarf, Dublin. Both the Cappoquin tenants and the Marino tenants feel that there are anomalies in the law which adversely affect their interests. I advised these tenants to put their cases before the Landlord and Tenant Commission and I understand that the commission are dealing with both cases. When I have the commission's recommendations I will be in a position to consider the question of changes in the law.

## Compensation Scheme for Persons injured in Violent Crimes

The Government have now approved of a detailed scheme of compensation. Briefly, compensation will be payable by a tribunal for personal injuries received in the course of crimes of violence. The injuries must merit an award of at least £50 and must have been sustained since 1 October 1972. Compensation will be on the basis of common law damages. I am now in

the process of setting up the tribunal and its organisation to administer the scheme and when I have done this—which should take no longer than a week or two—claimants will be in a position to get in touch with the tribunal itself. I may add that the tribunal will be entirely independent in determining claims. I recently caused copies of the scheme to be laid before the House.

Entry into the EEC has affected my Department in a number of respects, principally in relation to the Communities' Court of Justice and the treaty provisions regarding right of establishment and approximation of laws.

**Community Regulations and Directives**

The Council of the European Communities has issued a considerable number of directives and regulations to implement the treaty provisions regarding free movement of persons and services. One of the effects of these directives and regulations is to require member states to liberalise their regimes of entry and residence in respect of nationals of other member states availing themselves of the right of establishment, right to supply services and right to free movement of workers. The European Communities (Aliens) Regulations, 1972, accordingly confer rights of entry and residence on certain categories of persons who are nationals of member states of the Communities. These regulations take account of the special transitional provision in regard to free movement of workers that has been made in favour of this country in the Treaty of Accession to the Communities.

The right of establishment and the right to supply services has already been extended to some occupations in respect of which I am the appropriate Minister. As a result, Irish nationals or companies who wish to engage in the sale of intoxicating liquor, to act as auctioneers and house agents or to deal in arms, ammunitions and explosives can establish themselves in these occupations or supply the services in question in any state in the Community on the same basis as nationals or firms of the host member state. Conversely, nationals and companies from other member states can establish themselves here, or supply relevant services here, on the same basis as Irish nationals and Irish firms—in other words, they must comply with Irish law in all respects if they want to engage in those occupations here.

As far as this country is concerned, no change is needed in our existing legislation governing these occupations because our law does not discriminate against non-nationals. Similar provisions have been applied to pawnbrokers and moneylenders by virtue of a directive on freedom of establishment for banks and other financial institutions made by the Council on 28 June 1973 but member states have been given until the end of 1974 to apply the provisions in the case of these two occupations.

**Directive on Freedom of Lawyers**

A draft directive on the freedom of lawyers of member states to provide certain services in other member states is at present being studied by a working group established by the EEC Council. The proposed directive would permit lawyers of any member state to provide legal advice and also to engage in advocacy before the Courts in other member states on a temporary basis in pursuance of a professional engagement. Under the draft directive, member states would be required to remove any restrictions based on nationality which would hinder this freedom to provide the legal services concerned. There is continuous consultation with both branches of the legal profession on the draft so that account can be taken of their views in deciding the line to be taken in the working group discussions.

As a result of our entry into the EEC, there will be an important new body of law in the financial, industrial and commercial fields to be dealt with by our courts. The newly-established relationship between our courts and the Court of Justice of the European Communities is of particular interest to my Department. New procedures are required in this context.

In December 1972 two sets of regulations were made under the European Communities Act, 1972, so as to link up our judicial system with the European Court. These regulations related, respectively, to rules of court and enforcement of community judgments. The European Court (Rules of Court) Regulations, 1972, provided a basis for any new court procedures made necessary by this country's membership of the European Communities. The second set of regulations—The European Communities (Enforcement of Community Judgment) Regulations, 1972—were necessitated by the Treaty Provisions whereby judgments of the European Court and certain decisions of Community institutions are enforceable in the Member State concerned under the rules of civil procedure; these regulations provide for enforcement of "community judgments" under the procedure here for enforcement of divil judgments of the Irish courts.

The European Communities (Judicial Notice and Documentary Evidence) Regulations, 1972, which were also made under the European Communities Act, provide that judicial notice shall be taken of the Treaties governing the European Communities, of the Official Journal of the Communities, and of decisions of, or expressions of opinion by, the European Court of Justice; these regulations also provide for the proof in evidence of the treaties and of certain Community acts, judgments and documents.

The treaties confer on the European Court jurisdiction to give rulings concerning the interpretation of the treaties, the validity and interpretation of acts of institutions of the Communities, and the interpretation of the statutes of certain Community bodies. National courts may refer questions of this kind to the European Court and the making of rules of court in connection with such referrals is under consideration by the Courts' Rules Committees.

I should mention, in this general context, that the European Court, represented by its President and five judges, with an Advocate-General and the Registrar of the Court, paid an official visit to this country in November, 1972. There have also been a number of visits by judges of our courts to the Court in Luxembourg.

The Community institutions and the Member States are continuing with the work of harmonising their legal provisions which have a direct bearing on the establishment and functioning of the Common Market. To this end a number of Conventions have been prepared or are being prepared under the auspices of the EEC. My Department is directly concerned with three particularly important Conventions. These are the EEC Conventions on Jurisdiction and the Enforcement of Civil and Commercial Judgments, on Bankruptcy, and on Private International Law. The first-named Convention, which applies to maintenance orders as well as other civil

judgments, came into operation, as between the six original Member States, on 1 February 1973.

In signing the Treaty of Accession the new Member States undertook to accede to this Convention, subject to any necessary adjustments to be negotiated. These negotiations are now proceeding. It appears unlikely that the Convention will come into force for this country for some considerable time. Meanwhile, as the House is aware, negotiations are in progress with Britain with a view to working out a suitable interim arrangement for the reciprocal enforcement of maintenance orders. I hope that the position will be reached where I can introduce legislation to give effect to the arrangement on our side during the next session. Assuming that the legislation is enacted before the Summer recess, the agreement can be signed and implemented shortly afterwards.

The draft Convention on Bankruptcy is the outcome of approximately seven years' work by eminent jurists from the six original Member States. This draft is now being considered by delegates from Member States of the enlarged Community, including representatives from my Department, meeting periodically in Brussels. The report of our own Bankruptcy Law Committee has recently been published and proposals for the amendment and codification of our existing bankruptcy provisions are contained in the draft Bankruptcy Bill and the draft Bankruptcy rules which are appended to that report. The relationship between the draft convention and the recommendations of the Bankruptcy Law Committee is being examined Departmentally.

A Private International Law Convention is also being prepared under the auspices of the Commission of the European Communities. This Convention will deal with the law applicable to contractual and non-contractual obligations and the law applicable to corporeal and incorporeal property. A preliminary draft of the convention is at present being considered by a committee of experts consisting of delegates from the various Member States.

**Adoption and Aliens**

I was aware when I took office of the need for some changes in the adoption laws. I have had extensive discussions with persons knowledgeable in the field, the societies, social workers, the Board itself. As a result, I am now in a position to put proposals to the Government. I hope to have amending legislation introduced during this session. I confess I had hoped to be further advanced at this stage but the discussions took longer than I anticipated. I am grateful to all who had discussions with me.

The Adoption Board made 1,402 adoption orders in 1973, 111 more than in 1972. The proportion of children placed by adoption societies was 84 per cent compared with 83 per cent in 1972. Seven hundred and fifteen of the orders made in 1973 were in respect of boys and 687 were in respect of girls. The board continues to hold sittings outside Dublin so as to facilitate prospective adopters. Forty-eight of the total of 94 meetings held during the year were held in various centres outside Dublin.

There has been some increase in recent years in the number of aliens registered as being resident here for three months or more. The number so registered on 31 December 1972 was 6,118, as against 6,088 on 31 December 1971. These are the latest figures available. Roughly 226,000 temporary visitors came here in 1973 from places other than the North of Ireland and Great Britain, as compared with 211,000 such visitors in 1972. This is an increase of 7 per cent. The figures do not include British born subjects who are exempt from control on a reciprocal basis.

In 1973, 98 persons were naturalised as compared with 89 in the previous year. This brings to 3,115 the total number of all persons naturalised since 1935, when provision for naturalisation was made.

In 1973 the Film Censor examined 865 films with a total footage of 3,502,868. The number of films examined by the censor in 1972 was 791 and the footage examined in that year was 2,775,852. Of the total of 865 films which the censor examined in 1973, 650 were passed without cuts, 195 were passed with cuts and 20 were rejected.

**Censorship of Films and of Publications**

The Censor issued 247 limited certificates. The Censorship of Films Appeal Board considered appeals in respect of 13 films. Six of the appeals were rejected. One film was allowed for general viewing with cuts, four for limited viewing without cuts and two for limited viewing with cuts.

Complaints have been made to me from time to time that persons under age are admitted to films issued with a limited certificate.

My attention has been drawn to the increasing amount of unsolicited pornographic material received in the post from abroad and I would like to take this opportunity of warning parents to check the post coming to their homes. In addition, complaints have been made to me about the quantity of paperback pornography available and I am considering possible measures to deal with this undesirable development.

The Censorship of Publications Board examined 251 books and eight periodicals in 1973. Four books were examined as a result of formal complaints from members of the public and 247 books were referred to the board by officers of Customs and Excise. The board made 219 prohibition orders in respect of books and five in respect of periodicals.

Appeals for revocation of prohibition orders were examined by the Censorship of Publications Appeal Board in respect of two books and two periodicals. These appeals were successful.

Under section 2 of the Censorship of Publications Act, 1967, a prohibition order imposed on the ground that a book is indecent or obscene ceases to have effect after 12 years. By virtue of this provision 393 prohibition orders in respect of books ceased to have effect on 31 December 1973.

In the Public Record Office the amount of material being transferred continued to grow. The main intake of documents in the office consists of the transfer of records from the principal and district probate registries and from the courts. During the period under review a large quantity of legal papers was received from solicitors and others.

**Compulsory Social Work**

The alternatives available to courts at the moment ought to be looked at again with a view to devising some form of penalty which would deal with the many situations where a fine is inadequate but a prison sentence is too severe. I have in mind persons being deprived of leisure, having to do compulsory social work, serving sentences at weekends *et cetera*. This is an area in which I intend to initiate studies during the

coming year to see what changes can be effected. This will probably involve the Courts and in this regard I might mention that I have indicated to the Judiciary that I would welcome visits to our prisons by those who have not already visited them.

Under the Criminal Justice Act, 1960, I have considerable power to allow prisoners conditional release or what is commonly known as parole. I can attach conditions to this release requiring the prisoner to report back at weekends and by virtue of this power, which is used widely, can introduce variations in the sentences as mentioned above. The decision will have to be taken as to whether the proper person to introduce the variation is the Court imposing the sentence or the Minister who supervises it or some third party—some independent authority.

The system of conditional releases is operating very successfully up to now and last year up to 600 conditional releases were granted. The system permits considerable flexibility to allow releases for work, interviews, compassionate family reasons *et cetera,* and it is effective because it is flexible.

**The Courts**

We will all agree that persons who appear before our Courts, whether they are there because they have civil business to transact or because they have come into conflict with the law, are entitled to have their cases dealt with expeditiously and fairly. It is, therefore, of paramount importance that our Courts should have all the resources necessary to the expeditious and fair discharge of the business coming before them.

The continuous growth over the years in the volume of Court Business has accelerated in recent years especially, as one might expect, in Dublin. The number of cases set down for hearing in the High Court has doubled in the past four years. The overall volume of Circuit Court business has increased by 46 per cent in the past ten years; in the Dublin Circuit Court criminal trials have increased by 67 per cent and Criminal Appeals by 119 per cent in that period. The business in the Dublin Metropolitan District Court has increased by 70 per cent in the past ten years, the increase since 1970 being more than 30 per cent.

**Increase in Court Business**

This sharp increase in court business, coupled with the fact that the full time of a member of the judiciary from each of the three courts concerned is taken up with sittings of the Special Criminal Court, had overtaxed the time of the judiciary, with the result that serious arrears have arisen in the High and Circuit Courts and a few sittings of the District Court had to be cancelled.

Being very concerned at this situation I arranged, as a first step to remedy it, to provide additional judges and justices. The Courts Act, 1973, provided for an increase from six to seven in the statutory number of ordinary judges of the High Court and an additional judge has now been appointed to that court. Since 1971, the Circuit Court has had 11 judges including one "Temporary" judge. With the recent appointment of an additional "temporary" judge that number has now been increased to 12. The question of increasing the statutory number of ten "permanent" Circuit Court judges, including the President of the court, is at present being examined. The number of justices serving the District Court has been increased from 35 to 37, including the President of the court, by the recent appointment of two additional "temporary" justices. The question of appointing a further "temporary" justice is at present being examined.

While the appointment of extra judges is a most important contribution to improving the situation, the procedural machinery in the Courts must be examined to see how it can be changed or streamlined, or both, so as to ensure the most efficient discharge of court business. I have, therefore, as indicated earlier, arranged for an urgent study to be made of some of the reports of the Committee on Court Practice and Procedure which contain recommendations and suggest changes that could help considerably in improving the situation.

The accelerated growth in the volume of Court business in recent years has had its greatest impact in Dublin. One of the effects of this has been to create serious Court accommodation problems.

**Pressures on Court accommodation**

There are plans to erect a large complex of Court buildings on a site that has been acquired at Smithfield, Dublin and, as a temporary measure, to provide, on another site in the vicinity of the Four Courts, urgently needed accommodation for the Dublin Circuit Court and for the children's Court. It had been expected that by now the temporary additional accommodation would have been built and ready for occupation but unfortunately, certain difficulties arose, which, I am confident, will be resolved very shortly. I am now hopeful that this very urgently needed accommodation will be available in about a year's time. In the meantime every effort has been, and is being, made to relieve the accommodation pressures. For example, temporary prefabricated offices have been provided in Chancery Street for the District Court staff; existing accommodation has been rearranged to provide more office space; accommodation beside the Four Courts has been provided on a temporary basis for use as an additional District Court for "traffic" cases; the President of the District Court has made a determination the effect of which is to divert more Metropolitan District Court business to Dún Laoghaire; and an additional court has been provided for the Circuit Court from existing accommodation in the Four Courts.

Dublin is not, of course, the only area in which there are serious court accommodation problems. Problems of an acute nature have arisen elsewhere.

The business of the District Court in the provinces was disrupted last year by industrial action taken by District Court Clerks in pursuit of a claim for pay parity with their Dublin colleagues. I am glad to be able to report that a basis for the settlement of the claim has since been agreed with the staff. Briefly, the basis of the settlement is a productivity scheme, involving the reorganisation of the provincial District Court office and staffing structure.

**The Land Registry**

In the Land Registry, the upward trend in the volume of work of recent years has continued; the number of applications for registration increased from 52,700 in 1972 to 58,000 in 1973. This represents an increase of approximately 11 per cent over the 1972 figure. The arrears of work while still very high decreased by 12 per cent during 1973. I am aware that delays in registration are causing considerable hardship

but every effort is being made to reduce them. The reorganisation of the legal/clerical structure of the Land Registry which was carried out in 1970 has increased the output by 23 per cent over the corresponding period for last year.

However, I am still extremely concerned about the arrears in the Land Registry and in particular about arrears in the Mapping Branch. The Mapping Branch has also been reorganised recently on the same lines as the legal/clerical side with a view to providing a more efficient service. In addition, I have recently obtained sanction for an extra 12 posts in the Mapping Branch and I have arrangements for the attendance by some of the staff of the branch at special training courses. A sophisticated type of copying machine will be installed in the branch shortly which, as far as I am aware, will be the only one of its kind in use in this country. I expect that as a result the issue of copy-maps to the public will be speeded up. I am also arranging to have the accommodation at present used by the branch redesigned to provide better working conditions. I have arranged that I will be kept regularly informed about the arrears position in the registry as a whole and, in particular, in the Mapping Branch and I shall take other remedial measures if there is no appreciable reduction in the arrears in the near future. In a Parliamentary Question last July I indicated that I hope to introduce at an early date a system of payment of Land Registry fees by cash. This system will obviously facilitate most solicitors. The existing system of payment by Revenue stamps will continue to operate for those who find it more convenient. The necessary staff for the implementation of the new system have been assigned and an order has been placed for the office machinery. It is necessary to have these machines specially constructed and because of this there is some delay in the delivery date. It will be possible to have the new system operating soon.

**The Registry of Deeds and the Charity Commissioners**

There has also been a general increase in the volume of work arising in the Registry of Deeds. The number of deeds registered has gone up from just over 46,000 in 1972 to almost 51,300 and this upward trend is likely to continue.

As a result of representations which were made to me that the service provided for searchers in the Registry of Deeds was inadequate I had an examination carried out and the staffing cadre has been increased.

The Commissioners of Charitable Donations and Bequests are a statutory body originally incorporated in 1844. Their main functions, which are now derived from the Charities Act, 1961, are of an administrative character. They have power to advise charity trustees, to institute legal proceedings and to certify cases to the Attorney General with a view to his instituting such proceedings, power to frame *cy près* schemes, to accept gifts for charitable purposes, and to dispense with the publication of advertisements of charitable devises and bequests.

The commissioners have a long and distinguished record of public service. The last report which the commissioners made to me is in respect of the year 1972. Cash totalling £140,630 and stocks to the nominal value of £7,600 were transferred to the commissioners during that year and at the end of the year the nominal value of investments standing in their name was some £2,806,000.

In conclusion, I would like to take this opportunity to pay tribute to all bodies and commissions which are associated with my Department. It is heartening to note that so many people are prepared to devote their valuable time and expertise as well as their leisure hours to work of national importance.

# The Incorporated Law Society of Ireland Summer Meeting

The Summer Meeting of the Incorporated Law Society of Ireland will be held in Ennis, Co. Clare, from 10th to 12th May 1974. The headquarters will be the Old Ground Hotel.

**Friday, May 10th**

5-7 p.m. Arrival.
8.00 p.m. Medieval Banquet, Knappogue Castle.
11.30 p.m. to 2 a.m. Midnight Cabaret: Old Ground Hotel.

**Saturday, May 11th**

9.15 a.m. Ordinary General Meeting.
10.15 a.m. Morning Coffee.
10.30 a.m. "The Solicitor's Public Image". Speaker: Mr. Gerald Sanctuary, Secretary, Professional and Public Relations, The Law Society, London.
Medieval Tour to Folk Park, Bunratty and Quin Abbey.
11.45 a.m. "Legal Aid". Speaker: Mr. Declan Costello, S.C., T.D., Attorney General.
1.00 p.m. Official Launching of the Irish Edition, *New Law Journal*.
1.30 p.m. Lunch.
Afternoon Golf Competition; Fishing Competition; Tour of the Burren.
7.15 p.m. Reception by Shannonside and the Clare Bar Association.
8.00 p.m. Dinner (Black Tie). Cabaret and Dance.

**Sunday, May 12th**

8.30 a.m. onwards: Church Services.
10.30 a.m. Morning Coffee.
11.00 a.m. "The Financial Management of the Legal Practice". Speaker: Margaret Downes, Coopers & Lybrand, Dublin.
12.00 noon "Legal Education". Speaker: Mr. Martin L. Edwards, DL, President of the Law Society, London. Member of the Ormerod Committee on Legal Education.
1.30 p.m. Lunch and Departure.

# FREE LEGAL AID CENTRES

**Statistics: April 1969 to January 1974**

| *Centre* | (1) | (2) | (3) | (4) | (5) | (6) | (7) | | |
|---|---|---|---|---|---|---|---|---|---|
| Contract | 29 | 61 | 104 | 40 | 30 | 5 | 7 | 276 | (8 per cent) |
| Crime | 94 | 112 | 128 | 198 | 50 | 15 | 12 | 609 | (18 per cent) |
| Hire-Purchase | 16 | 21 | 53 | 48 | 25 | 4 | 4 | 171 | (5 per cent) |
| Interpersonal Relations | 400 | 99 | 146 | 201 | 98 | 59 | 24 | 1027 | (30 per cent) |
| Landlord and Tenant | 60 | 95 | 35 | 88 | 23 | 27 | 2 | 330 | (9 per cent) |
| Miscellaneous | 23 | 33 | 84 | 60 | 13 | 15 | 6 | 234 | (7 per cent) |
| Probate | 15 | 51 | 20 | 32 | 8 | 2 | — | 128 | (4 per cent) |
| Property | 37 | 14 | 17 | 49 | 2 | 3 | 5 | 127 | (4 per cent) |
| Social Welfare | 23 | 40 | 56 | 26 | 6 | 3 | 2 | 156 | (4 per cent) |
| Tort | 49 | 61 | 142 | 65 | 48 | 13 | 8 | 386 | (11 per cent) |
| Totals | 746 | 587 | 785 | 807 | 303 | 146 | 70 | 3444 | |

**Centres**
(1) Molesworth Street (746)
(2) Rialto (587)
(3) Ballyfermot (785)
(4) Crumlin (807)
(5) Ballymun (303)
(6) Monkstown (146)
(7) Finglas (70)

**Directors**
(1) Nicholas Butler
(2) Randall Doherty
(3) John Finlay
(4) Alan Shatter
(5) Daragh Buckley
(6) Aideen Byrne
(7) Brian Sheridan

**Comment on Statistics**

The statistics from the largest centre, Mountjoy Square, have not been included in the above Table. Due to the loss of the original book in which records of cases dealt with were kept the figures from July 1973 to October 1973 are not available. However, up to the middle of July, the number of cases dealt with in this centre amounted to 1435. As the case loads in all but one centre have doubled since July 1972, it is reasonable to assume that at the very least, Mountjoy Square has dealt with 2000 cases to date.

The present Director reports that 30 new cases per night is not unusual. This means that between the eight centres, since April 1969, five and a half thousand cases have been worked on.

The Interpersonal Relations category accounts for 30 per cent of the cases and thus remains far above all other categories. Molesworth Street alone has received 400 such cases to date as compared with 176 up to the end of July 1972.

Landlord and Tenant cases now make up 9 per cent of all cases compared with 13 per cent to July 1972. This is the only category where the percentage has dropped by 4 per cent whereas all others remain similar to the percentages recorded in the FLAC report, apart from Interpersonal Relations which has risen 4 per cent.

Directors have mentioned to me that sometimes a case may fall into two or even three categories and it is then difficult to decide under which heading to file the case. For instance, a case involving a marital dispute could also include landlord and tenant and social welfare problems, if a wife wished to have the Corporation flat in which she and her family were living, transferred into her name from that of her husband and at the same time might qualify for social welfare benefit.

This has got to be borne in mind in any interpretation of the statistics, but the problem is not new as the same difficulty arose in relation to all other statistics obtained from the centres, nonetheless this factor should be taken into account.

# CORRESPONDENCE

*Allied Irish Banks Limited Undertaking*

Allied Irish Banks Limited
Legal Department
P.O. Box 531 Royal Bank Chambers
Foster Place, Dublin 2

Dear Sir,

I wish to refer to an article which appeared in the July/August issue of the *Gazette* under the above heading. The article, due to the manner in which it was presented, has led to considerable misunderstanding and unnecessary confusion among solicitors in relation to the completion of the usual form of accountable receipt.

Many solicitors seem to have got the impression from the article that there is something unique in the form of accountable receipt used by Allied Irish Banks Ltd. and that it is objectionable in certain respects. I would hasten to assure solicitors that this is not the case. The present form has been in use for many years, not only by the banks but by other lending institutions, insur-

ance companies, building societies and indeed is used by solicitors among themselves without any objection being raised before now. The article in question was unfair and unbalanced in that, having commented on the form and the bank's refusal to alter it, it omitted to state the case put by me on behalf of the bank to the Council of the Law Society in support of the document.

For those who may be interested, I would offer the following explanation in defence of the form of accountable receipt in question.

When a bank holds title deeds from a customer as security for his general obligations, the bank is entitled to regard such deeds as being available to cover the customer's *entire indebtedness* and not just that part of it as would be covered by the value of the property comprised in the deeds. Consequently, the bank can retain the deeds until the customer discharges his entire obligations. When, therefore, a solicitor requests a bank to make title deeds available on accountable receipt, the bank facilitates the solicitor on the basis that:

1. the solicitor will hold the deeds in trust for the bank;
2. will return them on demand; and
3. will not do or suffer anything to be done with the deeds, the effect of which would be to prejudice, defeat or postpone the bank's security.

The bank, in its form of accountable receipt, makes it clear that should the solicitor default in these undertakings, he will be answerable to the bank for the amount of any loss which it may incur.

It follows that if a solicitor who has taken up deeds from the bank on accountable receipt, permits the property to be sold *without the consent of the bank or its agreement as to price or reserve,* he will be answerable to the bank for the short-fall between the price realised and the amount of the customer's obligations since, by selling the property without the bank's agreement and parting with the deeds, he has deprived the bank of its right to retain the deeds until satisfactory arrangements are made by the customer for the discharge of his obligations. It should be emphasised that it is only when a solicitor is *in default* of his undertaking that any liability arises and I believe that it would be extremely rare for a solicitor to sell property, the deeds of which have been taken up by him on accountable receipt from the bank without first seeking the bank's approval to the sale and its agreement on the question of price.

Insofar as the article in question was intended to caution solicitors against the signing of undertakings without fully considering the extent of the liability involved, the article was justified and worthwhile. But insofar as the article failed to publish the explanations given by the bank in defence of its documentation which had been criticised, it was unbalanced and misleading. I would hope that this letter would serve to clarify the issue.

E. RORY O'CONNOR
Group Law Agent

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Office of the Revenue Commissioners
Estate Duty Branch
72-76 St. Stephen's Green, S., Dublin 2
20 March 1974

Dear Sir,

With reference to our discussions on the 14th instant, it is agreed, in order to speed up procedures in connection with Land Commission sales, with particular reference to letter of clearance from this Branch, that the following system will be put in operation immediately.

1. In compulsory acquisitions under Section 24 of the Land Act, 1923, this Branch will initiate the process for obtaining the required letter of clearance, by acting on the information supplied in the *Final Lists* published in the Irish Oifigiuil and writing to the solicitor having carriage of the sale for further details (e.g., epitome of title, etc.).

2. In voluntary sales under Section 36 of the Land Act, 1923, the Examiners' Branch of the Land Commission will notify this Branch as soon as the agreement for sale is executed and furnish full details of the sale including the Affidavit of Title if then available. This Branch will then take up the matter with the solicitor having carriage if further information is required.

In either case, this Branch will have "early warning" of the sale, irrespective of any action taken by the solicitor in the case.

It would be as well to emphasise to solicitors that it is primarily their function to set in motion, at an early stage, the machinery necessary for issue of the Estate Duty Branch letter of clearance. The new system is intended merely to obviate any delay caused by a late application for such a letter—particularly in cases where claims for death duties do arise and require to be processed. It does not in any sense imply that the solicitor having carriage is relieved of his responsibility to comply with the relevant requisition of the Land Commission Examiner.

M. K. O'CONNOR

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*Lodgment and Investment of Infants' Monies in Court*

Solicitors are reminded of their duty to ensure that no loss will accrue to an infant through any unreasonable delay in dealing with Orders of the Court as to lodgment of infants' monies in Court and as to the investment of same and of funds already in Court to the credit of an infant.

When the Court makes such an Order the solicitor concerned should immediately bespeak same and attend the accountant with an attested copy of the Schedule to the Order so that no undue delay will occur in complying with the directions of the Court.

It is to be understood that in the absence of a satisfactory explanation for such delay the Court may have to consider the question of recoupment of the infant's loss by the person responsible.

P. J. DUNPHY
Registrar (11 March 1974)

# THE REGISTER

**REGISTRATION OF TITLE ACT, 1964**
**Issue of New Land Certificates**

An application has been received from the registered owner 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 is in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 30th day of April 1974.

DESMOND L. McALLISTER,
Registrar of Titles
Central Office, Land Registry, Chancery Street, Dublin 7.

**Schedule**

(1) Registered Owner: William Maynard; Folio No.: 19155; Lands: Bogganfun (situate on the east side of Roscommon Road in the town of Athlone; Area: 26p.; County: Athlone.

(2) Registered Owner: John Keenan; Folio No.: 27304L; Lands: The Leasehold Interest in the property known as 18 McKelvey Avenue in the parish of Finglas and District of Finglas North; Area: not stated; County: Dublin.

(3) Registered Owner: Martin Coffey; Folio No.: 15078; Lands: Rathcarran; Area. 19 a. 1r. 23p.; County: Meath.

(4) Registered owner: Charles Chambers; Folio No.: 65R; Lands: Belan; County: Kildare.

(5) Registered owner: John E. Hourihan; Folio No.: 8823L; Lands: The leasehold interest in the property situate on west side of Woodbine Park in the Parish and District of Kilbarrack; Area: Oa. Or. 8p.; County: Dublin.

Registered owner: Edward Day (deceased); Folio No.: 543; Lands: Cloonalassan; Area: 12a. 2r. 26p.; County: Kerry.

(7) Registered owner: Rachael Ketterick; Folio No.: 11076; Lands: Rathnakelligan (part) (being a plot of ground with house thereon situate on the south side of Emmet Street in the town of Ballymote; Area: 0a. 1r. 20p.; County: Sligo.

(8) Registered owner: Thomas Tinnelly; (1) Folio No.: 23296; Lands: Ardagh; Area: 16a. 2r. 0p.; (2) Folio No.: 23296; Lands: Meath Hill; Area: 10a. 0r. 5p.; (3) Folio No.: 23296; Lands: Ardagh; Area: 8a. 2r. 12p.; (4) Folio No.: 23296; Lands: Ardagh; Area: 0a. 0r. 19p.; County: Meath.

(9) Registered owner: Michael Coffey; Folio No.: (A) (1) 12304; Lands: (1) Cloghanelinaghan (parts); Area: (1) 22a. 0r. 32p.; Folio No.: (A) (2) 12304; Lands: (2) Cloghanelinaghan (four undivided 90th part of other part); Area: (2) 238a. 2r. 2p.; Folio No.: (B) (1) 12305; Lands: (1) Cloghanelinaghan (parts); Area: (1) 23a. 0r. 0p.; Folio No.: (B) (2 linaghan (parts); Area: (1) 23a. 0r. 0p.; Folio No.: (B) (2) 12305; Lands: (2) Cloghanelinaghan (four undivided 90th part of other part); Area: (2) 238a. 2r. 2p.; County: Kerry.

(10) Registered owner: Elizabeth Nugent; Folio No.: 59192; Lands: A plot of ground situate on the north side of Kerryhall Road and to the west of Fairhill in the Parish of St. Mary's Shandon in the County Borough of Cork; Area: 26p.; County: Cork.

(11) Registered owner: Charles Chevenix Trench; Folio No.: 39476; Lands: Lisnamore; Area: 21a. 3r. 25p.; County: Tipperary.

(12) Registered owners: Patrick Kivlehan, Cecilia Bailey; Folio No.: 1854; Lands: Ballylehane Lower; Area: 74a. 0r. 28p.; County: Queens.

(13) Registered owner: Anthony Lynch; Folio No.: 1135; Lands: Rahard; Area: 106a. 3r. 9p.; County: Meath.

(14) Registered owner: John G. Dickson; Folio No.: 7784; Lands: Drumloughlin; Area: 1a. 0r. 2p.; County: Monaghan.

(15) Registered owner: Geoffrey Head Palmer; Folio No.: 7265; Lands: Kertfield; Area: 1a. 1r. 32p.; County: Galway.

# NOTICES

**O'Connor & Bergin** wish to announce that they are still practising at 30 Bachelor's Walk, Dublin 1. Telephone Number 749241. Due to a misunderstanding the entry in the current Telephone Directory reads "O'Connor Bergin, 22 Leeson Park, 974234".

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**Gaffney Deceased: Gaffney v. Gaffney:** The facts in this case, as reported in the March *Gazette* at page 55, were stated *de bene esse* in good faith. It is understood that an appeal has been lodged in the Supreme Court.

# OBITUARY

**Mr. Dermot P. Shaw,** solicitor, died in St. Vincent's Hospital, Elm Park, Dublin, on 4 April 1974. Mr. Shaw was admitted as a solicitor in Hilary Term 1930 and practised as senior partner in the firm of Messrs T. A. Shaw & Co., in Mullingar, and subsequently in Parliament Street, Dublin. Mr. Shaw was a member of the Council for several years, was senior Vice-President of the Society in 1954-55, and President in 1955-56; he had lately also been a member of the Disciplinary Committee. Since it was established in April 1962, Mr. Shaw had been a member of the Committee on Court Practice and Procedure.

**Mr. James Smith,** solicitor, died at his residence in Arva, Co. Cavan, on 30 March 1974. Mr. Smith was admitted as a solicitor in Hilary Term 1940 and practised in Arva, first as a partner with the late George Maloney, and subsequently on his own.

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THE GAZETTE OF THE INCORPORATED LAW SOCIETY OF IRELAND

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# EDITORIAL

# Auctioneer's Fees

The subject of auctioneer's commission fees has long been a controversial one amongst solicitors, as, rightly or wrongly, it was contended that the fee for selling immovable property, throughout the Republic, had been fixed for auctioneers at 5 per cent of the value of the property sold, although solicitors, who had the responsibility of advising their clients on the title, were compelled by statute to accept much less than that. Furthermore, the scale of solicitor's fees went up on a receding scale, with the result that, on a sale of property of £10,000 or more the fees allowed to a solicitor rarely exceeded 1½ per cent and usually less, in the case of registered land. The long-awaited report by the National Pricess Commission on the services of auctioneers, prepared by Dr. Harrington of the Department of Economics, of Manchester University, which has just been published, fully justifies these criticisms. The report recommends that, within the Dublin area, the maximum commission fee for the selling of all immovable property by auctioneers should be reduced by half, from 5 per cent to 2½ per cent. No recommendations were made in respect of letting property, or in reducing the scale fee for the sale of furniture, goods, plant and machinery, and for live and dead farming stock.

As regards property sold outside the Dublin area, it is recommended that the scale fee be reduced from 5 per cent to 3½ per cent. These fees would be exclusive of advertising, but no other extras could be added on. It is recommended that these reductions should take place in stages, in the first year in all areas from 5 per cent to 4 per cent, in the second year in all areas from 4 per cent to 3½ per cent and in the third year, in the Dublin area alone, from 3½ per cent to 2½ per cent. It is also recommended that there should be no reduction in the scale fee in respect of the properties, mostly commercial, which are sold for more than £50,000. It is pointed out that in the last four years the price of new houses has increased by 64 per cent and that there were no less than 1,650 licensed auctioneers in 1973. In Northern Ireland, the scale fee provided for a commission of 2½ per cent on the first £5,000 in the value of the property and 1½ per cent on the balance. When all these factors are taken into consideration, it will be seen that Dr. Harrington's suggestion for a reduction in the commission scale fee of auctioneers on sales is not unreasonable.

# THE SOCIETY

# Proceedings of the Council

**16th MAY 1974**

The President in the chair, also present Messrs William B. Allen, Walter Beatty, Bruce St. J. Blake, John F. Buckley, Anthony E. Collins, Laurence Cullen, Gerard M. Doyle, Joseph L. Dundon, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, John B. Jermyn, Francis J. Lanigan, Patrick C. Moore, Patrick J. McEllin, Brendan A. McGrath, John J. Nash, Patrick Noonan, Peter E. O'Connell, James W. O'Donovan, Rory O'Connor, William A. Osborne, David R. Pigot, Mrs. Moya Quinlan, Brian W. Russell, Robert McD. Taylor, and Ralph J. Walker.

**Undertakings to banks**

Members wrote to the Society pointing out that some banks now require solicitors to give very detailed undertakings. One such undertaking reads as follows.

"If you provide facilities to our client for the purchase of property we undertake to hand over to you all deeds and documents after stamping and registration has been completed to show that our client is absolutely entitled to the said property free from encumbrances and that the property is not subject to any covenant against alienation or to forfeiture in the event of bankruptcy or where applicable of an excise licence being lost and in the meantime to hold them to your order."

Members have pointed out that difficulties can arise if the solicitor's client goes bankrupt or in the case of a company into liquidation during the course of the documents being stamped and registered. Solicitors are accordingly warned to consider this possibility when signing such an undertaking.

**17th Interim Report of the Committee on Court Practice and Procedure dealing with Court fees**

The basic recommendation in this report is that the administration of justice is a necessary State service for all citizens and it should be available to them without the payment of Court fees.

However, if it is decided to continue with the imposition of Court fees the amount of such fees should be determined so that the receipts therefrom should not exceed two-thirds of the costs of the administration of justice. In determining the cost of the administration of justice no account should be taken of salaries, pensions and travelling expenses of Judges and Justices, charges for public works or buildings or rates on Government property.

With regard to High Court fees it is recommended that no fees should be payable on the following documents: Notice of Motion, Affidavits, Subpoenas, and Court Orders.

Fees should be payable only on four documents: (1) the Originating Document, (2) the Defence, (3) Setting down for Trial, and (4) Certificate of taxation.

The attested copy system in the High Court is one which should be reviewed. So also is the system of charging for copying documents on a per folio basis. Certainly for photographic copies a per page basis would be a more rational system.

Lastly, the fee payable to the Official Assignee on the realisation of assets in bankruptcy should either be abolished or limited to a maximum.

The Council considered the implications of this report and decided that it should receive the support of the Society.

**Death of a solicitor**

Where a sole practitioner who is the proprietor of a busy office dies without having made any arrangements for the succession of his legal practice there can ensue a considerable number of difficulties both for clients and for personal representatives of the solicitor. The Council are presently to examine this problem in depth to see if any helpful solution can be found to answer many of these problems. Any members of local Bar Associations who are interested in this topic and have suggestions to make are invited to write to the Director General outlining their views. It is interesting to note that in Scotland the Law Society are given a temporary controlling interest over clients' funds on the death of a solicitor.

**Abortive mortgage transaction—amended version**

Members wrote to the Society concerning an opinion published in the June 1972 *Gazette* which was to the effect that a mortgagee's solicitor is not entitled to claim costs from a mortgagor in an abortive mortgage transaction. Members pointed out that an agreement made between the two parties prior to loan would be binding upon the parties and would superseded the ruling of the Council.

The Council considered this matter and agreed that such an agreement would supersede the Council's ruling.

# SOLICITOR'S LIABILITY FOR COUNSEL'S FEES

The Council's ruling relating to solicitor's liability for Counsel's fees has been published on many occasions by the Society. The ruling is as follows:

The matter falls under two heads, (a) the disciplinary rule and (b) the rule of etiquette. As regards (a) where a solicitor has received coursel's fees from the client or a third party, failure to pay fees to counsel when due may amount to misconduct. As regards (b):

(1) The rule of etiquette is an obligation of honour and applies whether or not counsel's fees have been received by the solicitor but it must be construed in the light of the circumstances and of any understandings between counsel and solicitor in the course of practice.

(2) A solicitor is personally responsible to counsel for the proper professional fees.

(3) If on the acceptance of the brief a fee has been marked on the brief and agreed with counsel that fee is the proper professional fee.

(4) If the fee has not been marked and agreed as aforesaid the proper professional fee means a reasonable fee, and, prima facie, the test is the amount allowed or which would be allowed on taxation of the solicitor's costs.

(5) Having regard to the fact that counsel has no legal remedy for recovery of fees a solicitor should as a matter of etiquette with counsel furnish his bill of costs and obtain payment of the fees from the client within a reasonable time unless he elects to pay the fees personally before reimbursement by the client.

The Society are finding that the great majority of counsel's fees are not being paid promptly in litigation cases.

According to members of the Bar, solicitors are in default in two ways.

(1) Where there is a question of taxation of costs, solicitors have been very slow to prepare Bill of Costs and have them taxed.

(2) Where a solicitor acts for a client who is well able to bear the expense of counsel's fees, members of the Bar state that the solicitor very often fails to apply to his own client for funds with which to pay counsel. Solicitors sometimes wait years on end attempting to recover costs from the other side.

Having regard to the high rate of inflation and to current bank rates of interest, delay in payment of counsel's fees can result in a severe loss of value to counsel.

The Society recommended to members of the Bar that they should furnish solicitors with a bill, quite apart from marking the back of a brief. A brief can very easily be used for other purposes, or filed away without proper attention being paid to the notation of counsel's fees appearing on the back thereof. However, if members of the Bar furnish solicitors with a bill for fees due, then such a bill can be treated in the same way as any other bill coming into a solicitor's office. In this respect it is felt that the minimum duty on a solicitor is to immediately write to his client, sending him copy of counsel's bill and requesting to be put in funds. Alternatively, the solicitor should arrange to have the fees recovered whether by taxation of costs or otherwise.

The Society has suggested to members of the Bar that as a matter of universal practice that barristers should furnish instructing solicitors with bills of all fees due which have not been paid for over three months since falling due, and furthermore that henceforth counsel furnish a solicitor with a bill.

# COUNCIL DINNER

The Annual Dinner of the Council of the Society was held in the Library, Solicitors Buildings, on Thursday, 4th April 1974.

The President, Mr. Peter Prentice, received the guests. The guests included the President of the High Court, Mr. Justice Walsh, Mr. Justice Henchy, Mr. Justice Griffin, Mr. Justice Murnaghan, Mr. Justice Pringle, Mr. Justice Butler, Mr. Justice Finlay, Mr. Justice O'Higgins, Mr. Justice Gannon, the Minister for Justice (Mr. Cooney), the Minister for Lands (Mr. Fitzpatrick), the Attorney-General (Mr. Declan Costello), Judge Durcan, Judge Ryan, Judge Wellwood, Judge Barrett, Judge Roe and Judge O'Malley, the President of the District Court (Justice O'Flynn), Mr. Leslie Morris (President of the Incorporated Law Society of Northern Ireland) and Mr. Sydney Lomas (Secretary of the Northern Ireland Law Society). Thirty members of the Council were present, and there were ninety guests.

Mr. Bruce St. John Blake, Vice-President, proposed the toast to "Our Guests" which was responded to by Right Rev. Edwin Owen, Bishop of Killaloe. The Attorney-General, Mr. Declan Costello, who had just returned from Australia, proposed the toast to "The Society" to which the President responded.

# FREE LEGAL AID PANEL SET UP

The Minister for Justice, Mr. Cooney, has announced the names of the people who will advise him on the introduction of a free legal aid system in civil matters.

As expected, the chairman of the advisory committee is a Judge, Mr. Justice Denis Pringle, of the High Court. The Minister announced his intention of setting up the committee last January.

He had been under considerable pressure to do so, particularly from F.L.A.C., the Free Legal Advice Centres, which threatened to close unless the Government promised to support free legal aid in civil matters.

There is already a limited form of legal aid in criminal matters. For 1973-74, £45,000 was allocated for this.

The members of the committee are: Chairman, Mr. Justice Denis Pringle, Judge of the High Court; Mr. Thomas G. Crotty, county registrar, Kilkenny; Mr. Brian M. Gallagher, solicitor (representing F.L.A.C.); Mr. Liam Hamilton, S.C.; Mr. James J. Ivers, director-general of the Incorporated Law Society; Mr. Eunan E. H. McCarron, solicitor; Mr. Tony Brown, social and economic adviser to the Minister for Social Welfare; Mr. C. K. McGrath, Department of Finance; Mr. J. C. McMahon, Department of Public Service; and Mr. Pierce Rayel, Department of Justice.

# SOCIETY'S REPORT ON COURT ORGANISATION

by W. A. OSBORNE (Vice-President)

## Part 1

The Twelfth Interim Report of the Committee on Court Practice and Procedure relating to Court re-organisation has been considered by the Incorporated Law Society, and the views of Bar Associations throughout the country on the recommendations of the Committee have been very fully discussed and considered.

It has been noted that the Committee approached consideration of the terms of reference with the following objectives in mind, viz. :

(a) The convenience of the public;

(b) The efficient dispatch of business;

(c) The volume of work and availability of legal practitioners in any given centre;

(d) Economy and the public interest.

The Society, while it accepts that the Committee's basic approach was correct, takes the view that the only re-organisation which should be implemented, is re-organisation which will achieve the objectives named and in a balanced fashion. To achieve any one of the named objectives in isolation would not justify change from the present system which has not been found to be defective in any major facet.

### Many recommendations fail to show objectives

It will be appreciated that in specific areas of the country, specific considerations arise in relation to some of the recommended changes, both in the District and Circuit Courts, with particular reference to the Circuit Criminal Court. Appended are comments from Bar Associations which deal with local implications arising from the recommended abolition of named District Courts, named Circuit Courts and in particular, to the suggested reduction in the number of venues of the sittings of the Circuit Criminal Court, and the inevitable problems which will arise if the recommendations in this respect are implemented. These reports show clearly and in a practical fashion how many of the recommendations fail to achieve the objectives named. The reports are based on the particular experience of practitioners who are involved in the every-day work of the Courts in question in their specific areas. In the experience of our profession, no inherent problem or difficulty has manifested itself in the system as it now operates. It has operated for many years without any cause for complaint from practitioners, nor from the public generally. The system has ensured an efficient dispatch of business in an economic fashion (considering the economic problems which are involved in litigation) and in particular, has operated to the satisfaction of the public, save and except *and only* when work has been in arrears, not through the fault of the system, but as is generally known, through the non-availability of a sufficient number of Judges or Justices to deal with cases and in a lesser way, through the non-existence of a sufficient number of suitable Courthouses.

### Failure to appoint Judges and lack of suitable Courthouses

The failure to appoint sufficient Judges to service the Dublin Circuit Courts resulted in very substantial arrears accumulating which caused frustration, not only to practitioners, but more particularly to the members of the public. The additional cost involved in the appointment of an adequate number of Judges was far less than the loss incurred by the public generally. The lack of suitable Courthouse accommodation has in many instances arisen through the sheer neglect and irresponsibility of some Local Authorities, who have failed completely to carry out their statutory duties and obligations by omitting and in some cases, absolutely refusing to repair, maintain, or where necessary, to provide suitable premises for use as Courthouses. There are many Courthouses through the country which would now be suitable if the minimum expenditure necessary over the years was made available to keep the buildings in reasonable repair and condition and to improve buildings where necessary. It is a sad reflection on the Local Authorities in question to find that many Courthouses of fine architectural design and value are dilapidated and eyesores. Even at this late stage, a reasonable expenditure over the next few years would reinstate many suitable buildings which are presently available and would thereby provide the premises required. Suitable Courthouses, of which there are still many, reasonably and properly maintained with an adequate number of Judges and Justices to serve them, would solve any major faults which may have been found in the existing system and would achieve the objectives named, without the necessity of having to implement any fundamental change in the present system. The cost of providing a sufficient number of Judges and Courthouses, in the view of the Society, would be far less than the value of the time which would be wasted and the additional expense which would be incurred, by members of the public (either in their capacity as jurors or witnesses), by the gardai, by professional witnesses, by accused persons, by county registrars and their staff and by all other persons involved in the legal system, if the recommendations in relation to the Circuit Criminal Court were implemented. From every point of view, it would be far better to have an idle Judge or Justice, rather than idle witnesses who are largely obliged to shoulder the financial loss which they incur through their imposed idleness, themselves. Many of the recommendations of a fundamental nature, if implemented, would increase the financial burden and loss and expense of the parties mentioned. This general conclusion has been arrived at on the basis of the comment hereunder made, which comment is related to the specific matters and recommendations of the Committee, namely :

## THE DISTRICT COURT

### Changes which have affected the District Court

**Transport:** By reason of the change in distribution of population through the country it is accepted that certain District Court sittings could be abolished, or the number of sittings reduced, but in this respect, the Society would like to have the views of the practitioners in those specific areas, as appended hereto, noted. However, in relation to transport it should be noted that while private motor cars and hackney cars are available to most people now, they are costly and even where they can be afforded, there is a substantial number of people who may be obliged to attend Courts from time to time and who must depend solely on public transport. The greater part of public transport available emanates from Dublin and provides transport between Dublin and specific centres radiating from Dublin along the east coast to the south, to the south-west, to the west and to the north. In many instances there is no public transport, which will provide a service travelling in an east/west direction, or in the midland and western areas will provide a service travelling north/south. There are very many areas through the country where a person dependent on public transport and wishing to attend, particularly one of the suggested venues for the Circuit Criminal Court, would be obliged to travel quite a distance from his home by public transport to a centre from which he could in turn find public transport leading to the particular Court venue. In many instances the distance involved is substantial. One can instance, as for example, a person resident in South Kildare area and wishing to attend Portlaoise Criminal Court, would be obliged by public transport to travel from Athy to Naas by bus and from Naas to Portlaoise by bus, a distance of some fifty miles and impossible to achieve in one day. There are many areas in a similar position.

**Criminal Procedure Act, 1967, Summary Judgment Rules and Changes in Enforcement of Court Orders:** While the introduction of the Criminal Procedure Act, 1967, has resulted in a saving in time, the tendency recently has been for defendants in many cases to ask for oral evidence on deposition. This request is becoming more common and the number of cases in which oral depositions will be called for, will increase in future. This is partly by reason of the unsatisfactory presentation on deposition of available evidence. While the Summary Judgment Rules have resulted in saving time, it must be remembered that a default procedure was always available in the District Court and that while the majority of Summary Judgment cases do not now reach Court, the amount of Court time saved in relation to the old default procedure is generally not great. In so far as Enforcement of Court Orders are concerned, the application to the Court for Examination Orders takes up proportionally very little time in most Courts through the country.

**Increased Jurisdiction:** Inflation has to some extent overtaken the advantages of the increase in the jurisdiction of the District Court and the number and importance of civil actions being tried in that Court has abated. In the type of case which now reaches the District Court, the specialist witness is usually the injured party's local doctor, or in so far as damage to vehicles is concerned, the local garage proprietor. The other witnesses are more often than not, a local member of the Garda, who investigated the accident, the plaintiff and defendant and their respective witnesses, the majority of whom are people resident in the location of the place at which the particular accident occurred and as the District Court is presently constituted, are usually within easy reach of the Court at which the claim is heard. While at times it may be necessary to have a specialist medical adviser attend Court, usually from the county hospital in the county where the accident occurred and who may be obliged to travel some distance to the particular Court, nonetheless, the cost of having that one specialist witness travel to Court is far less than the cost of transporting all of the other witnesses to a Court which may be quite some distance away from the locality in which they reside, with the consequent additional travelling expenses and loss of their valuable time. Most people are now working a five-day week and accordingly the loss of a day's work to a person engaged in business on his own behalf, by being obliged to attend Court, is substantial. A saving in witnesses' time and of the expense of compensating witnesses adequately for their loss through attendance in Court, is a major factor in keeping the cost of litigationw ithin reasonable limits. Apart altogether from this fact, many people are reluctant to attend Court by reason of the loss of income which they will incur. A witness obliged to attend Court by service of a witness summons is often a reluctant witness. He often tends in his reluctance and in his feeling of frustration in being obliged to attend Court, when in his mind he has something far more important to do, to be an unsatisfactory witness, who blames, not the system, but rather the particular lawyer who has been obliged to serve a witness summons upon him. The inconvenience caused to the public is therefore a very important aspect of the problem which exists in this respect, coupled with the difficulty of adequately compensating witnesses in respect of their attendance in Court.

**System of Districts:** There is no doubt whatever but that the present system of having a Judge or Justice permanently assigned to a district has worked perfectly and there seems to be no reason to suggest that any change should now take place. Later in the Committee's recommendations, it is indicated that by reason of a Judge being assigned to a particular area permanently, practitioners, knowing the particular Judge's requirements, can practice in a more efficient and economical way. That statement is perfectly correct. It is also suggested that changing a Judge from one area to another, from time to time, would give practitioners greater experience in appearing before different Judges and might provide more uniformity. It is difficult to understand the nature of the uniformity which would result. Practitioners generally have the experience of appearing before many District Justices and Circuit Court Judges and few mature practitioners lack experience in this respect. It can be assumed that a particular Judge will not change his outlook or attitude generally by reason of a change to a new area and it is not understood how any such change would result in uniformity in the application of the law. The important aspect of a Judge being assigned to a specific area is that there is continuity and an efficient dispatch of business, by reason of the fact that far more often than appears to have been appreciated by the Committee it is necessary to adjourn cases from a Court to the following Court, or from one venue to another venue. These are usually cases which are part heard, cases in which some outstanding proof or some further evidence is required in

the interests of justice, or where a Judge wishes to review the evidence before reaching a decision. This type of happening is quite common in all Courts and is desirable. If Judges are changed from time to time, or if there is not one Judge assigned to a specific area for a reasonably long period, then a backlog of adjourned cases can arise. All practitioners have had experience of the position where, for some unavoidable reason a Judge or Justice is unable to attend a particular Court in his district. Where this position occurs over a period of two or three Courts, invariably one finds that a list of cases accumulates which are left in abeyance or adjourned, so that the Judge or Justice who has dealt with the particular matter previously may deal with same on his return to duty.

## DUBLIN AREA—GENERALLY

The general recommendations of the Committee in relation to the Dublin Courts are acceptable and supported. The obvious and the immediate and extreme problem in the Dublin City area is the shortage of suitable accommodation for the Circuit and District Courts. The number of Judges and Justices presently available in the Dublin Courts appear to be adequate. The real pressing problem is Court accommodation and this problem has now reached extreme proportions. At present a Court sits in Church Hall in Lower Abbey Street which is totally unsuited and inconvenient for such use. The Children's Court at Dublin Castle has undergone continuous criticism with particular reference to the suitability of the accommodation available particularly from the point of view of parents, children, probationary officers and other persons who must attend at that Court. The Circuit Court has a similar problem and is endeavouring to accommodate itself in premises which are unsuited and overcrowded. It is believed that additional Courthouse accommodation will be available in the near future as a matter of extreme urgency and it is felt that when sufficient suitable accommodation is available the present system will work efficiently sbject to the changes recommended by the Committee in its Report. It is understood that a site has been purchased at the rere of the Four Courts where a block of Metropolitan Courts will be erected. The view of the Dublin Bar Association supported by the Society is that serious consideration should be given to the utilisation of accommodation in the vicinity of the Four Courts. In this respect it should be possible to utilise the buildings presently occupied by the Land Registry and the Records Office for Courts and to find suitable alternative accommodation for the Land Registry and the Records Office, perhaps in the new building complex.

With reference to the Committee's recommendations the following specific matters should be considered in the view of the Dublin Bar Association, namely :

### Circuit Court—Civil and Criminal

**Transfer of business from Kildare and Wicklow:** It is submitted that with the present overcrowding in the Dublin Courts that these Courts could not at present accommodate any further or additional work. Apart from this aspect of the matter and in accordance with the general reasons given later in this memorandum, it is the view of the Association and of the Society that, even if this recommendation was practical, then the inconvenience and additional expense that would be incurred by accused persons, by witnesses and the other parties involved in attending at a Dublin Court rather than at a local venue, would impose an unfair burden on the parties involved and would not achieve any improvement in the existing system and would not generally be in the public interest.

**Arrears:** The remedy referred to in recommendation 115 of the Report did assist in clearing the heavy backlog of cases in the Dublin Circuit Court. It is understood, however, that while the Dublin Circuit list was brought reasonably up to date, arrears accumulated in some Circuits through the country by reason of the transfer of the Judge of that Circuit into Dublin to deal with arrears. This remedy does not appear to be the correct method of approach, but it is now believed that with sufficient Courthouse accommodation available in Dublin, that there are presently sufficient Judges available to deal with all arrears and to keep the list up to date. Cases should be disposed of with as little delay as is possible, otherwise it merely causes adverse comment and frustration as well as financial loss to litigants.

**Listing of Cases:** The present system of listing cases in the diary for the Circuit Court without fixing a day-to-day list on a more certain and realistic basis has caused much of the delay, frustration and wastage of witnesses' time which has existed in the Dublin Circuit Court. Very often cases listed in the diary are not reached and this merely results in the loss of witnesses' time, inconvenience to them and further additional expenses by having witnesses attend Court on two or three occasions when one attendance should be adequate. It is suggested that, as cases are listed in the Circuits through the country by county registrars with the co-operation of local practitioners, a similar system could be adopted in the Dublin Circuit Court in relation to civil actions. The listing of cases could be left to the county registrar in co-operation with the local practitioners.

**Closing of Offices during long Vacation:** The closing of Court offices during the long vacation causes unnecessary inconvenience and delay. It is suggested that during the long vacation all of the Court offices should remain open during the normal office hours. While the Court may not be sitting, there is nonetheless quite a volume of work passing through the offices in question and it causes delay and inconvenience generally to close the Court offices, as is the current practice. There appears to be no justification for closing the Court offices on a half-day basis and it is strongly recommended that the offices in question be left open and available to practitioners and to the public during the normal working hours.

## DISTRICT COURTS

**Hours of Sittings:** The hours suggested in the Report are acceptable. However, complaints have been received from a number of practitioners in the Dublin area who indicate that while the Courts are set to commence at 10.30 a.m. they are in fact often late in commencing and suggest that this matter should be rectified.

**Fixing of List for Hearing:** This practice in relation to the hearing of civil claims has worked satisfactorily and has been of very great convenience to litigants and witnesses and it has been found that the system operates in a more efficient way by having cases listed for hearing on specific dates. This practice should continue as no defect has been found in this procedure and no wastage of time is involved.

**Wicklow/Bray Area:** The recommendation that part of the Dublin County area should remain within Bray District Court is acceptable but the recommendation in relation to appeals will cause confusion and may not be workable. It is recommended that appeals in respect of cases originating in the County Dublin area should be heard in Dublin rather than in Wicklow. This may well result in the involvement of the Chief State Solicitor's Office and of the State Solicitor for Co. Wicklow and it is generally believed that all appeals from a specific District Court should all be heard at the same Circuit Court.

**Dun Laoghaire Court:** The recommendations in relation to this Court are noted, but the Society would like the views of the practitioners in the Dun Laoghaire area to be considered before the recommendations in relation to this Court are implemented.

**Juvenile Business—Children's Court:** The recommendation made is noted. It is, however, felt that the whole question of the Children's Court and Courts for Juveniles in the Dublin City and County area require to be considered specially. The present system appears to be completely unsuited and it is suggested that a special committee should be set up to consider Juvenile Courts generally, not only in the Dublin area, but also through the country. The system in operation in Scotland has been referred to by groups interested generally in child welfare. This particular system has been considered by the Dublin Solicitors' Bar Association and is recommended as a basis for consideration in relation to the establishment of a new system of Courts for dealing with juveniles.

(Part 2 will be published in June Gazette)

# UNREPORTED IRISH CASES

**Production of most documents belonging to Department of Local Government allowed as interrogatories.**

Declaration sought by plaintiff that a decision of the Minister, by which he refused outline planning permission for a housing development of lands at Fosterstown, North County Dublin, is void. An order for discovery was made by the Deputy-Master.

Mr. Sheehy, Assistant Secretary of the Department of Local Government, on 31 May 1973, claimed that certain documents including documents covering normal Departmental procedure in dealing with an appeal, should not be produced. In a further affidavit of July 1973 Mr. Sheehy contended that the disclosure of these documents would be injurious to the public interest, and this was reinforced by the Minister's Certificate to that effect. The Deputy Master made a further order for discovery of these documents, numbered B1 to B22. Kenny J. allowed all these documents, except B7, B8 and B13, to be produced.

B7 was a draft order with the written comment of Mr. Kiernan, legal adviser to the Department of Local Government. Kenny J. held that advice by a qualified legal adviser to other members of the Department is in the same category as advice by a barrister or solicitor to his client, and is consequently privileged.

B8 is another draft of the order to be made, and came into existence as a result of the advice given by the legal adviser. Kenny J. held that a document which leads to the preparation of what is a legal order is a confidential document which should not be produced.

B13 is a document prepared by an officer who heard appeals similar to that of the plaintiff. Inasmuch as it is written by one civil servant to another, it is intended to be confidential.

The Minister appealed to the Supreme Court alleging that all these documents were privileged. On 5 April 1974 the Supreme Court (Fitzgerald C.J., Budd and Griffin J.J.) per Griffin J. affirmed Kenny J. and dismissed the appeal. In addition, the Supreme Court held that document B15 was privileged.

B15 is a communication in standard form, in which an outline is given of the various steps in the appeal which is sent to the legal adviser. It was essentially written to ascertain if the draft order was legally correct. Kenny J. would have held that it could have been produced, as it did not contain any legal advice, but the Supreme Court held it was privileged.

[Susan Geraghty v. Minister for Local Government; Kenny J.; unreported; 31 July 1973.]

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**McNaghten Rules on criminal insanity reviewed. In a malicious injury application, an applicant cannot be asked whether his property is insured for fire.**

Youth of 17 years set fire to the abattoir in Bray at night in January 1970 and the question arose whether he was criminally insane. Judge Kenneth Deale stated a case, in December 1971, to the Supreme Court with the following questions:

(1) Where, on the trial of an application for compensation for criminal injury, there is evidence of the insanity of the person who caused the damage at the time should the Judge determine the issue of insanity solely on the evidence offered, or should he in addition apply the principles laid down by McNaghten's lease?

(2) The applicant was asked in cross-examination by the County Council whether he had been insured for the whole or part of the loss by fire which was the subject of the application. Was the Judge correct in disallowing this question as irrelevant?

The case was heard by the full Supreme Court, main judgement was given by Griffin J. The submission that the Circuit Court Judge, in considering the question of insanity should not apply the standards appropriate to a criminal trial was rejected. Before the application for compensation can succeed, the applicant must prove that a crime has been committed by some person, known or unknown, for which the community is to be made liable. If by reason of insanity, the perpetrator of the act in question here is to be excepted from criminal responsibility, no crime would have been committed by him. Counsel for the County Council concedes that if the McNaghten Rules are applied, the Circuit Judge is bound to find against them. While insanity has always exempted from criminal responsibility a person from doing an act which would otherwise be a crime, the approach of the Courts to the question of insanity has become less rigid with the passage of time. Up to the eighteenth century, a person was no deemed insane unless he acted like a beast. From the eighteenth century it was held that no mentally disturbed person should be excepted from criminal responsibility, unless he was totally deprived of his understanding and his memory. Following the acquittal of McNaghten for the murder of Edward Drummond in 1843 on the ground of criminal insanity, the House of Lords asked Judges to give opinions on various questions relating to criminal insanity. For present purposes, the Judges answered "that the jury ought to be told that in all cases every man is presumed to be sane, until the contrary is proved; and that, to establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing the act, the accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing or that he did not know what he was doing was wrong". As Lord Reid pointed out in *Williams v. Williams* (1964) A.C., for many years the McNaghten Rules have not been regarded as entirely satisfactory and have frequently been applied liberally.

Griffin J. states that he does not think that the McNaghten Rules provide the sole test for determining the sanity or insanity of an accused. In *Hayes's case* (November 1967), unreported, Henchy J. stated that the McNaghten Rules do not take into account the capacity of a man on the basis of his knowledge to act or refrain from acting. I believe it to be correct psychiatric science to accept that certain serious mental diseases, such as paranoia or schizophrenia, in certain cases enable a man to understand the morality or immorality of his act, or the legality or illegality of it,

but nevertheless prevent him from exercising a free volition as to whether he should or should not do that act. In this case the accused understood the wrongfulness of act, but was debarred from refraining from assaulting his wife fatally because of a defect of reason due to mental illness. Griffin J. states that Henchy J.'s test would be a correct test for Judge Deale to apply in determining whether the act of the youth who burnt the abbatoir in Bray was malicious. It follows that this is not a case of legal insanity which would absolve the youth from criminal responsibility.

Counsel for the County Council contend that they are entitled to investigate whether the applicant was insured against damages for fire, and, if so, is not entitled to recover compensation under the criminal injury code, otherwise he would be getting unjust enrichment. As a policy of fire insurance is simply a contract of indemnity, it follows that all claims of the insured arising out of any ground of legal responsibility vest in the insured by subrogation. The case of *Ballymagauran Co-operative v. Cavan and Leitrim County Councils* (1915), 2 I.R., where it was held in a criminal injury that the fact that the premises damaged were insured against fire cannot be taken into consideration when assessing the amount of compensation to be recovered from the County by the owner, was followed. It follows that this question was correctly disallowed by Judge Deale.

[Doyle v. Wicklow County Council; full Supreme Court; per Griffin J.; unreported; 14 December 1973.]

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**Taxation of costs. Amounts for professional witnesses and reports should be reasonable.**

Application to review taxation of costs of jury trial held before Butler J. from 13 to 15 July 1971. The taxation was first held in January 1972, and completed in April 1972. The Taxing Master set out the following correct principles on which he acted :

(1) In the absence of any special order by the Court costs are to be taxed on a party and party basis.

(2) In costs as between party and party, the party awarded costs is not entitled to a full indemnity, but only to such costs as have been reasonably or properly incurred to enable him to conduct the litigation.

(3) Witnesses charges are to be charged on a party and party basis in accordance with expenses reasonably incurred.

Butler J. held that any witness whose attendance is directed by Counsel in his advice on proofs is a necessary witness, similarly if Counsel directs that any expert or technical opinion, advice or information be sought, the procuring of this is *prima facie* necessary. In ascertaining the expenses to be allowed to a witness for attendance, Order 99 Rule 37 (8) of the Rules of the Superior Courts 1970 would allow costs of travel, maintenance and attendance, provided these are reasonable. It is for the party seeking the costs to produce vouchers or other evidence of the actual expenditure. A party should not be required in asking for a report, i.e. a medical report, to indicate the maximum fee he can pay. *Prima facie* the expense actually incurred should be incurred, provided it is in line with similar fees charged by professional men of similar standing.

Accordingly Butler J. directed that items 86 to 88, 90 to 95, and 97 should be remitted to the Taxing Master for re-taxation.

As regards Counsel's fees, Butler J., having tried the case, stated that £11,125 damages had been recovered, although only £1,775 had been lodged with the defence. As this was a complicated case, he would allow a brief fee to Senior Counsel of 75 guineas, with consequent increases in other items relating to Counsel's fees.

[Kelly v. Hoey; Butler J.; unreported; 18 December 1973.]

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**Priest-Teacher is given credit for service abroad. Exclusion rule unconstitutional**

In a reserved judgment delivered in the High Court, Dublin, Mr. Justice Butler held to be unconstitutional a Department of Education rule, which excluded religious teachers from receiving credit for teaching service in under-developed countries.

Mr. Justice Butler granted a declaration to this effect to the Rev. Francis Mulloy, a member of the Holy Ghost Order, who is attached to the teaching staff of Templeogue College, Dublin.

Father Mulloy had sued the Minister for Education and the Attorney-General claiming that the Rules for the Payment of Incremental Salaries to Secondary Teachers, 1958, as amended by the Department in 1971, granting the benefits of the scheme to lay teachers only were unconstitutional.

The scheme was introduced to encourage secondary teachers to give service in under-developed countries.

In his judgment, Mr. Justice Butler said that Father Mulloy had taught in Blackrock College, Dublin, from 1954 to 1956, being registered as a secondary teacher under the regulations of the Department of Education in 1955. Registration qualified a secondary teacher to be paid incremental salary by the Department in accordance with certain rules. It was difficult to know by whom these rules were made or under what authority. Some were stated to have been made by the Minister; many were not signed by him. The rules with which the Court was principally concerned were not attributed to, or signed by anybody. None of them appeared to him to have any statutory force or effect and had never been considered by the Oireachtas.

Mr. Justice Butler said the amount of the incremental salary was calculated on the number of years approved teaching service of the teacher.

**Went to Nigeria**

In 1956 Father Mulloy left to go to Nigeria on the missions. He had completed his first year of approved teaching service after registration, so that thereafter, had he continued teaching in Ireland and otherwise satisfied the regulations, he would have been qualified to receive incremental salary. In Nigeria he had taught first in a secondary school in Mbisi and, from January 1960, to the school year 1965 at the Holy Ghost College in Owerri.

The latter was a full secondary school providing a range of tuition as extensive as and of a standard not lower than that given in recognised secondary schools in Ireland. From 1965 to 1968 Father Mulloy was assigned to a seminary in Nigeria and then returned to Ireland. Since 1968 he had been a teacher in Templeogue College, which was a recognised secondary school, and he had been in receipt of incremental salary. The present case arose because of a dispute with the Department as to the rate at which this salary should be paid.

Mr. Justice Butler said that ordinarily, service to be approved, must be given in a recognised secondary school in Ireland. Accordingly, Father Mulloy would not be entitled to have his teaching service in Nigeria taken into account for incremental salary purposes. However, in order to encourage secondary teachers to give service in certain under-developed countries in Africa and elsewhere, the Department had introduced a scheme under which certain teaching service in these countries might be reckoned as approved teaching service. The conditions under which the scheme operated were embodied in supplemental rules for the payment of incremental salary. These rules, and therefore the scheme, applied only to lay secondary teachers.

Mr. Justice Butler said it had not been questioned that were Father Mulloy not a religious, the location, duration and type of teaching service he gave in Owerri was such as might properly be considered by the Department for the purpose of recognition under the supplemental rules.

However, because he was not a lay teacher the rules did not apply to him and the Department had refused his claim for consideration under them.

**Discrimination on Ground of Religious Profession**

Father Mulloy had claimed that the rules, by confining the scheme to lay secondary teachers, were repugnant to Articles 40 and 44 of the Constitution. His counsel had confirmed his submissions to Article 44 (2), (3), which stated that the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status. The argument based on this provision was that the plaintiff had the religious status of a priest, and because of that status he was excluded from having his teaching service in Nigeria considered for the purpose of calculating his incremental salary under the terms of the scheme. Equivalent service by a lay secondary teacher would qualify for such consideration. Therefore, it was submitted, as compared with a lay teacher he had suffered a disability and was also subject to discrimination.

Mr. Justice Butler said the question was whether the distinction between lay and religious persons was a difference in religious status. It was to be noted that in Article 44 (2), (3), the concept of religious status was something other than a question of religious profession or religious belief. These were also mentioned in the same clause and as something different.

**Two interpretations possible**

Consequently the concept was not merely that of the possession of any, or of a particular religious faith, or none, nor of the fact or manner of the profession or witness of such faith. There remained two possible interpretations: that the concept was of the status of persons in religion inter se—for example, a professed brother and a priest or a priest and a bishop, or that it was wider and embraced all the different degrees and conditions of persons in the context of religion. If the latter, one clearly identifiable difference of status was between a lay and religious.

He was of the view that the second broader concept of religious status was what the subsection imported. If he was correct in holding that the distinction between lay and religious persons was a matter of religious status within the meaning of Article 44, then the plaintiff's submission seemed to be both logical and unanswerable. It mattered not, as was urged on behalf of the Minister and the Attorney-General, and readily accepted by the plaintiff, that the scheme was designed to help developing countries by providing an incentive to teachers to volunteer their services in these countries and that no such incentive was necessary to secure the services of missionaries who went because of their vocation and commitment.

**Exclusion as priest unconstitutional**

This might explain, but could not justify the exclusion of religious from the scheme, if the exclusion was repugnant to the Constitution and contravened constitutional rights. Neither was it relevant that under the rules a teacher had no right to be paid incremental salary and that every payment was at the absolute discretion of the Minister. What was in question in the case was not the right of the plaintiff to be paid incremental salary, but his right to be considered for such payment on the same footing as a lay teacher in a position similar to his. What did matter was that because he was a priest, the plaintiff was excluded from the terms of the scheme. It was a clear discrimination. In *Quinn's Supermarket versus the Attorney-General,* Mr. Justice Walsh had stated that the State should not make any distinction on the ground of religious profession, belief or status. He had also stated that to discriminate in that sense was to create a difference between persons or bodies, or to distinguish between them on the ground of religious profession, belief or status.

"It seems to me to be clear beyond argument that the terms of the scheme confining it to lay teachers does create a difference and does distinguish between them and teachers of a different religious status, namely clerics, such as the plaintiff," said Mr. Justice Butler. He added that it was also clear that the ground of such discrimination was the difference in religious status.

Mr. Justice Butler added that for these reasons he was of opinion, and so declared, that the supplemental rules for the payment of incremental salary to secondary teachers were repugnant to Article 44 (2) (3) of the Constitution in that they were confined to lay secondary teachers. He added that he was not prepared to make any further declaration or order, but would give either party liberty to apply.

[Mulloy v. Minister for Education; Butler J.; unreported; 22 March 1974.]

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**Builder loses appeal over compulsory purchase order. Case against Corporation and Minister.**

The Supreme Court dismissed an appeal brought by a Dublin builder and company director, Joseph Murphy, of Fitzwilliam Place, against the dismissal by the President of the High Court of an action in which he had challenged the making of a compulsory purchase order in respect of lands in the Poppintree-Balbutcher-Santry area.

Mr. Murphy had claimed that the compulsory purchase order was *ultra vires* the 1966 Housing Act on a number of grounds including the following: that prior to the making of the order the Dublin Corporation, as housing authority, had entered into no agreement with the Dublin County Council for building on the Council's land; that the Minister was wrong in confirming the Compulsory Purchase Order in disregarding the requirements for such an arrangement, and that he disregarded the recommendations of the inspector at

the inquiry which had been held, as well as the evidence at the inquiry.

In proceedings against both the Corporation and the Minister for Local Government, Mr. Murphy had sought to have the order quashed. The defendants, in their defence, had claimed that the order was lawfully made.

**No agreement alleged between Corporation and County Council**

Delivering the Court's judgment, Mr. Justice Henchy said it had been argued on behalf of Mr. Murphy that the compulsory purchase order, being in respect of land which the Corporation intended to acquire compulsorily for the purposes of the Act and which was outside their functional area and within the functional area of the County Council, was invalid because the Corporation should first have entered into an agreement with the Council providing that it was the Corporation and not the County Council who would acquire the land compulsorily. It was not in dispute that the land in question, which included Mr. Murphy's land, was situate in the functional area of the County Council, or that the Corporation intended to acquire the land compulsorily for the purpose of the Act. Neither was it disputed that the Corporation had not entered into any agreement with the County Council on the lines stated, under S. 109 (2) of the Housing Act 1966.

On behalf of Mr. Murphy it had been contended that it was one thing for a housing authority to acquire land by means of a Compulsory Purchase Order when the land was within their own functional area, but that it was quite a different thing when it was within the functional area of another housing authority.

Mr. Justice Henchy said it had not been suggested that the Corporation were not empowered to acquire the land compulsorily.

It had been readily conceded that Section 109 (1) of the Act gave them that power but counsel for the plaintiff had argued that the true interpretation of Section 109 (2) meant that, before they could do so, they should have entered into an agreement with the County Council providing that it was the Corporation and not the Council who would exercise the function of acquiring the land compulsorily.

Mr. Justice Henchy said the language of Section 109 (1) was unambiguous: "A housing authority may perform any of their functions under this Act outside their functional area." Section 109 (2) then provided that when a housing authority intended to perform a function authorised by Section 109 (1), the two housing authorities "may make and carry out an agreement in relation to the function, and where an agreement is made under this section, the parties may terminate it at any time if they so agree." On behalf of the plaintiff it had been suggested that the word "may" should be given the meaning of "shall". However, a close examination showed that to give a mandatory effect to "may" would attribute to the parliamentary draftsmen a slackness of thought and uncertainty of expression quite unmerited by the precision of the surrounding language. In no instance did there appear to be a confusion of the one word for the other in the relevant three sections.

**Unambiguous language**

Mr. Justice Henchy said that even to read "shall" for "may" would not necessarily be sufficient to invalidate the compulsory purchase order, for even if an agreement between the two housing authorities was necessary for the performance of the function, the sub-section was silent as to when the agreement was to be entered into.

**Preliminary agreement unnecessary**

It would be open to the Corporation to argue that an agreement now entered into between them and the County Council in relation to acquiring the land by compulsory purchase order would be sufficient. Faced with these and other difficulties, counsel for Mr. Murphy argued instead that Section 109 (2) should be construed as necessarily envisaging an agreement between the two housing authorities before one of them could exercise a housing function in the functional area of the other. If, however, such an agreement was to be a condition precedent to the exercise of the power given in Section 109 (1), one would have expected the section to say so. It conspicuously did not. Even if such an agreement were held to be a necessary preliminary it need not be an agreement to perform the function. Any agreement in relation to the function would appear to qualify. If the making of such an agreement were a condition precedent, so would the carrying out of it. That would mean that Subsection 2 could have reference only to an agreement, capable of being made and carried out before the performance of the function. There was no justification for so reducing the scope of the plain words of the section. He was satisfied that if the power given by Section 109 (1) was intended to be exercisable only after compliance with a condition imposed by Section 109 (2), such limitation of the power would be stated and not left to be inferred.

Mr. Justice Henchy said it had been argued on behalf of the plaintiff that if there was not to be such a condition precedent, administrative chaos could result.

**Development plan not in conflict with Compulsory Order**

It was further suggested that in the absence of prior agreement, the intrusion of the Corporation into the functional area of the County Council could cut across the development plan which the County Council had to have in order to comply with Section 19 of the Local Government (Planning and Development) Act, 1963. It was urged that this Act and the Housing Act, 1966, should be read together, said the Judge, but he considered it would be a breach of a fundamental rule of statutory interpretation to treat them as a statutory whole. If Section 109 was read the way the Corporation and the Minister would have it read, he failed to see how any administrative chaos should follow. The confirmation of the compulsory purchase order need in no way cut across the powers and duties of the County Council as a planning authority. Counsel for the Corporation had conceded that before the land was developed, development permission under the 1963 Act must be got from the County Council. There was, therefore, no question of the functions of the County Council as a planning authority being overborne by the compulsory purchase order.

**Minister to decide**

Regarding the submission on behalf of Mr. Murphy that the Minister had acted *ultra vires* in confirming the compulsory purchase order because the evidence given at the public inquiry coercively showed that the objectives of the Act would be better attained by the plain-

tiff than by the Corporation, Mr. Justice Henchy said the function of the inspector holding the inquiry was to make a fair and accurate report of what took place. It was for the Minister to reach his own decision unfettered by any conclusion the inspector might have come to, but on the basis of the same evidential material as was before the inspector.

**Inspector's advice not to confirm order rejected by Minister**

It had been contended on behalf of Mr. Murphy that the Minister would not have confirmed the compulsory purchase order if he had followed the inspector's conclusion of fact. The inspector recommended that the Minister be not advised to confirm the compulsory purchase order because the Corporation had failed to prove that their acquisition was essential to, or even the most expedient way of securing the speedy erection of new houses. The gist of counsel's argument for Mr. Murphy was that the Minister had obviously rejected this finding by the inspector; that he had done so without evidence and in the teeth of the evidence given at the inquiry, and that, therefore, the Minister's confirmation of the order should be invalidated.

Mr. Justice Henchy said that in his opinion this argument failed because it was based on a false premise. It had assumed that the Minister had rejected the inspector's finding that the compulsory acquisition was not essential to, or the most expedient way of securing the speedy erection of new houses. But the fact that the Minister confirmed the compulsory purchase order did not mean that he disagreed with that finding. Even if he agreed fully with it, he would still have been entitled to confirm the order because since the land was being compulsorily acquired, all he had to be satisfied of was that it was being acquired for the purpose of the Act and that the provisions in the third schedule to the Act had been complied with. To be satisfied on either of those counts it was not necessary for him to be satisfied that the land was wanted for, or would lead to the speedy erection of new houses was envisaged as a housing purpose in certain cases—to eliminate overcrowding —the Act enabled housing authorities to take a longer view.

Apart from acquiring compulsorily land to be immediately used for the purposes of the Act they were empowered to acquire compulsorily land not so required "provided that the Minister is of opinion that there is reasonable expectation that the land will be required by the housing authority in the future in order to attain any of the objectives to which they are required by Subsection (3) of Section 55 of this Act to have regard in preparing a building programme".

**Fallacious to treat inquiry as contest between Corporation and Plaintiff**

The Judge added that as pointed out by the President of the High Court it was fallacious to treat the public inquiry as a contest between the Corporation and the plaintiff as to which would be allowed to build houses on the plaintiff's land, with victory to be accorded by the Minister to whichever of them could do so more speedily. Once there was either (a) evidence that the land was required by the Corporation immediately for the purposes of the Act or (b) evidence enabling the Minister to form the opinion that there was a reasonable expectation that the Corporation would require it in the future in order to attain any of the objectives set out in Section 55 (3), the Minister was entitled to confirm the compulsory purchase order. Neither in the High Court, nor on the appeal, had it been suggested that such evidence was wanting. While the criticism could be made—and was made—that the land was not required for the immediate building of houses on it, there was undisputed evidence that the Corporation would use it in the future for the "provision of adequate housing accommodation to meet needs arising from the obsolescence of dwellings or the prospective increase in the population", which was one of the objectives of the Act.

[Murphy v. Dublin Corporation (No. 2); Full Supreme Court; per Henchy J.; unreported; 5 April 1974.]

# DISALLOWANCE OF COUNSEL'S FEES ON TAXATION RESTORED — PRINCIPLES APPLICABLE STATED BY MR. JUSTICE GANNON

In this action the plaintiff claimed damages for personal injuries which he sustained in an accident in 1968 for which the defendant accepted liability and the only issue for determination in the action was the nature of the plaintiff's injuries and the amount of damages which should be awarded.

Before the conclusion of the evidence on the second day of the hearing the parties reached a compromise. A judgment was entered by consent before Mr. Justice Murnaghan for a sum of £16,000 with costs to be taxed. The taxation of costs proceeded before the Taxing Master in due course and as a consequence of a number of disallowances objections were lodged on behalf of the solicitor for the plaintiff on the 24th March 1972. The objections related only to a number of items in respect of the disallowance of disbursements made by the solicitor for the plaintiff in respect of fees to counsel. These items are numbered 39, 67, 70, 73, 75, 77, 83, 86 and 89 on the plaintiff's solicitor's bill of costs and relate to such disbursements. The grounds of objection to the disallowances were stated in very wide and vague terms.

Mr. Mackey submitted that *in determining* whether allowances were proper or not and in the determina-

tion of whether to make disallowances the Taxing Master should have regard to (a) the amount of work involved for counsel including the presentation of the case and his barristers as to marking fees insofar as accepted by solicitors in practice. He suggested that the scales of fees adopted by the Bar for High Court and Circuit Court work were a matter of personal consideration by the Taxing Master as also the fees paid to the Counsel for the opposing party in the same matter subject to whatever factors might be special to the case. Mr. O'Shaughnessy contended that the fee payable to Counsel prima facie is a solicitor and client item and therefore recoverable by the solicitor from his own client. He suggested that the client might recover from the opposing party against whom the order for costs has been made a contribution only towards his costs of such amount as the Taxing Master in his discretion might allow. He submitted that the only matters for consideration of the Taxing Master in the exercise of such discretion are the importance of the case and its difficulty.

Having regard to the decision of Budd J. in *re Kevin J. Walshe,* 96 I.L.T.R. (1962), 173, I came to the conclusion that it was desirable that I should have heard the evidence of the nature which had been given to the Taxing Master on the taxation and on the hearing of the objections. I considered also that only so much of the evidence of Mr. Conor Ryan as conformed with the evidence given by Mr. Kevin White in relation to matters upon which he had given evidence before the Taxing Master might be considered by me. **In my view any evidence which enables the Taxing Master to exercise his discretion in conformity with the standards of the practising solicitor who is reasonably careful and reasonably prudent, without erring on the side either of over-caution or of excess is pertinent and admissible. The discretion invested in the Taxing Master is of a judicial nature and accordingly should be exercised by him without any element of predetermination or rule of thumb** or indeed any arbitrary or capricious determination. The standard set for him throughout the rules in Order 99 of the Superior Court Rules and in the many decisions of the Courts which emphasise his qualifications for the function of his office are the standards of the practising solicitor.

During the hearing of this application I had occasion more than once to point out that neither the Taxing Master on the taxation of the costs, nor this Court on the review of the taxation, was in any way concerned with the determination of the fees to which counsel might be entitled, nor with an assessment of the amount of the fee which counsel might require to be paid. **It is no part of the function of the Taxing Master on taxation of the costs nor of the Court on a review of the taxation to examine the nature or quality of the work done by or required of counsel, nor to assess by measurement of fees the value of counsel's work.** The sole matter with which the Taxing Master is concerned in respect of the items the subject matter of this application is whether to allow in whole or in part disbursements made by the solicitor in the course of his practice in respect of fees to counsel retained by him in the action in accordance with the rules relating to party and party taxation. The significance of the fact that these items are disbursements made by the solicitor is underlined in the frequently quoted passage from the judgment of O'Sullivan M.R. in *Robb v. O'Connor,* I.R. 9 Eq. 373, in which he says at page 380: "The principle which I think should be acted on and I am prepared to enforce is this—that if a solicitor, acting bona fide within the rule I have above stated, delivers a brief with the fee marked thereon to counsel, prima facie that fee ought to be allowed, even in party and party costs; otherwise the solicitor must be exposed in every case to the risk of having to pay out of his own pocket money which he honestly and bona fide paid to his counsel, unless he has taken the precaution of fixing the fee beforehand with his client." Because these items are disbursements made by a solicitor in the course of his practice in respect of fees to counsel retained by him on his client's behalf the amounts of the disbursements should be assessed on the basis of what a practising solicitor who is reasonably careful and reasonably prudent would consider a proper and reasonable fee to offer to counsel. This standard does involve having due regard to the changes in what the practising solicitor considers to be reasonable derived from his day-to-day and year-to-year experiences in the course of his practice.

The principle for so long proposed by the Courts to the Taxing Masters is that they should have regard "to the magnitude of the case and the nature of the questions involved in it". As stated in a much-quoted extract from the judgment of Kenny J. in delivering the judgment of the Court of Kings Bench Division in *Barry v. Spaight and Sons,* 1904, 2 I.R. 478, at 486, the Court will interfere with the decision of the Taxing Master "if the Court comes to the conclusion that he has failed to adequately recognise the gravity, perplexity, and difficulty—in other words, the magnitude of the case". This statement of principle was adopted by the Supreme Court in both the dissenting judgment of Maguire C.J. and the judgment of the Court delivered by O Dalaigh J. in the *Attorney-General v. Simpson* (Number 3), 1963, I.R. 329. But it appears evident to me from these judgments in Simpson's case that this principle is intended as an indication of the factors affecting the judgment of a solicitor in practice in determining what would be a reasonable fee to offer to counsel. To construe this statement of principle as an indication to the Taxing Master as to how he should determine by reference to the nature or value of the work required of counsel the amount of the fee to be paid to counsel is quite erroneous in my view. The effective purpose of this principle is to guide the practising solicitor in the selection of counsel competent in the field of work to which the brief relates and in the determination of the fee which such a counsel would be content to take. Put in another way the solicitor in the course of his practice would estimate the fee which, having regard to the principle stated, counsel appropriate to the brief would be content to take for that brief. Authority for this concept of the "hypothetical counsel" who would be capable of conducting the particular case efficiently and who would not demand a particularly high fee because of his special reputation or other extraneous reason is to be found in *Simpson's Motor Sales* (London) *Limited v. Hendon Corporation* (Number 2), 1965, 1 W.L.R. 112.

Since the adoption of the present rules of the Superior Courts governing taxation of costs the Court is no longer confined upon a review of a taxation of the Taxing Master to circumstances involving an error in principle on the part of the Taxing Master. This has been demonstrated in the very careful analysis of the present rules as compared to the former Supreme Court

rules to be found in the judgment of Kenny J. in *Lavan v. Walshe* (Number 2), 1967, I.R. 129. Accordingly, as Kenny J. did in that case, I propose in this matter before me to reconsider the matter of these disallowances on the taxation before the Taxing Master, all of which are concerned only with disbursements of fees to counsel. In doing so I have regard to the fact that the Taxing Master is very experienced in this work and particularly qualified by his previous practice as a solicitor for that function. I appreciate therefore the considerable assistance I have received from counsel for both parties on this motion and the care taken to put before me by way of evidence matters pertinent to my consideration which had not been so fully presented to the Taxing Master. On the matter of the depreciation in the value of money insofar as it may be considered a pertinent factor I have had some evidence which was not before the Taxing Master. The evidence before me has clearly demonstrated that the **continuing and accelerating depreciation in the value of money is a matter of real significance to the solicitor in practice today in every aspect of his work.** I am satisfied that the practising solicitor in contemplating the "hypothetical counsel" with a view to assessing the reasonable fee which he would be content to take would have regard instinctively if not deliberately to the depreciation in the value of money. As correctly pointed out by Mr. O'Shaughnessy this is not a factor which can or should be measured by any purported scale of percentages taken from statistics, nor is it capable of measurement with any degree of precision. Nevertheless, it is part of the reality of the daily life of the reasonable solicitor in his everyday practice. I accept as correct the submission by Mr. Mackey that the Taxing Master may not only be guided by his own previous experience as a solicitor but must also keep himself informed of the practices of solicitors in up to date circumstances as to what is reasonable and that he should have regard to the practices of barristers in marking fees insofar as accepted by solicitors in practice. Although Mr. Mackey has suggested that for the purpose of so keeping himself informed the Taxing Master should have reference to the scales of fees adopted by the bar in general meeting for High Court and Circuit Court work and to the scale of allowances in respect of counsels' fees in the rules of the Circuit Court and also to the fees paid to his own counsel by the solicitor opposing the costs on taxation, I do not think it necessary or appropriate that I should outline or limit in any way the manner in which the Taxing Master should keep himself informed up to date of the standards of solicitors in practice. **It is essential, however, to bear in mind that the Taxing Master adopts the standard of the practising solicitor who is reasonably careful and reasonably prudent rather than that he purport himself to prescribe the standards which he requires solicitors to adopt.**

I will now endeavour myself to apply this standard to the consideration of the items on the bill of costs before me in relation to which the disallowances of the Taxing Master are challenged. The first item is Number 39 being a disbursement of 12 guineas to senior counsel for advices of proofs. Although the bill of costs appears to show a disallowance of 2 guineas, which in the phrase used in *Robb v. Connor,* I.R. 9 Eq. 373, would be "clipping" or "shaving" fees, it appears from the report of the Taxing Master that at each stage of the taxation he considered 12 guineas a reasonable disbursement under this heading. Accordingly it suffices to point out in respect of this item that an error was made on the bill of costs at this item and that the full 12 guineas claimed by the solicitor was intended by the Taxing Master to be allowed.

In regard to the items Numbers 75 and 77 on the bill of costs which are concerned with the disallowances of disbursements for fees to counsel for a consultation held prior to the advising of proofs it appears to me that Mr. Mackey is correct in his contention that the Taxing Master misunderstood the nature of the matter and the purpose of this consultation and appeared to determined the allowances by rule of thumb. Reference to pages 15 to 18 of the bill of costs shows that there were special considerations and unusual circumstances relating them to the matter of the plaintiffs' own pleadings and not merely to a consideration of the defence delivered with a lodgment. It is evident that the plaintiff's own circumstances had changed in a serious manner by reason of his injuries and the nature of the matter to be stated in the pleadings was a matter of technical nature which required special consideration in relation to which assistance of medical experts was required and obtained. In these circumstances it appears to me that the Taxing Master was in error in disallowing the amounts of such disbursements to the extent to which he did so. Accordingly in respect of item 75 I would consider the appropriate disallowance in respect of this item should be £4.20 and in respect of item 77 the correct disallowance should be £2.10.

The remaining items relate to the disbursements of fees for briefs for counsel and of fees for refreshers. In reference to these the Taxing Master in his report says: "In measuring these fees at the taxation I had special regard to the nature of the case, the pleadings, the directions of learned senior counsel in his advice on proofs, the duration of the case, the size, extent and the value of the damages awarded by the Court to the plaintiff, the importance of the subject matter of the action for the parties concerned and in particular for the plaintiff. I took the view that it was a case where it was reasonable for the solicitor to have briefed two senior counsel and that the brief fee of £52.50 allowed to each of them and the refresher fee of £21 allowed to each of them was fair and reasonable.

"I noted that the cause of action arose on or about 7 July 1968, that the originating plenary summons was issued on 3 April 1969 and that the action was disposed of by the Honourable Court in November 1971.

"On the hearing of the objections it was argued on behalf of the plaintiff that while the trial of the action was confined to the issue of damages only that the plaintiff's injuries were of a serious nature and that apart from the other witnesses hereinbefore mentioned counsel had to concern themselves with the evidence of two surgeons, an eye specialist and a dentist who dealt with the different aspects of the injuries from which the plaintiff was alleged to have been suffering. I noted, however, that the dentist did not attend Court as a witness. On reconsidering the entire circumstances of the case I felt that the fee on brief to each of the senior counsel should be increased to 60 guineas with an appropriate fee for junior counsel and I so ruled. I took the view that the refreshers should also be increased and having regard to what was urged in this regard and taking all the circumstances of the case into consideration that the refreshers to each of the two senior counsel should be increased to 30 guineas and with an appropriate increase to junior counsel and I so ruled."

The report is so expressed as to convey to my mind that the Taxing Master considered that he was deciding what fees should be paid to counsel and that he was measuring such fees in relation to the matters to which he says he had regard. If this be so he erred in principle in the exercise of the discretion vested in him. Nothing in the report gives any indication that the Taxing Master had in mind the problems of a reasonable solicitor in practice at the time in determining what would be a reasonable fee to offer to counsel either on the brief or as a refresher. Indeed the allowances in respect of brief fees and those in respect of refreshers do not appear to bear any relation to each other, and it is difficult to discover what significance, if any, was given to the various matters to which the Taxing Master says he had regard. I cannot accept that any reasonable practising solicitor would expect that a fee of 20 guineas would be acceptable as a refresher fee to a senior counsel competent to deal with the technical and other evidence in a case of this importance and magnitude. I cannot accept that a reasonable practising solicitor would expect that his disbursement of a refresher fee to junior counsel in a case of this magnitude would be equivalent to the allowance he would expect to receive for copying the brief, or indeed to the allowance for his own attendance in Court. There appears to be no common rational basis for the variation of the allowances for refresher fees (in the case of senior counsel from 20 guineas to 30 guineas) and the variation of the allowances in respect of brief fees (in the case of senior counsel from 55 guineas to 60 guineas) such as might be expected if regard was had in respect of each to the same relevant factors. In my view the claim by the solicitor for allowance of disbursements for refresher fees to counsel in this case having regard to all the matters to which the Taxing Master refers in his report was reasonable to the degree of being cautious.

I understand from the evidence of Mr. White that the Taxing Master disregarded the submissions in relation to the depreciation in the value of money. The standard apparently adopted. of allowances for disbursement of brief fees in this case appears to correspond in a general way with the allowances which might have been made by the Taxing Masters in similar types of cases of slightly smaller awards some six to ten years earlier. It may well be as Mr. Mackey suggests that the Taxing Master has not kept himself informed as to the standards of the reasonable solicitor in practice today. The portion of the Taxing Master's report which I have quoted indicates a possible misconception by the Taxing Master of the nature of the function he was performing insofar as it appears to indicate that he considered he was measuring the amount of counsel's fees. His report does not indicate that he exercised his discretion in relation to these disbursements of fees on a consideration from the solicitor's point of view of what would be a reasonable fee to offer to counsel with the brief in this particular case, which he had no reason to believe would stop short of a verdict of the jury.

In general the claims for allowances in this bill of costs are all such as one would expect of a reasonably cautious and prudent solicitor, and in this respect I take into account other items in relation to which objections were not taken to the disallowances. If, as it appears to me, the solicitor is in general reasonable in his claims on this bill of costs, and if the principle that "a successful party should, so far as is reasonable, be idemnified from the expense he is put to in an action" is to be applied there can be no justification for such drastic disallowances of disbursements for fees on briefs for counsel. Had the Taxing Master considered these disbursements on the basis of the principles I have earlier indicated it may well be that he might have made some partial disallowances. This, however, might savour of caprice or arbitrary disallowance unless good reason could be shown for relatively slight reductions. To me all the indications are that the solicitor in this case not only "acted in good faith and with ordinary intelligence" but also was reasonably prudent in his disbursements. Consequently, as there is no basis for any substantial disallowances, his measure of remuneration ought not be interfered with. In the circumstances I would rule that the disallowances at items 67, 70, 73, 83 and 89 be disregarded.

Finally I feel compelled to comment that the Taxing Master and the Costs Drawer who drew this bill of costs seem to be unaware of the remarks of Kenny J. at the conclusion of his judgment in *Lavan v. Walshe* (Number 2), 1967, I.R. 129, in relation to the contents of bills of costs, and I wish to draw their attention to this aspect.

[Dunne v. O'Neill; Gannon J.; unreported; 5 April 1974.]

# BOOK REVIEWS

**Ganz (Gabrielle)—Administrative Procedures.** 8vo; pp. xv plus 118; London, Sweet & Maxwell, 1974; £1.20 paperback.

The learned author is a Senior Lecturer of Law in Southampton; she has unfortunately decided to omit the vital rules of National Justice, and the rules of procedure for tribunals. The process of conciliation under the inapplienable Rent and Race Relations Acts is first dealt with. However, written representations under the Town Plan procedure are dealt with. The investigation procedures under the restrictive practices Court, which is somewhat similar to our Fair Trade Commission, are then explored; it is stated on the other hand that the Monopolies Commission has been criticised as being both prosecutor and judge. The objections to Local Government inquiries are fully set out. As regards development plans, many English local authorities endeavoured to secure public co-operation by having public meetings, exhibitions, films and press conferences. The English Courts, unlike the Irish Courts, have not had to construe administrative procedures in relation to human rights. An interesting booklet.

**Farrar (J. H.)—Law Reform and the Law Commission.** 8vo; pp. xv plus 151; London, Sweet & Maxwell, 1974; £1.25 (paper); *Modern Legal Studies Series.*

The author, who is a Law Lecturer in Bristol, has given us valuable information about the prospects of Law Reform in England and Scotland, particularly since the establishment of the Law Commissions there in 1965. The importance of having a full-time Law Commission with fifty staff members to consider current problems of law reform and statute law revision and consolidation is strongly emphasised, and *ad hoc* committees on the Irish model would be strongly depreciated. The Law Commission's valuable report on the Interpretation of Statutes is fully discussed. The position of law reform in New Zealand, the United States and France, as well as in the field of international relations, such as the United Nations Commission on the International Law, is fully discussed. The author mentions five factors propounded by Norman Marsh which are alleged to make judicial reform unsatisfactory but his arguments are unconvincing, particularly in the context of a written constitution. An interesting introductory handbook.

**Schmitthoff (Clive M.), ed.—European Company Law Texts.** 8vo; pp. x plus 322; London, Stevens, 1974; £8.

This well-timed volume is the seventh in a series published under the auspieces of the British Institute of International and Comparative Law.

Under the Treaty of Rome, member states have an obligation to approximate their laws to the extent required for the proper functioning of the Common Market. One of the areas in which approximation is most necessary is that of Company Law. This is so because of the many and varying differences that exist in the national laws of the member states. It is imperative for the success of the Common Market that the laws governing the forms of association under which the majority of businesses operate be not alone approximated but harmonised as soon as possible. There have been considerable developments in this area and the aim of the volume is to record these developments by presenting the principal texts in their best vailable English translation.

The volume is divided into two parts—the introduction and the texts. The introduction by Professor Schmitthoff deals with the various points arising out of the texts which are of especial interest to British and Irish lawyers. It is a clear and indeed a most helpful guide to the texts. It is a pity that the Draft Regulation on Merger Control and the Draft Convention on International Mergers although included in the texts were received too late to have the learned editor's comments.

The main body of the volume contains English translations of the First Council Directive, the Second, Third, Fourth and Fifth Draft Directives and an (unnumbered) Directive and draft Council Recommendation concerning the contents and checking of prospectuses. The proposed statute for the European Company and the Convention on the Mutual Recognition of Companies and Legal Persons are also set out. Section 9 of the European Communities Act, 1972, the object of which was to give effect in the U.K. to the Provisions of the First Directive is also set out. Irish lawyers should refer in this regard to the European Communities (Companies) Regulations, 1973.

The volume is a useful and practical guide to those relatively uninformed of the developments to date in Company Law in the EEC and as such will be useful to practitioners and those with an interest in these developments. In the words of Professor Simmonds who wrote the Preface : "The present collection of materials is up to date and comprehensive; necessarily, however, it can only present an interim statement of the progress achieved by a unique movement toward international legal co-operation and understanding." The truth of these remarks is evident in relation to the Fourth Draft Directive which has been revised since the volume was printed to take into account "the true and fair view" concept. Nevertheless the volume is worth a reading. For those with a particular interest in this field it should be read in conjunction with *The Harmonization of European Company Law* also edited by Professor Schmitthoff which is Volume 1 of the United Kingdom Comparative Law Series.

*Laurence K. Shields*

# EXAMINATION RESULTS

**First Irish Examination**

At the First Irish Examination held on 11 March 1974 the following candidates passed.

Michael A. Barrow, Richard J. D. Bennett, Helen Boland, Laurence Brennan, Paul P. J. Brady, Adrienne Byrne, Philip Cahill, Patrick D. Callanan, Paul P. Clune, Michael Coghlan, William Cullen, Raymond Duggan, Margaret T. Dargan, Patrick Dawson.

David Dillon, Margaret W. Duffy, Mark E. Doyle, Brendan Duke, William J. Egan, Joan Etchingham, Paul Eustace, Anne Fagan, Helena G. Fitzgerald, James P. Foley, Joseph D. Gallagher, Kevin P. Geraghty, Emer Gilvarry, Irene M. C. Gleeson.

Catherine Gray, John J. Grennan, Patricia M. C. Harney, Jeremiah F. Healy, Patrick D. Hickey, Pamela B. M. Holland, Pauline M. Horgan, Robert Hyland, Maurice P. Joy, James H. A. Joyce, Colm S. Judge, Miriam Keane, Paul C. Kerrigan, Ruadhan Killeen.

Mary Linehan, James V. Long, Kenneth D. Morris, Patrick G. McDonnell, Joseph G. Nolan, John A. O'Donoghue, Thomas O'Donovan, Orlagh O'Farrell, Cormac R. O'Hanlon, Mary B. O'Higgins, Anthony O'Malley, John O'Regan, William O'Reilly, Phyllis Pitcher, Patrick Punch.

Barbara Quinlan, John P. Rowan, Kieran Ryan, Kieran A. Ryan, John M. Schutte, Adrian Stokes, Mary M. Taylor, Fiona Thornton, Deirdre M. K. Townley, Edward Tynan, Anne Wiseman, Mrs. Ann P. Woods.

77 candidates attended; 69 candidates passed.

**Second Irish Examination**

At the Second Irish Examination held on 27 February 1974 the following candidates passed :

David M. Bergin, James J. Binchy, John G. Brady, Marian N. Brazil, Eithne Breathnach, Michael G. M. Brennan, David Browne, George Bruen, Daragh Buckley, Nicholas A. Butler, B.C.L., Brian D. Casey, Kieran Cleary, B.C.L., Marie G. Connellan, Donogh J. M. Crowley, B.C.L., Vincent Crowley.

Gerard Cummiskey, Anastasia M. Cunningham, B.C.L., William B. Devine, Dominic M. Dowling, Thomas F. Dowd, William Earley, Paul Ferris, Paul Fleming, William J. B. Garvan, Sylvia Geraghty, B.A., Mary W. Griffin, B.A., LL.B., Christopher A. Grogan, Henry N. Healy, Declan Hegarty, B.A., Dermot V. Hewson.

Edward F. Hickey, Patrick J. Kelly, Simon W. Kennedy, Joseph F. Langwell, Martin Lennon, Helen Lucey, B.C.L., Margaret Lucey, John R. Lynch, Justin MacCarthy, B.A. (Mod.), Aedin Meagher, David Morris, Thomas K. Mulcahy, Fionnuala M. R. Murphy, B.A. (Mod.), Patrick McCafferty, Michael J. K. McCarthy, B.C.L., Dermot McDermot, B.C.L., Rory McEntee, B.C.L.

Madeleine McGrath, Anne McKenna, David F. McMahon, B.C.L., Laurence McMorrow, Matthew J. Nagle, Bernard J. O'Beirne, B.C.L., David C. O'Brien, Thomas V. O'Connor, Hugh O'Donnell, Michael J. O'Donnell, Thomas E. O'Donnell, John G. O'Donovan, Thomas O'Dwyer, Richard R. O'Hanrahan.

John B. O'Herlihy, B.C.L., Margaret M. O'Kane, B.A., H.Dip.Ed., Kathleen A. O'Leary, Michael J. O'Malley, Brian O'Sullivan, Mary C. O'Sullivan, Brendan J. Rossiter, Edward M. Sheehan, B.C.L., John V. Shannon, William J. Synnott, Michael P. Walsh, B.A., Ronan Walsh, Mary T. P. Ward, Brian O. Whelan.

80 candidates attended; 75 candidates passed.

**First Law Examination**

At the First Law Examination held from 15 to 22 February 1974 the following candidates passed.

Michael C. Ahern, Henry Arigho, Sheena M. Beale, Padraic Brady, Ciaran Judge Branigan, M.A., Ernan F. Britton, John P. Brophy, Niall B. Browne, B.Sc., Nicholas A. Butler, B.C.L., Paul Byrne, James Cahill, Patricia Carroll, B.C.L., Beatrice M. Carton, B.C.L., Niamh F. Casey, Eoghan P. Clear.

Kieran W. Cleary, B.C.L., Terence W. Coghlan, B.A. (Mod.), LL.B., Aidan B. Collins, B.C.L., Helen M. Collins, Frances Cooke, B.C.L., Patrick T. M. Crilly, Michael J. Cunningham, Randal Doherty, B.C.L., Pauline M. Doyle, Andrew T. Dunne, Patrick J. Farrell, Denis I. Finn, Michael P. M. Fitzpatrick.

Julia M. Gillan, Patrick G. Goold, Christopher Grogan, Alice B. J. Hanahoe, B.C.L., Alan G. Harrisson, Ita M. Harvey, John Hayes, Declan M. C. Holmes, William J. Kennedy, Benjamin L. Leon, Margaret E. Lucey, B.C.L., Shelia F. Lynch, Cathal M. MacCarthy, Daniel T. Maher, B.C.L., Mary Mangan.

Joseph T. Menton, Michael Mooney, B.A., Michael J. Moore, B.C.L., Oliver Moran, Patrick F. Mulvey, John T. Mulvihill, Anthony J. Murray, B.C.L., LL.B., Gerard A. McCanny, Lorna McCarthy, B.A., Paul McCormack, Karen M. McDowell, Michele M. McEvoy, John McGlynn, Raymond P. McGovern, B.A.

Anne McKenna, Patrick. E. McMullin, Patrick J. McNally, Elizabeth M. Nagle, B.A., John G. Naughton, Gerard M. Neilan, Kieran J. O'Callaghan, B.C.L., LL.B., Thomas E. O'Donnell, Stephen O'Dwyer, B.C.L., Ursula M. O'Dwyer, Adrian P. O'Gorman, B.C.L., Anthony F. M. O'Gorman, Michael F. O'Gorman, Constantine G. O'Leary, Raymond St. John O'Neill, Francis A. J. O'Riordan, Thomas V. O'Sullivan, B.C.L.

Michael Pattwell, Celine Reilly, Graham Richards, B.A. (Mod.), Patrick Rogers, B.C.L., Sharon M. Scally, Joanne M. Sheehan, B.C.L., Charles C. Sherry, B.A., Peter J. Smith, William Smith, Valentine Turnbull, Dorothy Tynan, B.A., Michael W. Tyrrell, Gerard A. Walsh, Brian S. Whitaker.

147 candidates attended; 88 passed.

**Second Law Examination**

At the Second Law Examination held from 15 to 22 February 1974 the following candidates passed :

*Passed with Merit* : (1) Eugene P. Fanning, B.C.L.; (2) Rory McEntee, B.C.L.; (3) Brian P. O'Reilly, B.C.L.; (4) John J. Carlos, B.C.L.; (5) Thomas Hayes, B.C.L.; (6) Catherine Bergin, B.C.L.; (7) Michael Staines, B.C.L.; (8) Geraldine M. Pearse, B.C.L.

*Passed* : Dermot Agnew, B.A. (Mod.), Timothy P. W. Bouchier-Hayes, B.C.L., George Bruen, Daragh Buckley, B.C.L., Patrick J. Butler, Eamonn B. Byrne, B.A. (Mod.), John R. Carroll, Stephen M. Coughlan, Anastasia M. Cunningham, B.C.L., Eugene Cush, B.C.L.

James Macartan Daly, B.C.L.

Geraldine A. Davy, B.C.L., Philomena M. Devins, John G. Dillon-Leetch, B.C.L., Anthony J. Doherty, B.A., LL.B., Roderick Dolan, B.C.L., Ivan J. Durcan, William Earley, Vivian M. Emerson, B.A., John R. Fetherstonhaugh, William J. B. Garvan, Geraldine Gaughan, John W. Gaynor, B.A., John M. M. Griffin, B.C.L.

Michael J. Hanrahan, B.C.L., Edward C. Hughes, B.C.L., Mary F. Hutchinson, B.C.L., Caroline Keane, B.C.L., Anne E. Kennedy, Gillian Kiersey, Alan J. King, Maurice J. Linehan, B.C.L., LL.B., Francis J. Lowney, B.C.L., Dermot MacDermott, B.C.L., Noel O. Malone, David Morris, Desmond Mullaney, B.C.L.

Bryan McAlister, Patrick J. McCartan, B.C.L., Roderick McCrann, George C. M. P. McGrath, Fiona McGuire, B.C.L., Peter V. McLaughlin, David F. McMahon, B.C.L., Thomas McNally, B.C.L., Bernard J. O'Beirne, B.C.L., Isolde A. O'Connell, B.C.L., Patrick O'Connor, B.C.L., John V. O'Dwyer, B.C.L., Michael J. O'Malley, B.C.L.

Anne P. O'Regan, Thomas P. Quinn, B.C.L., Brian P. Redden, B.C.L., Peter J. Redmond, John C. Reidy, B.C.L., Rosemary A. Ryan, B.C.L., Linda M. Scales, Vincent M. Shields, Thomas J. Stafford, B.C.L., Terence D. Sweeney, Michael Tracey.

94 candidates attended; 69 candidates passed.

**Third Law Examination**

At the Third Law Examination held from 18 to 25 February 1974 the following candidates passed:

*Passed with Merit*: (1) Matthew O'Donohoe; (2) Colin O. Keane, B.A.; (3) Charles Kelly, B.A.

*Passed*: Patrick D. W. Boland, B.C.L.; Jennifer M. M. Cantillon, B.C.L., John F. Carroll, B.C.L., Margaret M. Carter, Martin D. Cellier, B.C.L., John A. Coughlan, B.C.L., Peter O'Neill Crowley, Anne M. Delaney, B.C.L., Sheila Devitt, Mary-Catherine Dolan, John D. Dunne, B.C.L., Daniel Fagan.

Deirdre Nic Fhionnlaoich, B.C.L., Raymond Finucane, B.C.L., Grace M. Grench, B.C.L., Sylvia Geraghty, B.A., Mary W. Griffin, B.A., LL.B., Edward G. Hall, B.A., H.Dip.Ed., Michael Hayes, Edward J. Hickey, Liam Hipwell, Doreen Levins, Richard A. Liddy, B.A., H.Dip.Ed., Maurice J. Linehan, B.C.L., LL.B.

Hugh F. Ludlow, Justin MacCarthy, B.A. (Mod.), Stephen P. Maher, Patrick J. Minogue, Michael E. Molloy, B.A., Arthur D. S. Moran, B.A. (Mod.), Deirdre Morris, B.C.L., Madeleine McGrath, Laurence McMorrow, Eimear O'B. Kelly, Orla O'Brien, John G. O'Donovan.

Martina O'Gorman, Richard O'Hanrahan, Anne Ormond, B.C.L., Eugene O'Sullivan, B.A., Joseph Philpott, B.C.L., Anne M. Regan, B.C.L., Mary Regan, B.C.L., Nicholas K. Robinson, M.A., Brian Roche, Patrick D. Rowan, M.A., James J. Ryan, B.C.L., Edward M. Wheehan, B.C.L.

Bryan Sheridan, B.C.L., Michael J. Sheery, B.C.L., Ambrose J. Steen, Joseph R. Sweeney, Patrick J. Sweeney, Philip T. Tormey, Paul D. Traynor, Catriona M. Walsh, Brian O. Whelan, Richard R. Whelehan, B.A., H.Dip.Ed.

67 candidates attended; 61 candidates passed.

By order: James J. Ivers, *Director-General.*
10 April 1974.

# Solicitors Apprentices Debating Society Inaugural 1974

**Part 1**

The President, Mr. Prentice, presided at the Inaugural Meeting of the Solicitors Apprentices Debating Society held in the Library of Solicitors Buildings on Friday, 25 March 1974, at 8 p.m.

**Mr. Michael Staines,** the Auditor, in delivering the Inaugural Address, said that there had been many allegations in recent months that all is not well with our prison system. Prisoners and journalists alike have described our prisons as "hell-holes". Because of the great air of secrecy surrounding the operation of our system, it is difficult for an impartial observer to decide on the correctness or otherwise of these allegations. From what information we do have, however, much of which is contained in the Prison Study Group Report, it is evident that conditions leave much to be desired. The prison buildings are relics from the nineteenth century. Mr. Cooney has stated: "Our prisons are a system of buildings, very old, Victorian, designed and built in another age, when the area of penology had not received attention, when prison was looked upon as a punishment for man's sins against society without consideration of what causes him to sin—places of incarceration. Their structure inhibits reform." Educational, recreational and work facilities are poor and certainly do not conform to the requirements as laid down by the Prison Rules 1949. Psychiatric screening at reception is non existent, which might explain why nearly forty prisoners in 1971 were classified at the time of admission to prison as "possibly" or "probably" insane.

However, as long as we maintain our present prison system, many reforms are undoubtedly necessary, I would suggest to you, that, instead of trying to reform the system, we should seriously consider abolishing it as it stands. Prison is undoubtedly a wasteful, inhuman and for the most part unnecessary institution, and its existence can be justified only if we accept the primitive justification of retribution. However, its many defects far outstrip any positive function it may have.

**Retribution as justification**

There have been many different justifications given down through the years for the existence of prisons. They extend from the primitive view "that prisoners

should atone by suffering for their offences" to the more enlightened view of the Gladstone Committee that: "Prison treatment should be designed to maintain, stimulate or awaken the higher susceptibilities of prisoners and turn them out of prison better men and women than when they came in." It has also been maintained that to the extent that prison deters potential offenders from engaging in criminal activity, it protects society. While our present prison system is largely based on the concept of retribution—in fact Mr. Cooney himself has admitted as much in a recent television interview—very few people today will seriously argue that retribution alone is a sufficient justification for prison. The 1962 Interdepartmental Committee on Prisons had as its recommendation that "prisons should have as their aim the final rehabilitation of the offender".

Nigel Walker in his book *Sentencing Policy in a Rational Society* points out that since no human being has the attributes of the legendary recording angel, capable of looking into men's minds, it is impossible to decide on a form or degree of punishment appropriate to a particular offence. It has sometimes been suggested by some that we can "improve" offenders by punishing them. This, of course, has never been proved, but even if we accept the argument for a moment, it is obvious that before he can be improved, the offender himself must accept the punishment as just retribution. If we follow this reasoning to its logical conclusion we arrive at the absurd position that as Walker states "a man with a tender conscience will have to undergo a more severe punishment than a man who does not admit that he deserves his punishment". Finally, there is implicit in the concept of retribution a view of the criminal as being somehow different than other people. On the contrary, crime is an integral part of our society and indeed of any society.

**The protection of society**

The other main justification for imprisonment is that it serves to protect society by somehow reducing the incidence of crime. Crime is thus seen as something to be eradicated—something which threatens the bulwark of society and is likely, if not stamped out, to tear our society asunder. This view constitutes the greatest single obstacle to penal reform. Crime, like any other form of deviance, has a positive as well as a negative role to play in society. Emile Durkheim, the famous criminologist, was the first to make this point. He claimed that crime is not an abnormal but a normal part of our society "bound up" as he said "with the fundamental conditions of all social life and by that very fact it is useful". Another criminologist, Cohen, has given examples of some of the useful functions that crime can play in society—for instance, it helps to clarify the rules on which society is built, it serves the useful purpose, from society's point of view, of uniting the group against the deviant (this is the scapegoating process familiar to us all), it can act as a safety valve for frustrations, etc., or it can act as a warning signal to society that something is radically wrong. The scapegoating process can be seen in the remark of Lord Denning that "punishment inflicted for grave crimes should reflect the revulsion felt by the great majority of citizens for them". When deviance acts as a warning signal Leslie Wilkins has pointed out, that by isolating criminals in jails, and therefore ensuring that information regarding them can be rejected and distorted, society's defects and shortcomings can be hidden. Instead of trying to eradicate crime we should be satisfied to *diminish* the frequency of behaviour which is acknowledged as being *particularly damaging* to society. The irrational fear that many people have of crime and criminals is not justified. It seems that many have a stereotyped picture of the criminal as being a marauding violent person, lurking in the shadows, waiting to pounce on completely innocent and unsuspecting bystanders. This is just not the case with the majority of criminals. Only about 17 per cent of the prisoners in 1971 were convicted of offences against the person. The offences which result in the greatest number of convictions are the property offences of simple larceny and housebreaking and shopbreaking. Only eight people were convicted of murder and manslaughter in 1971. Furthermore, in many of these crimes of violence the offender and the victims were previously known to each other. Marvin Wolfgang in his *Patterns of Criminal Homicide* has pointed out that only 12 per cent of the homicides in his study of homicides in Philadelphia were committed by strangers—and in well over two-thirds of them there was a pre-existing victim-offender relationship. Rather similar findings were disclosed in England by Gibson and Klein. The President's Commission on Crime in the U.S. points out that the risks of s erious attack from strangers in the street is only half as great as the risk of such attacks from spouses, family members and friends and that the closer the relationship the greater the hazard. Thirdly, as Nigel Walker points out, "the anti-social use of vehicles in Northern Ireland is a much more important source of death, bereavement, physical suffering and disablement than any intentional form of violence" —yet people are far more paranoic about crime than about car accidents. Also, it could be argued that the community is economically injured far more by, for instance, the speculator and the tax dodger who exploit the community for their own ends, than by an offender who steals something from a shop—yet the first is held out to us by society as a model of what we all could become and the second is thrown in jail to atone for his sin.

**No deterrent effect in prison**

However, even if we accept that the aim of the penal system should be to control and reduce criminal behaviour prison is certainly the most expensive, wasteful, cruel and probably least effective method of so doing. It is impossible to prove that prison is a more effective *deterrent* than any other sanction, either on the offender who has been processed through it, or on potential offenders. In a survey carried out by Willcock in 1963 the majority of the 808 youths he questioned put fear of imprisonment as only fourth in the list of consequences which would deter them from committing crime. The effect on his family's opinion, the possible loss of a job, the shame of appearing in Court were considered greater deterrents. Secondly, before any sanction can become a deterrent the person must believe that if he commits the crime there is a reasonable possibility that firstly, he will be caught, and secondly that the particular sanction will be applied to him. It is generally accepted that approximately half the crimes committed are not even reported to the police, and of those that are less than one-half are traced to the offender. Finally, of course, not all convicted offenders

are sent to prison. Therefore, it would appear that the deterrent effect of prison is not very substantial.

**No Problem of Rehabilitation in Prison**

As for rehabilitation, the prison statistics contain ample evidence that prison does not rehabilitate. The statistics do show us that two out of every three prisoners behind bars in 1971 had been in prison at least once before, one out of every three had been in there at least five times and one out of every ten had been in prison at least twenty times. These statistics have been more or less similar over the past ten years. Nevertheless, the high rate of recidivism in this country is a monument to the failure of prisons to do anything for prisoners. Most of these recidivists have become so institutionalised that they cannot survive outside and must continually return. Of all the people affected by the futility of our prison system the recidivist is the person who suffers most. Prison is indeed a "collection of its own failures".

**Most Prisoners not Reconvicted**

A better way of measuring the efficacy of imprisonment in reducing crime is to follow the activities of prisoners released from prison and discover whether they will commit another crime within a certain period (the period taken is usually three years). Research of this type carried on in the U.S. for instance by Daniel Glaser has shown that approximately 70 per cent of those released from prison have not been reconvicted. However, it is generally recognised that even figures such as these are no real indication of the success rate. For instance many of the prisoners may have committed crimes which were not reported to the police or even, if reported, not traced to the offender. Secondly it is not always possible to ensure that a subsequent conviction is traced. Thirdly, as Nigel Walker points out even if we can believe with certainty that he has infact "gone straight" we have no way of proving that this is the result of imprisonment unless we can claim to know whether he would have gone straight even if he had not been imprisoned. In other words, the offender might just have decided not to commit any more crimes.

Therefore, it would appear to be almost impossible to discover how effective is any one penal sanction and whether one penal sanction is more effective than another one or indeed more effective than none at all. However, in 1958 Leslie Wilkins carried out a survey on the efficacy of probation versus other sanctions and he came to the amazing conclusion, which has yet to be refuted, that reconviction rates appeared to be the same, no matter what form of disposal was used. Dr. Roger Hart, summarizing the conclusions of comparative studies of treatment results in a report to the Council of Europe in 1964 came to the same conclusion. In other words if reconviction rates are taken as our criterion, then it would appear to be absolutely irrelevant whether we put the offender in jail, fine him, put him on probation or just discharge him. When one considers the tremendous economic and social cost of putting a person in prison it is unbelievable that we have not pulled down our prisons long ago. That's not all, however. The vast majority of the prisoners in 1971 spent less than six months in jail. I would suggest that it is impossible to rehabilitate anybody in six months no matter how good the conditions. Judge Kenny made the same point recently at the Law Conference in Galway. Yet our judges continue to send hundreds of prisoners to jail each year for such short periods. The Justice must know that such a sentence won't rehabilitate the prisoner. They are imprisoned merely to get them out of the way for a few months.

**Defects of imprisonment as a sanction**

It is now time to discuss the defects of imprisonment as a sanction. Firstly, it is the most expensive sanction in use. According to the Prison Study Group Report it costs over £70 a week to keep a man in prison. Probation costs approximately £3 a week and fines cost nothing. Secondly, imprisonment of an offender not only punishes him but will also punish, both economically and socially, his wife, and family, who, of course, have not been found guilty of any crime. Thirdly, while he is in prison society will lose any of the positive services he was capable of contributing. Finally, while he is in prison he will be associating with others who can teach him new criminal techniques.

However, the worst defect of imprisonment is the effect on the prisoner himself. As the Working Party of the Labour Party on Prisons reported in 1946: "A prisoner is withdrawn from society and condemned to a life of uselessness. He is left in silence and darkness for long periods of unbroken monotony to nurse a grievance against society and against the community. When he returns to the world from which he has been withdrawn for years he is a stranger to the normal way of life." Elsewhere Goffman states: "The prisoner comes to prison with a conception of himself made possible by certain stable social arrangements in his home world. Upon entrance he is immediately stripped of the support provided by these arrangements. He begins a series of abasements, degradations, humiliations, and profanations of self. His self is systematically if often unintentionally, mortified." He is, therefore, rejected—and more importantly he sees himself as rejected. In the end he turns his back on reality and lives in a contorted world of make-believe, he refuses to accept rules of fellow mortals and makes ones that fit in with his own little world. He is emotionally and sexually deprived. Most of all perhaps the little freedoms which we take for granted—freedom to decide when to get up, when to eat, where to work, what time to go to bed—are all taken from him. He is then thrown back into a society full of stress and strain—into a society that hates and despises him, that won't give him a job because he has been labelled a criminal. It is no wonder that so many wish to go back.

**The Pattern of Criminal Behaviour**

Let us now stress the following points. Firstly, it is impossible to completely eradicate criminal behaviour. The very fact of having rules at all will invariably mean that these rules will be broken. Instead, the aim of penal system should be to control types of behaviour considered particularly damaging to society. Secondly, we must realize that criminal behaviour, like all behaviour is not "the manifestation of pathological individuals" —on the contrary, it occurs in the interaction with others in the community—it is part and parcel of the community and cannot be separated from it. Wilkins has pointed out that it is easier to talk of a maladjusted offender than a maladjusted society. It can be shown that there is nothing in the criminal that sets him apart from others except the fact that he has been labelled a criminal in what Garfinkel calls a status degradation

ceremony, as for instance a trial. Therefore, since criminality is a fundamental part of our community it should be treated, not by isolating the offender from the community, but by treating him in the community. Thirdly, our whole concept of criminality seems class based. Our prison population is derived almost entirely from the group of underprivileged in our society. This does not, of course, mean that the members of so-called "working class" are more prone to criminal behaviour than members of the middle classes. The criminal code does, however, reflect the interests of the middle classes if only because they have had the power to impose their values and their view of normality on the whole society. Finally, when we realise that the police, the legal profession and the courts are almost entirely institutions of the middle classes, we can understand why so many of our prisoners come from the working class. Fourthly, though it may be necessary to prevent an offender injuring the community, we must ensure, at the same time, that he should not be manipulated to conform to the life style of others against his will.

**Offences to be treated within the community**

It is, therefore, necessary that as many offenders as possible should be treated within the community. Only those who have committed dangerous acts and are likely to do so again should be imprisoned and only then in the most humane conditions. The aim of the penal system must be to keep our prisons empty instead of filling them to capacity. If such a suggestion was followed only about 5 to 10 per cent of our prisoners would remain imprisoned. The hope would be that in future even those unfortunates could be treated in the community. Furthermore, at the moment there are many people behind bars who are only in prison on remand awaiting trial. Over 2,000 prisoners were received on remand in 1971—of these only 800 were later recommitted.

**The disadvantages of Bail**

The law is that an alleged offender *must* be given bail on certain conditions unless there is a high risk of not attending the trial. The effect of this rule is often nullified by the fact that the prisoner cannot afford bail or cannot find sureties to go bail for him. Accordingly, the *money*-bail system should be abolished and instead the judge should be given the power to attach penalties for failure to reappear. It should also be possible to devise a system that no prisoner should be kept in jail while awaiting bail—as one American author has stated "The indignities of regimental living, utter isolation from the outside world, unsympathetic surveillance, outrageous visitor facilities, are surely so searing that one unwarranted day in jail in itself can be a major social injustice." If we based our criminal law on a concept of harm done to others, such crimes as those of drunkenness, vagrancy, soliciting, begging, homosexuality between consenting adults, etc., should no longer be treated as crimes. Prison certainly cannot rehabilitate alcoholics or drug addicts and will often have the exact reverse effect on homosexuals.

**Alternatives to Prison**

There are many different ways of dealing with offenders in the community—some of which have been tried here and others which have not. The Radical Alternatives to Prison group (RAP) in England have published a pamphlet listing twelve alternatives including projects such as '(1) non-residential education centres open to offenders and non-offenders alike, (2) the creation of foster families and family groups for lonely offenders, (3) mixed community houses (such as the one operated by the Simon Community in Dublin), (4) re-education of young offenders schemes, (5) the provision of proper treatment facilities in either homes or residential communities for drug addicts and alcoholics, (6) the "new careers scheme" which has as its basis the re-education of professional criminals and finally different types of offender-victim projects, and, already in use here (7) the Garda Juvenile Liaison System which could be extended. It would, of course, be obviously better to prevent as many offenders as possible from being processed by the courts and preventive measures such as crisis centres, counselling projects, community centres, youth clubs etc. could all have a part to play here. An informal process such as the "Pre-Court Dialogue Scheme" could adequately deal with many of the petty problems that fill the courts at present. Even if the offender *does reach* the court stage, however, we are still left with the alternatives of the probation order, the fine and the suspended sentence, all three of which could be extended to work in conjunction with the other alternatives listed.

**Probation**

Probation has been defined by the Morrisson Committee in England as: "The submission of an offender while at liberty to a specified period of supervision by a social caseworker who is an officer of the Court—during this period the offender remains liable if not of good conduct to be otherwise dealt with by the Court." This sanction has, the Committee points out, the advantage that while it seeks to protect society through the supervision to which the offender is required to submit, it both minimises the restriction placed on him and offers him the help of society in adjusting his conduct to its demands. The Judge can attach conditions to the order and, therefore, like the suspended sentence it has the advantage that it can be adapted to the needs of the individual offender. Secondly, it costs no more than £3 a week to operate. It may surprise many of you to know that at the moment the probation order is only used in the District Courts—the reason being that there is no probation officer attached to the other courts. The Department of Justice has, however, stated it has increased the number of welfare officers to sixty and presumably some of these will act as probation officers. The VERA scheme which originated in New York and which can be used in conjunction with probation, has as its basic idea a three-month suspension of trial for certain offenders—if everything goes well in that three months the slate is wiped clean and the offender can make a fresh start. We could also introduce a system of volunteer probation counsellors as in Colorado—each offender could be assigned on probation to one of these. This scheme would have the advantage of not only being inexpensive but also involving members of the comunity in this type of work.

The fine is another form of non custodial treatment that could be extended. However, at present it operates against the interests of the poorer offender who often goes to jail because he is unable to pay it. To rectify this situation I would suggest that we introduce the Swedish system of "day fines". This means that the fine is calculated not only according to the gravity of

the offence but also according to the means of the offender. Furthermore, non-payment of the fine because of financial difficulties should not mean automatic imprisonment—imprisonment should only follow where the offender deliberately seeks to avoid paying. In 1971 over 2,000 of our prisoners were imprisoned without the option of paying a fine and a further 300 imprisoned in default of payment—a liberal application of the Swedish system could, I feel, do much to reduce the number of offenders in our jails.

**Suspended sentences**

The operation of the suspended sentence could also be considerably extended. This differs from probation in that there is no direct supervision of the offender—the *execution* of his sentence is merely suspended. There is no statutory form of the suspended sentence in this country, unlike in England, but it has nevertheless been in operation here since 1910. Because of the lack of published statistics, it is impossible to judge the efficacy of its operation. However, it was stated in the Northern Ireland case of *R. v. Wightman*, 1951 : "The relatively small number of cases in which prisoners so bound by recognisances and against whom sentences have been recorded are brought before the court to receive judgement or sentence is the best evidence that could be afforded in support of the retention of the practice."

Efforts have been made to show you that our present prison system has failed miserably. There are undoubtedly many reforms that must be introduced to rectify the graver defects. Improved educational, recreational and work facilities would be essential. We could introduce more open prisons on the lines of those at Shanganagh and Shelton Abbey. We could follow the example of the Swedes and introduce their "furlough system" that is where prisoners are allowed out for a couple of days every few months. We could allow conjugal visits by the prisoner's spouse. However, such reforms, welcome as they would be in relation to our present penal system, cannot go to the root of the problem which lies in the very concept of prison itself. Our aim must be, not so much to reform prison conditions but to abolish as far as possible the whole concept of imprisonment. The alternatives outlined could, if properly utilised, do much towards this end. We cannot claim that we have not sufficient resources—the suggestions outlined could on the contrary save the Exchequer much of the £4½ million spend last year on the prison system. The money allocated for the proposed women's prison could instead be utilised to introduce some of the new alternatives and extend some of the old. Indeed, the shortsightedness of building a new women's prison is shown by the fact that in 1971 the daily average of women prisoners was twenty-three—and many of these were convicted of drunkenness and soliciting.

The Department of Justice and the Courts must be willing to experiment and be willing to use the alternatives open to it. A greater onus perhaps lies on the community itself. The purpose of these alternatives is to treat the prisoner in the community. If we refuse to undertake this new responsibility the alternatives just will not work.

Finally, I would commend to you Oscar Wilde's "Ballad of Reading Gaol" which goes a long way in summing up the futility that is prison.

# West Germany: The Failure of Federalism

by JOSEPH MATHEWS, Barrister at Law

The Constitution of West Germany (known as the Basic Law) describes Germany as a "Democratic and Social Federal State"—a Federation (Bund) consisting of Lands (Laender). The Germans chose the word Grundgesetz (Basic Law) rather than Verfassung (Constitution) because to them the latter word suggests a hybrid creation; the former expresses the belief that human law should be based on ultimate moral principles. But, today, the internal politics of West Germany shows that there is some distinction between German Constitutional theory and practice—and there is strong evidence to suggest that West Germany today has fallen far short of her position as outlined in the Basic Law—so much so that she is no longer a truly democratic or federal state.

To assess whether West Germany, a leading partner in the enlarged European Economic Community, falls short of being the democratic Federal State which its Constitution says it is, it is first necessary to outline briefly the necessary conditions for a Federation. If a state is to be federal it must fulfil at least five conditions. A federal state requires a written Constitution; a recognised method of amending the Constitution; a Supreme Court to interpret that Constitution; a second chamber in the Legislature is extremely useful (if not essential); and the Federation must decide how the power of making and enforcing laws is to be divided between the Federation itself and the member states. West Germany would appear to fulfil these necessary conditions. The Basic Law provides the written Constitution for the Federation. The West German Federal Constitutional Court is the recognised interpreter of that Constitution. Proceedings for Constitutional amendment are laid down in the Basic Law. A second chamber exists in the Federation in the form of the Bundesrat, and, lastly, the distribution of power and law enforcement between the Bonn Government and the Laender is worked out by law. The essential principle of Federal Government is missing in West Germany however, for the Federal principle means that the method of dividing powers in a Federal State is such that the General and Regional governments are each within a sphere co-ordinate and independent and this is not the case in Germany.

### West Germany a tight Federation

The Basic Law has made West Germany a tight rather than a lose Federation and the degree of rigid control that is exercised by the Bonn Government over the Laender is a pointer that West Germany today has not lost the "Reich Type" mind. Bonn Government to the average German means government of irrebuttable decision, whereas Laender Government usually means only implementing directives from Bonn. The status and authority of the German Laender continues to diminish, and, even within their own sphere of limited authority, member states (such as Bremen, Lower Saxony, Hesse) seem content to merely implement federal decisions and leave even their own policy-making spheres safely in the hands of Big Brother Bonn.

Federal Government is based essentially on partnership and power between National Government and the member states of the Federation. The essential point is not that the division of power is made in such a way that the regional governments are the residuary legatees under the Constitution—but the division is made in such a way that, whoever has the residual power, neither general nor regional government is subordinate to the other. In the case of West Germany in the matter of division of powers, the regional governments are very much the dominated partners and the Laender hardly qualify for the status of "partners in power" with the National Government at Bonn. In theory the area of authority of the Regional Governments covers a reasonable area of legislative jurisdiction—education, culture, religious affairs, police, local government, parts of agricultural regulation, and intra-governmental matters pertaining to their administrative agencies, finances and civil services. But, in practice, the Federal Government can enact federal laws for the Laender areas of policy and leave the Laender to administer any federal framework laws deemed necessary for the member states. But, if the status of member states of the Federation is to be worth having, all Member States ought to be completely free to legislate, independent of the Federal Government, in their own constitutionally decided spheres of authority. But in West Germany almost all areas of importance in the field of government are given to the Federal Government at Bonn—Bonn alone has power over foreign affairs, defence, citizenship, immigration, communications, Federal employees, Federal rail and air traffic and co-ordination of police activity (both Federal and State).

There is, of course, a wide area over which both Federation and Lands may legislate, but again, the Federal Government is the far stronger partner in this area and may take over the field completely if it is necessary to secure "uniformity" or if Bonn judges that the relevant matter cannot be effectively regulated by Land legislation. This field includes the Constitution and procedure of law courts, rights of citizenship in the lands, laws affecting land, industry and commerce, public ownership, laws affecting labour, social insurance and—a wide phrase—"Public Welfare"; also, non-Federal railways, road traffic, shipping and the control of pests and infectious diseases! **Where Federal and Land laws in these matters conflict, the former are always to prevail.** The distribution of power is such that, as time goes by, Federal legislation predominates more and more. Under the present system the Bonn block of power must increase and it would appear that the present relationship between the Federal Govern-

ment and the member states in West Germany is not the tie between partners in power but a relationship somewhat analogous to that of "master and servant".

**No comparison between U.S. and German Federations**

Michael Stewart, Foreign Secretary in the last Labour Government in England, has suggested that the relationship between the Federation and the Lands in West Germany resembles that between the American Federal Government and the States—but an examination of the German situation proves this statement far from fact. The American type principle of Federalism is only, in theory, operative in West Germany—the actual working of government in Germany shows how far, in this matter, theory is from practice. Unlike the U.S.A. model (where both National Government and the States maintain not only their own areas of legislation, but also independent and frequently overlapping administrative machinery), German Federalism is characterised by the fact that the vast amount of legislation issues from Bonn and is merely administered by Land bureaucracies, but the mode of Federalism which operates in a Federation should never transgress the basic principle on which this form of government rests—partnership in power.

What seriously undermines the working of Federalism in West Germany today is the position of the Bundesrat —the second chamber of the National Legislature—designed to guard the interests of the Lands against encroachment on the part of Bonn. Though West Germany and the United States are said to operate the same form of government, the Bundesrat can in no manner or measure be compared with the United States Senate.

**The Bundesrat**

The Bundesrat hardly qualifies for the term "second chamber". It is composed, not of directly-elected persons, but of members of the Land Cabinets: thus it is a Council with a watching brief rather than a full partner in the legislature. An effective second chamber in a Federal system can usually help maintain a balance or equilibrium in Federal state relations—but the Bundesrat, being more of an administrative council than a political assembly, fails even to do this.

West German Federalism is far from fair to the Land governments. The influence of the Federal Government in the spheres of authority specifically given to the States is so large that, today, the strong tendency towards uniformity in German Government leads the Laender to accept Federal administrative regulations (even where there is no legal obligation) in relation to the administration of their own Land laws. Such regulations must have the approval of the Bundesrat (which is seldom powerful enough to oppose them). Considering this development towards uniformity of government (but, perhaps, more accurately unitary government) some Germans have come to the conclusion that administrative rationalisation of government has led the German states to derive their powers from the Federal Government and its laws just as much as the cities derive theirs from the Land Governments and their laws—and this is a corruption of the Federal concept of Government.

**The Federal Constitutional Court**

It is beyond the compass of this article to examine the structure of the Courts of West Germany, but in the context of the failure of the Federal principle in that Republic, it is suggested that the Federal Constitutional Court (Das Bundesverfassungsgericht) is the Federal organ which can by a process of "judicial activism" maintain the necessary equilibrium or partnership between the Federal Government and the member states and thus restore the Federal principle. The multiple functions of this Constitutional Court combined with factors arising from its role within a code law system make even a summary description of its jurisdiction complex. A Federation requires a Supreme Court to interpret its Constitution and the West German Federal Constitutional Court is that necessary interpreter of that Basic Law. By Article 93 of the Basic Law the Federal Constitutional Court shall decide:

(1) All cases of differences of opinion or doubts on the formal and material compatibility of Federal Law or Land Law with this Basic Law or the compatibility of Land Law with other Federal Law.

(2) Differences of opinion on the rights and duties of the Federation and the Lands particularly in the execution of Federal Law by the Lands and the exercise of Federal supervision.

(3) Other Public Law disputes between the Federation and the Lands, between different Lands or within a Land unless recourse to another Court exists.

(4) All other cases provided for in the Basic Law.

**Judicial Review**

The most extensive power of the Constitutional Court is its power related to judicial review of legislation. The Court distinguishes between the exercise of "concrete" and "abstract" review jurisdiction. "Concrete" review is when the Court is asked to rule on Constitutional questions arising as aspects of an actual controversy being adjudicated in lower Courts. "Abstract" judicial review includes organs of the Federal and Land Governments contesting the Constitutionality of legislation or the Constitutional interpretation of other agencies even without reference to a particular case.

The second distinct function of the Court arises out of its Constitutional power to decide disputes concerning the extent of the rights and duties of the Federal and Land organs as well as parties functioning within them. Whereas these cases might be described as "political" if brought before the United States Supreme Court, the Federal Constitutional Court is drawn by the provisions of the Basic Law directly into the area of partisan political conflict.

A third broad function of the Constitutional Court arises from its powers to decide on petitions charging infringements of the Constitutionally guaranteed basic rights of individuals.

The Court has also the power to deprive groups and individuals of normal constitutional rights if they engage in innumerated kinds of anti-democratic and anti-constitutional behaviour.

**Is the Court Political?**

There is admittedly a danger that such a Constitutional Court may lay itself open to the charge that it is invading the legislative arena and becoming "a third branch of Government". But in West Germany it is the Basic Law and the role which it assigns to the Federal Constitutional Court rather than the Judges themselves that accounts for that Court's necessary involvement in the making of so many apparently political decisions. The Court's decisions in the last decade may indeed

have caused a certain judicialisation of what is more correctly a political area—but it has helped sustain that Federal principle of partnership which is being currently eroded by Bonn. And the Germans, as yet unused to the idea that in a pluralistic democracy decisions are made by groups and not by an all-embracing State, should welcome the presence of such a strong reviewing power as the Federal Constitutional Court.

To the German mind words such as "uniformity" and "homogeneity" are closely linked with the concept of government. The "single will" idea is not dead in West Germany even though Germany is supposedly a Federal and not a unitary State. The National Government at Bonn tends to steamroller opposition from the Lands somewhat in line with the ingrained German idea that a State should not at the same time have two contradictory wills. Diversity in government and politics does not necessarily mean disunity and the Germans might do well to remember Harold Laski's comment on government :

> We must make consent to disagree the basis of our State—therein, we shall ensure its deepest harmony.

If West Germany sincerely wishes to retain a genuine Federation then Bonn must not become too big for its boots.

**Spirit of Constitution undermined**

It is somewhat ironical to note that though there is (as is usual) a provision in the German Constitution for altering parts of the Basic Law, those articles of it which describe basic rights and which declared Germany to be a Federal and not a unitary State cannot be altered by any process whatever. The theory and the written Constitution may remain the same but the spirit of the Constitution has been seriously undermined in West Germany and that nation's Federal Constitutional Court stands out as the institution which can revive and revise a system of government which is today in practice far from Federal.

It is indeed somewhat anomalous to note in the wider context of the European Economic Community that the hopes of European Federalists such as Monet and Schumann which Conrad Adenauer always encouraged have not either been fulfilled. It is a factthat in 1957 the Treaties of Rome on the creation of the European Economic Community and a European Atomic Authority were successfully concluded, but in 1974 the Federal Union of Europe favoured at least in principle by all the Member States, has not at all advanced in spite of the phenomenal economic success of that Community.

# Reyners v. Belgium

There has been much interest in European legal circles about this case, on the freedom of professional establishment, which has recently been referred by the Belgian Conseil d'Etat to the European Court under Art. 177. The case concerns a Netherlands national, but a Doctor of Belgian law, who cannot be called to the Belgian Bar because reciprocity in the country of origin is required as a condition for admission to the Bar under Belgian law. Art. 55 states that the provisions of the chapter of the Treaty of Rome on right of establishment shall not apply, so far as any given Member State is concerned, to "activities which in that State are connected, even occasionally, with the exercise of official authority". The Belgian Court has asked for an interpretation of the words in quotation. In particular, it has asked whether they are to be interpreted in such a way that within a profession like that of avocat only activities which are connected with the exercise of official authority are excluded from the application of this chapter of the Treaty, or as meaning that this profession itself is to be excluded on the grounds that its exercise involves activities which are connected with the exercise of official authority.

Governments of Member States are entitled to submit observations on references under Art. 177 and it is understood that the U.K. Government, after consultation with the profession, has submitted observations on this case, in which the oral hearing will take place on 7 May.

The European Court's ruling on this question may help to produce a solution of the problems concerning the freedom of establishment for lawyers within the EEC which will be acceptable in Member States.

**Note**: It is understood that the Netherlands Parliament is currently considering a Bill on the reform of the legal profession, including a clause removing the nationality requirement for admission to the Bar, but this may not proceed until the outcome of the Reyners case is known.

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(The subsequent parts will follow in the June Gazette)

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**Presidential Address of FRANKLIN J. O'SULLIVAN, LL.B., Solicitor, delivered on Thursday, May 16th**

# TO ANNUAL GENERAL MEETING OF THE FEDERATION OF PROFESSIONAL ASSOCIATIONS

In an age when the controlling influence of the public sector on the private sector of society has increased alarmingly the professional organisations must reassess their relationships with the community and the manner in which they contribute to its welfare. "To promote and advance the contribution of professional organisations to the welfare of the community" is the first object of this Federation.

Running right through our society today is the hidden assumption that the satisfaction of material needs results in greater progress and welfare for our people. In developing the welfare state we have now approached the position where almost 70 per cent of the gross national product is under the direct control or command of the State and its agencies. To cope with the multitude of decisions which this expansion necessarily requires, bureaucracy has the aid of computers and newly-developed organisational disciplines. This organisational trend easily leads to the temptation to develop a society with aims that can be achieved more easily in terms of the "mass" than in terms of the individual and the variable. This temptation will very quickly be translated into action if as a society we fail to distinguish between the economic management decisions and those decisions which reflect social value judgments on alternative strategies. The right to participate in shaping the values that govern our lives is the hallmark of democracy. It is for this reason we will see a growing demand for more direct democracy and the creation of loser and special representation on different subjects. This Federation has for a considerable time urged the wisdom of participation in a National Economic and Social Council but being denied this direct participation they must in my view now consider whether they should seek more direct access to our legislators on those matters on which they have a competence to speak.

The greatest need of our society in this context of change and computerised control is to assess the value judgments on which modern economic planning is based. The conventional belief that poverty is our greatest misery has been shaken by the growing awareness of mental illness in our society: one person in five surviving to the age of seventy will be admitted at least once to a psychiatric hospital and one our of every three persons consulting his family doctor has a psychiatric aspect to his illness. These data were furnished this week by the Attorney-General. Furthermore, the naive belief in the removal of deprivations by means of the consumer society is no longer accepted as valid. The general fruits of the present affluent materialistic society have been enumerated as: alcoholism, attempted suicides, deserted and beaten wives, vandalism and violence, drugs and drug abuse. In this milieu the professional organisations which hitherto have kept aloof from value judgments on the larger goals of our society must think again and think deeply. While individuals with specialised knowledge and experience have always sought to deal with social problems and suggest remedies in an atmosphere of objective scientific truth the collective professional expertise of the professions is now required and must be made available to the public without fear or favour. All of us have a vested interest in the management of our society and it should not be beyond the abilities of our political leaders and our professions to ensure that our society of three million people progresses along the path that safeguards human liberty and happiness.

The ethical responsibility of the professions is the distinguishing mark of their status and if they fail in this ethical dimension they are no longer deserving of special respect from their fellow man or of special rewards for their services. "When needed my skill and knowledge shall be given without reservation for the public good. From special capacity spring special obligation to use it well in the service of humanity; I accept the challenge that this implies." This is the high ideal called for from the true professional man, however, often, like all sinners, he may fall by the wayside. We are a privileged elite and must give back something to society beyond the call of duty or remuneration. It is for this reason that we should consider tonight whether we can make a contribution to the good administration of society and by so doing ensure our future evolution in keeping with man's inner needs and aspirations. It is pertient here to recall the evaluation of the professions made by the Commission on Vocational Organisation when it said: "Professional organ-

isations are a corrective to the development of bureaucracy which would control all spheres of social life and which is in danger of ignoring the subtler developments and needs of professional technique and service, of imposing a mechanical arbitrary regulation and of being governed by secretly-conceived decisions. They add to the individuality and independent of social life."

Ireland today needs ideals. She needs men and women who can define our problems, assemble the factors which are important and choose the solution which is most likely to be correct. The physical and social sciences must be brought together in teamwork to resolve the problems of today and of the future. In making this contribution to the welfare of the community the professional organisation can no longer avoid the conclusion that progress will turn to ashes unless it is built on more than economic growth and material progress. A rational gleaming machine, however ingenious, cannot substitute for a loving humanity and "the managerial problem of humanity" not "the human problem of management" must be seen as the central issue in this age of "discontinuity" and the restless anxiety it has stirred in the core of man's being, concerning his identity and his destiny.

The professions should now begin to examine and to suggest the way forward in relation to these issues.

# MARRIAGE LAW REFORM—A.I.M. SEMINAR

A Seminar on Marriage Law Reform and Deserted Wives, initiated by AIM, was held in the Burlington Hotel, Dublin, on Saturday, 26 January 1974.

A deserted wife told her whole story, compulsively, how her fairly well-off business man husband left her seven years ago and how she and her children have tried to survive on the £4 per week which he pays, not directly to her, but through the I.S.P.C.C. He sold the house before she knew about it and as she had no rights to it, she had to be evicted by the new owner.

There weree over 600 people at the seminar including doctors, social workers, priests, nuns, lawyers, deserted and separated wives. Some deserted wives stood up and identified themselves as such. At coffee people came up to the experts and asked them how they could cope with husbands defaulting on maintenance, how they could get a legal separation, was it really true that if they initiated *a mensa et thoro* proceedings that he would have to pay.

### Suspicious of Promise

There seemed to be almost complete agreement on the fact that Irish family law badly needs changing. Numerous criticisms were voiced and a number of recommendations made. The Minister for Justice had tried to take the wind out of their sails by promising some reforms at the first session, but, in the words of James O'Reilly, lecturer in Family Law at U.C.D., there was general fear that "it was only wind".

The lack of adequate preparation for marriage was much discussed. Miss Frances Hishon, a social worker with the Southern Health Board, pointed out the long training and apprenticeship needed for most careers, the length of time spent in preparing for life in a religious order, and yet there were no prior requirements for the only non-dissoluble contract that most people will ever enter into. The lack of adequate preparation for marriage in the school was mentioned and the almost complete absence of sex education. Miss Hishon remarked that many girls were conditioned to believe that marriage was the great social status symbol, and that they consequently rushed into it. "If they are not married at the age of 19 or 20, they feel they are left on the shelf". She regretted the lack of social support for what was piously referred to in the Constitution as the fundamental unit of society. It was fact that we glorify the family, and legally prevented emphasised by a number of speakers that despite the the marriage from dissolving, we gave little or no help to hold it together.

Miss Hishon said that all social workers had examples of cases where there were alcoholic husbands, or husbands with psychiatric problems who were ill treating their wives.

### Deserted Husbands

The problem was that in a marital breakdown situation the woman was economically dependent on her husband and consequently powerless. Deserted husbands have problems, too, but they have greater advantages under the law, they have economic status and they have jobs. A wife who deserts her husband because he is treating her badly will usually have no right to the family home. She will have to exist on home assistance for six months before she qualifies for a deserted wife's allowance and even then she has to prove that she is deserted—not always easy. She finds it very difficult to find accommodation and often will not be able to afford it. She has no means of taking her husband to court and she finds it difficult to take a job if the children are small. Miss Hishon said that in most cases she came into contact with, one partner was not prepared to settle, which meant that a deed of separation —the cheapest means of regulating the situation—was useless.

There was general agreement that the State should not encourage couples to separate, but the point was strongly made that neither should it put unnecessary legal obstacles in the way of marriages which had obviously irretrievably broken down. In cases where, with the help of social workers and counsellors it had become obvious that the marriage was not viable "in their own interests and in the interests of their children people should be helped to plan separate mutually respecting lives rather than be left in a permanent battle-field; they should not be forced to remain in a situation where they are destroying themselves and their children."

### Free Legal Aid

Free legal aid for wives was the obvious priority, as most wives finding themselves in this situation have no means of resorting to the Courts. This was given as the reason why so few cases go to the Courts. And Barbara Hussey, chairman of FLAC, pointed out that

the other by-product of this situation was that very few legal practitioners specialised in this type of case and that there was a consequent lack of expertise and lack of knowledge of the possibilities of the law.

A young man from Northern Ireland stood up and gave four reasons for the present situation: 1, Lack of Women in Politics. 2, Rigidity of Religious Authority. 3, Social priorities of Male rights and privileges. 4, Uninspired and unwilling breaucracy. He delivered a mighty attack on the Department of Justice under this heading, calling it the Department of Injustice. A clergyman said we badly needed open and honest sex education and that the great curse of this country was hypocrisy (more applause). He said that he had worked in Manchester for ten years and that the social service workers there spent much of their time trying to solve the social problems which had been exported from Ireland, particularly girls who arrived there pregnant.

The Catholic Church came in for an amount of criticism and the Catholic theologian who spoke got a pretty rough reception. In the course of discussion a pathetic example was quoted of a woman who was afraid to go to confession for three years because her love making with her husband was not conducted in the orthodox position. It was suggested that the State should legislate for people as citizens, and not as Catholics or Protestants. It was pointed out that Church was now more lenient on the issue of annulments.

**Statistics of Catholic Annulments**

Rev. Professor Seamus Ryan gave the interesting piece of information that 45% of annulments granted in the Westminster diocese during 1972 were granted on the score of "due discretion" as opposed to traditional grounds of non-consumation, etc. The Dublin diocese, he said, tended to follow the example of Westminster and there had been some annulments granted here on these grounds also. The interesting figure of 200 annulments considered out of 346 applications in the Dublin diocese last year emerged from the discussion. He admitted that things were different outside Dublin.

Forty-six applications had come to Dublin from the Cork area and had to be returned. In the experience of AIM, the problem of broken or difficult marriage is, if anything, greater outside Dublin. The majority of their letters come from outside Dublin and the biggest problem area is Cork county and city. Incidentally, when they tried to set up a branch of AIM in Cork only 25 people turned up. AIM feel that the need to remain anonymous and not to let the neighbours know of their problems is a big issue in the countryside.

An interesting example of the inferiority of a wife before the law was quoted by James O'Reilly. Both husband and wife have mutual right of consortium in each other, which includes the right to sexual intercourse. But there are three instances where a husband can get damages against a third party for interference with his right of consortium, and a wife cannot claim. They are:

(a) an action for criminal conversation (damages against a third party for an act of adultery committed with his wife).

(b) damages for total loss of his wife's consortium (e.g., where a wife spends a lengthy period in hospital after a car crash caused by a third party).

(c) damages for loss of services (a husband is entitled to be compensated for the lack of household services his wife performs).

The reason only a husband can claim here (and I quote Mr. O'Reilly) is:

**Recommendations**

"He is given superiority in law. He is recognised as having a quasi-proprietary interest in his wife and accordingly if someone has "damaged" his property, he is entitled to be financially compensated. He can also claim damages against a third party for loss of his wife's services, because technically, his wife is his servant."

Many people pointed out the necessity for equal status before the law for wives, even if only in the interest of their own dignity and self esteem.

A number of summing up recommendations emerged from the end of the conference. They were (1) A system of attachment of earnings for the enforcement of maintenance orders. (2) The introduction of a system of family tribunals—marriage cases should be kept out of criminal law—these should have power to make separation, non-molestation, custody, maintenance and other financial orders (3) The introduction of a system of free legal aid and advice. (4) Immediate support for deserted wives and an increase in the level of allowances.

There were no proposals for the complete dissolution of marriage with a right to remarry. Nobody thought this was feasible, though some like Mrs. Catherine McGuinness, pointed out that we should realise that the fact that no legal dissolution existed did not mean that marriages did not break up irretrievably and Mr. William Duncan, a lecturer in Law at Trinity spoke of the brutality of forcing people "to live together in loathsome circumstances."

# Local Authorities' Solicitors' Association

**Officers for 1974**

Chairman: William Dundon, Law Agent, Dublin Corporation.

Hon. Secretary and Treasurer: Dermot Loftus, Solicitor, Dublin Corporation.

Committee: Messrs Michael J. Leech, Law Agent, Dun Laoghaire Corporation; Timothy Murphy, County Solicitor, Kerry County Council; Donal M. King, City Solicitor, Cork Corporation; Francis Keane, County Solicitor, Dublin County Council; Henry Murray, Law Agent, Dublin Port & Docks Board.

# CORRESPONDENCE

7th May 1974

*Private*

Mr. R. Ryan, T.D.,
Minister for Finance,
Government Buildings,
Upper Merrion Street,
Dublin 2.

*re Capital Taxation*

Dear Mr. Ryan,

The Incorporated Law Society is deeply concerned at the proposals in the White Paper on capital taxation that certain capital taxes should be charged on property.

As a practising Solicitor in the past you will appreciate personally that such a provision in legislation implimenting your proposals would create the greatest difficulty with regard to administration and would indeed make the completion of sales of property a virtual impossibility at present.

You will recollect the difficulty in obtaining Certificates under Section 6 of the Finance Act 1928 with regard to Schedule "A" Income Tax, until this was abolished some time ago.

The amounts then involved were very small and it was usually possible to deal with the situation by the Solicitor for the Purchaser retaining a small sum until the Section 6 clearance Certificate was available from the Revenue Commissioners when the sum was released to the Vendor.

The Section 6 Certificate usually took months to obtain.

The Society urge strongly upon you that you should either abandon or at least postpone, until adequate machinery is available, the provision that any capital taxes should be charged on property and permit the position to remain that capital taxes would be the personal liability of the Vendor.

A decision could always be made to introduce a charge Clause in later legislation if it was felt necessary, after some experience of operation had been gained.

There is at present no machinery for the furnishing of Certificates of Discharge by the Revenue Commissioners and there are already sales which it is not possible to close as the Purchasers are not prepared to accept property subject to a possible claim by the Revenue Commissioners for tax unpaid by the Vendor.

The Society regards this separate issue as very urgent from the point of view of the every day administration of the property market particularly in relation to the purchase of private dwelling houses.

Yours faithfully,

James J. Ivers,
*Director-General*

## HOW THE NEW LEVELS ARE INTENDED TO OPERATE

**Capital Gains Tax**

It is intended to:

(1) Reduce the rate from 35 p.c. to 26 p.c.

(2) Exempt all gains realised on a principal private residence standing on grounds of up to one acre.

**Annual Wealth Tax**

The following changes will be made:

(1) There will be a single rate of 1 p.c. instead of the rates of 1½ p.c. to 2½ p.c. indicated in the White Paper.

(2) Exemption thresholds will be increased to £100,000 for a married man and to £70,000 for a single person, instead of thresholds of £60,000 and £40,000 in the White Paper. In addition, there will be an allowance of £2,500 for each minor child and a new exemption threshold—of £90,000—for widowed persons.

(3) These thresholds will be revised every three years to take account of inflation, and such valuations will remain valid for three years.

(4) Three new exemptions will be introduced—1, Principal private residence standing on grounds of up to 1 acre and normal contents; 2, Livestock and bloodstock, and, 3, Pension rights.

(5) Instead of the test for liability in respect of what might be called "world property" being domicile or ordinary residence as proposed in the White Paper, it is intended to apply a test of domicile and ordinary residence.

(6) Other aspects of wealth tax to which consideration is being given include the form of relief appropriate for productive capital used in business. Because of varying needs of industries and businesses it is not easy to define a suitable code for universal application.

Further discussions will be held with the interests concerned to identify special problems.

**Income Tax**

(1) Contemporaneously with the introduction of wealth tax, the top rate of income tax will be reduced from 80 p.c. to 70 p.c. and this will apply to taxable incomes from £10,350 instead of £8,350, as at present.
This will be achieved by substituting for the present two bands of taxable income at 50 p.c. and 65 p.c., three bands of £2,000 each, chargeable at rates of 45 p.c., 55 p.c. and 65 p.c. Relief will be given to all taxpayers at present chargeable to income tax at a rate of 50 p.c. or over.

(2) Despite the modification in the income tax rates, higher thresholds and lower rate of wealth tax, the combined rate of income and wealth tax might, in some cases, still absorb an unacceptably high proportion of total income. Various ways of meeting this problem are being examined.

Some overall limit might be set on the percentage of income to be taken by these two taxes, but with the proviso that any consequential abatement of wealth taxation would not reduce the Wealth Tax payable below a certain percentage of the assessed liability.

Land Registry, Central Office, Dublin 7
6th March 1974

*Solicitors must Investigate Title in Leasehold Estates*

Dear Mr. Ivers,

You will remember we met on the 14th February 1974 in the Department of Justice to discuss various matters that were irking members of your Society in relation to the Land Registry.

**Leaseholds**

In the course of the proceedings I tried to make clear that the practice of the Land Registry officials making their own searches in the Registry of Deeds and Judgment searches in the case of applications for the registration of title to leases made necessary by Section 70 of the Registration of Title Act, 1964, and Rule 123 of the Land Registration Rules, 1972, would cease. Solicitors must make their own searches as they do in unregistered conveyancing. The practice grew up in order to facilitate solicitors in the early days of the operation of the Act and because at that time the searches were of short duration and there was little arrear in the leases section and few leases were then registered.

I would ask you to place this rule before your Council to the effect that in future a common search or a verified hand search and a judgment search will be required as additional necessary documents on such applications. In the special case of leases in this office forming part of cases in arrear, in general no searches have been enclosed with most of them. In many of these cases the solicitors concerned have searches in their files. These will be requisitioned by us and all other necessary searches will be carried out in accordance with the Land Registry practice referred to above. Apart from these special arrear cases *no* searches other than a continuation search in the Registry of Deeds or the Judgment Office will be carried out by the Registry staff in future.

**General Practice in Applications for First Registration and Conversion of Possessory Titles**

In any of these applications which require searches it is the duty of the applicant to supply such searches at his own expense. In future, therefore, no search other than a continuation search in the Registry of Deeds or Judgment Office will be carried out by Registry officials.

Yours sincerely,

Desmond McAllister.

*Registrar*

# THE REGISTER

**REGISTRATION OF TITLE ACT, 1964**

**Issue of New Land Certificates**

An application has been received from the registered owner 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 wil be issued unless notification is received in the Registry within twenty eight days frlm the date of publication of this notice that the original certficate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 31st day of May, 1974.

D. L. McALLISTER,
Registrar of Titles

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

**Schedule**

(1) Registered Owner: Michael J. Hallahan; Folio No.: 6353; Lands: Moneycusker; Area: 114a. 1r. 24p.; County: Cork.

(2) Registered Owner: William Dixon; Folio No.: 9946r; Lands: Ballynahone; Area: 70a. 0r. 88p.; County: Donegal.

(3) Registered Owner: Peter McGovern. Folio No.: 455r; Lands: Curraghglass; Area: 6a. 0r. 4p.; County: Cavan.

(4) Registered Owner: Ernestine Obenaus; Folio No.: 8628; Lands: Garrauesoge; Area: 18a. 2r. 32p.; County: Cork.

(5) Registered Owner: John Buckley; Folio No.: 31979; Lands: Dromskarragh Beg; Area: 21a. 3r. 32p.; County: Cork.

(6) Registered Owner: Tobias Joyce; Folio No.: 8790Rev.; Lands: Pass of Kilbride; Area: 108a. 3r. 0p.; County: Westmeath.

(7) Registered Owner: Thomas Murphy; Folio No.: 8514; Lands: (1) Kernanstown; Area: (1) 8a. 2r. 0p.; Lands: (2) Chapelstown; Area: (2) 13a. 2r. 10p.; Lands: (3) Chapelstown; Area: (3) 16a. 3r. 10p.; County: Carlow.

(8) Registered Owner: James Lambert; Folio No.: 982; Lands: Ballynastraw; Area: 13a. 1r. 0p.; County: Wexford.

(9) Registered Owner: William Ryan; Folio No.: 951; Lands: Bosnetstown; Area: 1a. 2r. 2p.; County: Limerick.

(10) Registered Owner: Eileen Whelan; Folio No.: 5475; Lands: Lissernane; Area: 16a. 3r. 10p.; County: Tipperary.

(11) Registered Owner: Annie Tunney; Folio No.: 4131r; Lands: Tullymore; Area: 10a. 3r. 14p.; County: Donegal.

THE GAZETTE OF
THE INCORPORATED
LAW SOCIETY
OF IRELAND

June 1974.
Vol. 68 No. 6

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# Ordinary General Meeting

An Ordinary General Meeting was held in the Old Ground Hotel, Ennis, Co. Clare, on Saturday, 11 May 1974, at 9.15 a.m. The President took the Chair.

By permission of the meeting, the notice convening the meeting was taken as read. The Director-General read the minutes of the last ordinary meeting of the Society which were duly signed.

Mr. McClancy, President of the Clare Solicitors Bar Association, welcomed the members of the Society to Co. Clare and hoped they would enjoy their stay in Ennis.

On the proposal of Mr. Osborne. seconded by Mr. B. St. J. Blake, the following members of the Society were appointed as Scrutineers for the ballot for the election of the Council for the year 1974/75 : Messrs. R. J. Branigan, T. Jackson, B. P. McCormack, A. J. McDonald and R. P. Tierney

## ADDRESS BY MR. PETER D. M. PRENTICE, PRESIDENT

Dear Colleagues,

My purpose this morning is to report progress on developments in the Society's affairs in the six months since the Annual Meeting last November. However, since the occasion is a momentous one, I feel you will bear with me if I concentrate on what has been the major consideration of the Director General and the Council in that period—the reform of our existing system of legal education and training for persons seeking to practice as soliictors.

The statutory functions in regard to the education and training of persons seeking admission to the solicitors' profession are performed by the Incorporated Law Society of Ireland. The Society's functions are derived partly from the charters of 1852 and 1888 and partly from the Solicitors Act, 1954.

### Brief history of legal education

Historically the Society's functions in regard to legal education and training date from the passing of the Attorneys' and Solicitors' (Ireland) Act 1866. Before 1866 all solicitors were required to be members of the Society of Kings' Inns by virtue of certain resolutions passed by the Benchers in 1793. At that time there was no statutory obligation on any professional body to provide legal education either for barristers or solicitors. By the statute 7 George II cap. 5 an applicant for admission as an attorney was obliged to prove by affidavit that he had served apprenticeship of five years and under the statute 13 and 14 George III cap. 23 "moral examiners" had been appointed by the Courts, but the examination was perfunctory and there was no real test of the candidates' legal knowledge of attainments. Between 1793 and 1866 the Council of the Society, which had received a royal charter in 1852 sought to persuade the Benchers of the day to institute a system of lectures and examinations and some sort of system was instituted in 1860 but it was generally regarded as unsatisfactory and insufficient. By the Attorneys and Solicitors (Ireland) Act, 1866, passed at the instance of the Society, solicitors were no longer required to be members of the King's Inns and the control of the legal education and training of attorneys' apprentices was transferred by the Society of the King's Inn to the Law Society acting with the consent of the judges. The matter was taken a step further by the Solicitors (Ireland) Act, 1898 which transferred the rule making functions in regard to legal education, examinations and the appointment of lecturers and examiners from the Judges to the Society. Finally the Solicitors 'Act 1954 laid down the statutory requirements in regard to education and training and gave the Society a fairly wide rule-making power to deal with all necessary matters regarding lectures, examinations and training within the framework of the Act.

### Solicitors 'Act very rigid and restrictive

The present educational requirements for solicitors are set out in the Solicitors' Acts 1954 and 1960 and the Regulations made thereunder. They provide for a period of apprenticeship which shall be :

(a) Three Years for a person who holds a degree of Bachelor of Arts or degree which in the opinion of the Society is equivalent thereto in the N.U.I., University of Dublin or in any of the Universities of Ireland, England, Scotland or Wales.

(b) four years for a person who, as a matriculated or non-matriculated student of a prescribed university, attends the prescribed lectures and passes the prescribed examinations of the Law Faculty for a period of two collegiate years;

(c) three years for a bona fide clerk with seven years service to a solicitor;

(d) five years for any other person.

The Act requires the Society to hold :

(1) a preliminary examination;

(2) a final examination which may be divided into two or more parts, now divided into three parts;

(3) a first and second Irish examination.

Under the Acts and present regulations, to be eligible for apprenticeship, the applicant must have attained the age of 17 years and have passed the Preliminary Examination and the First Irish Examination. Exemption from the Preliminary Examination is given in cases where the applicant has matriculated in the appropriate subjects.

To be eligible for admission to the Roll of Solicitors, under existing regulations the apprentice is required to have passed :

(1) First Law Examination,

(2) Second Law Examination,

(3) Third Law Examination,

(4) Examination in book-keeping,

(5) Second Irish Examination.

Under existing arrangements, the Society requires apprentices to attend University lectures in Property,

Contract and Tort for one full year before sitting for the First Law Examination and University lectures in Equity for one full year before sitting for the Second Law Examination. In practice, the present arrangements allow a student to attend the Society's lectures and the degree course at one and the same time. This gives rise to difficulties in the scheduling of lectures which are compounded by the fact that in Dublin the University lectures are held in either T.C.D. or University College, Belfield, and the Society's lectures are held in University College, Earlsfort Terrace, Dublin. There is also the problem of providing properly for graduates of U.C.C. and U.C.G.

At the moment there are upwards of 650 apprentices on the register of the Society. Slightly over 100 qualify as solicitors each year and the number attending lectures varies between 100/150. Due to the limitations of lecture space, the problem the universities have of taking an unlimited number of non-degree students and the difficulty of securing apprenticeship, it would appear as if from 100 to 120 is the practical upper limit of the number of students that can be handled in any one year.

## Educational policy of Society

Since 1961 it has been the stated policy of the Society that :

(1) The present division of functions between the Universities and the professional bodies should be continued, namely the Universities should provide lectures on the theoretical aspects of law while training in the practical application of these subjects should be given by lecturers provided by the professional bodies.

(2) A university degree should be required before entering into indentures of apprenticeship.

In Britain the Report of the Committee on Legal Education (ORMROD REPORT) published in March 1971 recommended the intending solicitors should have a Law Degree obtained as a result of a three-year full-time academic course before commencing professional studies. The Committee divided on the issue of whether the universities or the profession should assume responsibility for the year of professional studies. The profession there favours assuming responsibility for the professional stage of training but appreciates that the cost of training may be too great for the profession to carry. In Northern Ireland where the legislation is very similar to that obtaining in the Republic, a degree has been specified as the requirement for apprenticeship (except in the case of the law clerk) since 1949. For the future it is proposed that the basic professional training should be provided in an Institute of Law working in association with the Queen's University, Belfast. Insofar as the Republic is concerned the view of our Society is that the professional training should be provided by the Society.

## New Education Regulations from October 1975

Following consultation with the Universities, the Society proposes that as from 1 October 1975 all intending apprentices other than a bona fide clerk to a solicitor with seven years service, will be required to hold a degree. This requirement is to be specified in the Regulation which with the approval of the Council will be made at the Council meeting next Thursday. The particular regulation is being made at this stage so that second level educational institutions can have as long a notice as is feasible of the change. (A minimum of one year has been suggested.) Nearer the time of the change, there will be need for further and more detailed regulations setting out :

(a) the transitional examination arrangements for those already admitted to apprenticeship, and

(b) the examination and other arrangements under the new situation.

It is visualised that these regulations will not be made until early in 1975 and that the intervening time will be used by the Society to clarify all outstanding matters as to course details, etc. with the Universities.

## Details of Society's Course

The Society has agreed the outline of its course with the Universities and has established a joint committee with them to examine and agree the detailed syllabus of the course as outlined. This Committee is working harmoniously. This will take some time since discussion with the existing teachers and examiners will be necessary to establish the desired syllabus for each of the subjects in the proposed course. It will be necessary also to establish how much of each course will be given by way of lecture and how much by way of discussion group. A problem here will be the recruitment and training of interested teachers and tutors in suitable numbers. On that account, it is visualised that the introduction of an improved syllabus in each subject will be a gradual procedure. As with the universities, the syllabus will be revised from time to time according as teaching expertise is developed. It is stressed that in each of the subjects listed, the emphasis in the Societys' course will be on the practical aspects as they apply in the everyday work of a solicitor's office.

It is visualised that in the First Year as an apprentice lectures and group discussion will take place from Monday to Friday from 9.00 a.m. to 11.00 a.m. and from 4.00 p.m. to 6.00 p.m. and that in addition tutorials will be held for 2 hours per day. The arrangements for the second study period will not be as intensive, since to some extent the apprentice will be specialising in subjects of his own choice. At the end of the first year of study the apprentice will be required to sit a 2nd Law and Book-keeping examination (new form). He will then go to his master's office freed from lectures and examinations and for the best part of two years should learn the practice of his profession. About three months after the end of the second period of study the apprentice will be required to sit a final examination. It is intended that this particular examination will be broad rather than detailed in its approach. Candidates will be specialising in subjects of their own choice.

## Admission to Law School

Under the new arrangements for admission to the Societys' Law School an applicant with a Law Degree will be allowed to commence subject to passing the statutory First Irish Examination and obtaining a master.

Where the applicant has any other degree, again subject to passing the statutory First Irish Examination and obtaining a master, he will be allowed to commence a 3 year apprenticeship. Before being admitted to the Society's Law School, he will be required to pass an examination at degree level in Contract, Property, and Tort, Constitutional Law and two optional subjects. It is hoped in discussion with the Universities, to arrange that such persons will be in a position to attend the appropriate University lectures and sit the appropriate University examinations, which would be recognized for the Society's purposes.

As I mentioned earlier, there are approximately 600 apprentices in training. There are some 1500 solicitors in practice. By comparison Scotland with a population of 5,212,000 and a comprehensive system of legal aid, has 3,500 solicitors in practice. Notwithstanding our high apprentice/solicitor ration, there is an unsatisfied demand for apprenticeship. The Society being conscious of the problem of obtaining masters, agreed on 7 February 1974, that in these special circumstances, it would be prepared to consider applications from solicitors generally for second apprentices subject to there being a minimum of a year between the commencement of the individual apprenticeship. Also, as an exceptional measure, it agreed to allow solicitors of 5-7 years standing to take apprentices subject to the Society's approval in each case. While the Society has taken steps to ease entry into the profession, I feel that some comment is necessary on the capacity of the profession to absorb the numbers which now appear to be seeking admission. In 1960 the Society had an intake of about 30 apprentices per year, whereas today that figure is rising towards 150 a year. How far this is a reflection of the difficulty of getting into other professions through the raising of the University entrance standards, is difficult to say, but undoubtedly it is a factor. Under the new arrangements when entry to the profession at the academic level will be broadly on a par with that to other professions, the actual numbers seeking admission may decline somewhat. On a comparison with Scotland given that a scheme of free legal aid and advice in civil matters is inaugurated, then it is reasonable to suggest that the number of practising solicitors could grow to about 2,000, an increase of one third over the existing number in practice. Also, it is possible that the solicitor of the future may turn his thoughts towards employment in the industrial, commercial and administrative world in either a specifically legal situation or in a managerial assignment.

Concluding on the subject of legal education, might I say that the Society is very conscious that there may be criticism of the length of apprenticeship—3 years for a person with a University degree. This is a statutory requirement provided for under Section 26 of the Solicitors' Acts 1954-1960 and the Second Schedule to the Act. It cannot be altered without amending legislation. As and when an opportunity presents itself for amending legislation, something we do not anticipate at an early date, the position of apprenticeship will be reviewed. In the meantime, the Society will have had the opportunity of reviewing the situation in light of experience gained with the new arrangements. Since 1961 we have tried in vain to obtain amending legislation. Professor Ryan of Cork, Mr. Sweeney of Galway, and the Minister have been most helpful.

**Other activities of the Society**

Turning briefly to other areas of the Society's endeavours you should be aware that:

The Society and local Bar Associations have commented in detail on the Reports on Court Practice and Procedure.

The Society has through its expert Committees assisted the Department of Justice, the Department of Industry and Commerce and the Dail Committee on Secondary Legislation on E.E.C. matters.

The Society has commented, as opportune on pending legislation and Government reports. At present its major concern is to comment on the various White Papers on Capital Taxation. As part of its endeavours in this area, it has sought and will be obtaining next week the advice of a Danish expert in the area, Mr. Koch Nielsen, who is coming over specially to assist us.

As a conscious policy, the Society is making considerable efforts to improve communication and liaison with its members throughout the country. Here I would like to thank the committees and members of the local Bar Associations for their co-operation with the Director General and for the welcome and the hospitality shown to him. The interchange of views on the occasions of his visits have been most useful in the development of the Council's ideas and policies.

The general current view is that premiums should not be paid by apprentices, but apprentices should be paid according to the difficulty of work they perform. The Society has paid attention to the reports of the Committee on Court Practice and Procedure. Mr. Osborne's excellent report on Court Organisation has been generally commended and is being published in the Gazette.

By way of conclusion, having outlined the activity, and I hope, progress of the Society I feel you would like me to express your appreciation to the members of the Council and the various Committees of the Society for their efforts.

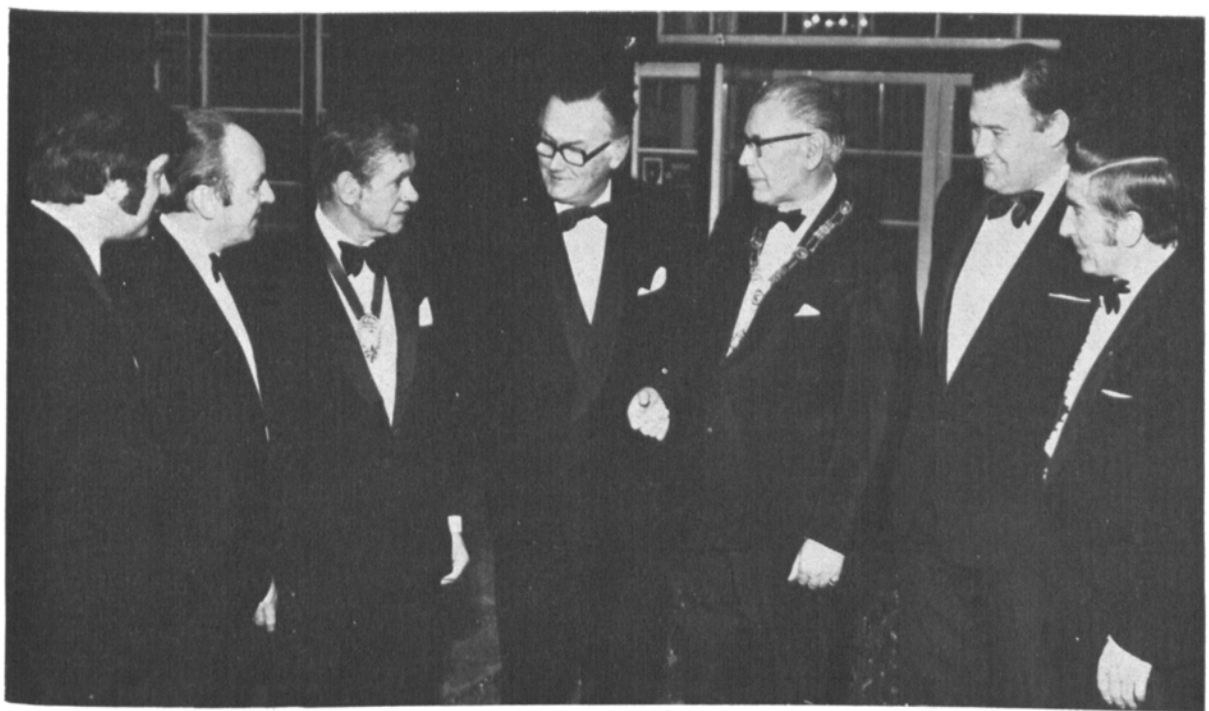
In the course of the discussion, Mr. Gerard Doyle mentioned the difficulty of apprentices finding masters and asked what steps were being taken in the education of suitable law clerks.

Mr. Dundon, Chairman of the Court of Examiners stated that this matter had been fully considered by them, and that the implementation of the programme outlined by the President would call for the appointment of many additional examiners and lecturers.

Mr. Brendan O'Maoleoin complimented the Director-General upon the more popular image which the solicitors were getting. While praising the *Gazette*, he thought that, with some assistance, the publications of the Society could be expanded, in association with the Council of Law Reporting. The Director-General, while stressing that the resources of the Society were limited, considered legal education as a priority and hoped that the difficult position in regard to Irish legal textbooks would improve. Messrs. T. C. G. O'Mahony, Niall O'Neill and Michael O'Connor also spoke. Mr. James O'Donovan complimented the President upon the reforms in legal education which he had announced.

The President then declared the meeting closed.

From left to right, back row : J. Boland, Clare County Manager, Harold Horsfall Turner, Secretary-General, The Law Society, London, James J. Ivers, Director General, The Incorporated Law Society, Ireland, R. Laurie, Secretary, The Law Society, Scotland, Michael Houlihan, Hon. Secretary, Clare Bar Association, Sydney Lomas, Secretary, The Incorporated Law Society, Northern Ireland, Martin Bradley, Shannon Tourism Organisation. Front row : J. B. MacClancy, President, Clare Bar Association, D. P. Honan, Chairman, Ennis Urban Council, Peter D. M. Prentice, President, The Incorporated Law Society, Ireland, Tom Mannion, Shannon Tourish Organisation.



From left to right : Martin Bradley, Shannon Tourism Organisation, J. Boland, Clare County Manager, J. Sutherland, President, The Law Society of Scotland, J. B. MacClancy, President, Clare Bar Association, Peter D.. M. Prentice, President, The Incorporated Law Society, Ireland, Michael Houlihan, Hon. Secretary, Clare Bar Association, Tom Mannion, Shannon Tourism Organisation.

## THE SOLICITOR'S PUBLIC IMAGE

Mr. Bruce St. John Blake, Vice-President, presided at the first lecture on Saturday, May 11. The subject was The Solicitor's Public Image and it was brilliantly delivered by **Mr. Gerald Sanctuary** (Secretary, Professional and Public Relations, The Law Society).

Every solicitor is really his own best Public Relations Officer. Anyone who takes up responsibility for protecting, and indeed enhancing, the public image of lawyers has set out across an uncharted sea full of rocks, hidden reefs, sunken ships, treacherous currents and even hostile submarines. Also, the crew are far from being united as to their ultimate destination, there often being as many opinions on a subject as there are solicitors considering it.

There are many, of course, who see no reason to set sail at all. "What need has a profession of an 'image'?", they ask, "We are not selling packets of corn flakes, nor do we figure in the pop charts. We are doing a very necessary job, we are needed by the community; let us simply get on with our work to the best of our ability, and people can take us as they find us."

I mentioned rocks, reefs, currents and submarines. The rocks and reefs are difficult to avoid; they represent the delays in the processes of law, the difficulties experienced with national and local government officials, and the problems unnecessarily inflicted on us by the legislators. If we are not very careful our clients will blame us for the existence of these legislative hazards, and we deserve to be blamed if we fail to explain them and fail also to give a regular account to clients of the way in which we are negotiating our way round them.

The sunken ships are those members of the profession who have capsized through their own inefficiency or dishonesty. Hundreds of satisfied clients make no news; one crooked solicitor among thousands makes the local and even national, headlines.

As to treacherous cross-currents, I can speak of these with some authority; they are those elements in the mass media of radio, television and the press who set out aggressively to prove that solicitors are pompous, dilatory and expensive. We have developed ways of navigating through these tidal waters, and I will describe them.

The submarines are those who compete with us for our more remunerative work. Tax, Estate and Wealth Duty Consultants lurk in shoals in the deep waters of the City of London, and throughout the country the Banks are now trying to get hold of the profitable end of the Executor and Trusteeship market. There are even a few pirates trying to set themselves up as cheap conveyancers, but they are not earning themselves a very good name, and the recent dramatic fall-off in the property market in England has not helped them.

### The current activities of Solicitors

In considering the public image of an individual, a company or a group one must first perceive the reality behind the image. It may be helpful to see ourselves as others see us, but it is just as important to see ourselves as we really are. I am a solicitor, and I think of solicitors as men of affairs, experienced in solving the practical and legal problems of men, women and corporations, most especially in relation to the property they own.

What other work do we do? In my work for the Law Society I have recently brought up-to-date the series of leaflets entitled *See A Solicitor*. These are based on our perception of the current activities of the profession. They deal not only with such matters as house purchase and the making of Wills, but also with executorships and trusteeships, with Advocacy, taxation, starting a business, and of course matrimonial affairs. I am well aware, of course, that divorce is not yet legal in the Republic of Ireland, but in my own country there are now about 110,000 divorces a year. This compares with rather less than 400,000 marriages, but the figures produce something of a false impression because many of the recent divorces are based on separation for a period of five years or more. Many people who could not previously obtain a divorce are now doing so on this ground.

The *See A Solicitor* leaflets also deal with motoring problems, and explain the services offered by solicitors to landlords and tenants. These leaflets indicate our view of what solicitors actually do. They are a reflection of the way in which we see ourselves.

### Public image of solicitors

But how are we seen by others, by our clients, and by those members of the general public who have never had occasion to consult a solicitor? A little over a year ago we conducted a survey in order to discover the answers to these questions. You will be glad to hear that, of those questioned who had already consulted a solicitor, their opinion of our profession was more favourable than those who had not. Generally, in fact, we stand fairly high in the public's esteem. Most popular are the nurses, doctors and surgeons, and we come in the next group, with the bank managers and clergy. In fact, we are sandwiched in between the bankers and the ministers of religion, less popular than the former but marginally more liked than the latter. Right at the bottom of the popularity stakes are Members of Parliament, and Estate Agents.

Yet the survey we commissioned was not primarily designed to show how much we are liked; much more important is the type of work that the public think we do. It will not surprise you to learn that they already knew that solicitors do conveyancing work, and that we are skilled in the preparation of Wills. Also, they will tend to turn to us when accused of crime, and when their marriages get into such difficulty that the resulting conflict must be settled in a Court of Law. Bt let me go back for a moment to the claim that solicitors are men of affairs, able to solve the practical and legal problems of their clients. The unpalatable fact is that, in England and Wales at least, the public do not perceive us as particularly skilled in matters of finance.

This discovery is somewhat galling. When I was in private practice I fancy that I had a fair grasp of the taxation and Estate Duty problems of my clients, and knew a good deal about the best ways of solving them. I like to think too that I was reasonably acquainted with such matters as insurance, the raising of money on long-term and short-term loan, the vagaries of the stock market, the significance of shareholdings in private companies, and so on. I was experienced in administering large trusts, and this involved the general management of their affairs, and collating the advice given by accountants, stockbrokers, bank managers, insurance advisers, and others. No doubt you also consider that you possess a similar competence. Unfor-

tunately, our skill in matters financial is little known to the general public. They will certainly turn to an accountant to solve their taxation problems, when in fact a solicitor, with his more intimate knowledge of the family and its affairs may be able to offer better all-round advice. They are as likely to go to a Bank in relation to trusteeships as they are to a solicitor, and when they have a substantial insurance claim, they will approach the Insurance Company itself, rather than seek independent legal advice. For help with investment problems they will probably go direct to a stock-broker; if they have an employment difficulty—currently referred to as an 'industrial relations' problem—they will go to their Union representative rather than to a lawyer.

**Competitive role of solicitors**

There is therefore much to be done if we are to be perceived by the public as we think we should be. It is comforting to know that we are reasonably well trusted, and indeed accepted as one of the essential professional services. Yet it is worrying, to say the least, that the extent of our real competence is not appreciated.

Why is it worrying? Because we have to make a living in this egalitarian society. Gone are the days when a solicitor would live comfortably on fees charged to three or four well-to-do families. Today we are more obviously in the market-place, competing in many areas with others who have an equally good head for business.

This is why the public image of the solicitor matters today, where in the past it was less significant. Our income is directly related to our perceived role in society, and we are in competition with others when it comes to much of the best business. We have no monopoly in the formation of companies for clients, nor are we the only people permitted to advise others on the best way to order their affairs so as to pay the least amount of tax. Although solicitors are normally permitted to represent clients at Tribunal hearings, many others are also given this right. We claim a skill in advocacy, but there are others, such as Union officials and social workers, who are also operating successfully in this field.

Our public image is particularly important in the case of those people who have a practical, financial or legal problem and who have not previously consulted a solicitor. If they see our profession as distant, pedantic and over-expensive, they will turn to someone else for help. We still suffer somewhat from the Dickensian image. I see television programmes quite frequently which portray solicitors as rather witless and doddery characters. Admittedly, in Britain we have had the programme, *The Main Chance,* in which an aggressive and somewhat over-sexed solicitor plays the central character. Yet there is little doubt that the public at large regard their first visit to a solicitor with as much enthusiasm as a similar call on the dentist as illustrated in BBC 2 in *The Carnsforth Practice.*

This is the age of communication. Events occuring in a distant part of the globe within the last few hours are immediately brought to the television screen in the corner of our living-rooms. A hijacking in the Persian Gulf, a Congressional election in Wisconsin, a football match in Belgrade, are all instantly reported to us, with suitable comment. If a new law is proposed, lawyers are asked what they think about it. If a critical comment about the legal profession is made by a garrulous Scottish Member of Parliament, the mass media are on the telephone to us within the hour.

**Views should be expressed publicly**

We are listened to. In the three years I have been at the Law Society there has not been one occasion when a Press Release from our office has gone unnoticed by the mass media. If we were to fail to say what we think, then the public would be left to form their own impressions about us, basing their views to some extent, no doubt, on what our critics or detractors say. We need to look after our public image by having something to say for ourselves.

Not that I am in any way opposed to criticism. If we are unable to cope with it, we cannot be much good at our own profession. And of course we have critics within, as well as without. There are solicitors who would like to see the Law Society adopt different policies; there are some who want to see our work in administering the Legal Aid Scheme handed over to some other authority; others say that the Society should not be involved in matters of discipline and professional conduct. I believe they are quite wrong, but critics render a public service by stating their views, and we render a greater one by explaining their errors.

It is not always easy. A critic is usually responsible to no-one but himself, but a professional association must take time for thought before it makes public statements or responds to criticism. We cannot afford to seek to capture the headlines with sensational statements, for we have a reputation to uphold, and people rightly expect us to behave in a responsible way. Thus it is that our own criticisms are couched in moderate language and carefully argued, not put together in sensational terms in one of the more popular taverns of Fleet Street.

I wouldn't have it any other way. People have come to rely on what we say, and would be much disappointed if they thought that we were getting into the babit of crying "wolf". At the same time, the eyes of the world are upon us, and if we make no effort to explain ourselves then some folk are bound to form a false impression of us. Yet I believe that salesmanship to be a mistake. As I mentioned earlier, we do not sell packets of cornflakes. Nor do we sell wills, contracts, settlements or statements of claim. We offer a personal service, and we deserve to be well paid if this service is of a high quality.

**Image to be built on knowledge of work**

So our "image" is to be built on public knowledge of our work and the nature of our skills, not on the more obvious end-products of our activity. I am not sure how far it is appropriate to mention it here in Ireland but the client who is legally divorced with the assistance of his solicitor has not necessarily been well served. Lord Goodman said not long ago that the solicitor who is nothing more than a lawyer is not much of a lawyer. So the client who has obtained the divorce she sought may have been ill-served by her legal adviser if reasonable prospects of reconciliation were ignored by him. Equally, if the terms on which the divorce is obtained are harsh on her, or if her solicitor has failed to advise her effectively in relation to matters of custody and access, the division of property, the adequacy of maintenance or the provision of pension rights, then she will have just as much right to complain as the young lady who found the famous snail in the ginger-beer bottle or thought she did. The solicitor with

a matrimonial practice is not selling divorces; he is providing a service as guide, counsellor and friend. Therefore it is a regular and sustained campaign of public information about our services that the profession needs, and I trust that this is what we are providing.

There is one blind alley in pursuing public relations for solicitors. One can all too easily be tempted into frantic activity by the inaccurate and provocative statements of others but this should be resisted. Many is the time when I have been telephoned by a solicitor and asked—sometimes told—to point out that this or that statement on the radio or in the press was wrong, unfair, even slanderous. There are of course occasions when a false statement is made by someone of consequence, and this has to be corrected; but one finds far more often that the attempt to deny an unfair remark or report does more damage than did the original slur. After all, if a leading politician—or for that matter a politician who tends to follow rather than lead—says that solicitors are expensive parasites, the only way in which one can respond to this is to issue a statement that repeats the original slander, followed by a denial. Why should the slander get a second hearing? No, it is far better to ignore such remarks and to continue with a carefully planned programme that explains what solicitors are, and the value of the work that they do.

We all want to be liked, or at least approved of. Most of us would prefer the public to recognise the need for lawyers, and to accept that we meet that need. The Department at the Law Society for which I am responsible is entitled the Professional and Public Relations Department, and one of our tasks is the maintenance of good relations between the Society and its members. Strangely enough, I believe that one of our most effective exercises in Professional Relations during the past two years was the publication of the results of the survey that showed that solicitors were far more popular than they had themselves thought.

**Better understanding by public**

If public relations for solicitors are correctly described as "the improvement of relations between the profession and the public', then it is necessary to think in strategic as well as tactical terms. I have of course been discussing strategy up to this point rather than tactics. We must first aim to be better understood by the general public before we can hope to be appreciated—and instructed to act on their behalf. Which brings me to a yawning gap in public understanding, their virtual ignorance of what law is all about. What are the most popular phrases in day-to-day use which refer to the law? "I'll have the law on you", "It's against the law", "Ignorance of the law is no excuse", and "The law is an ass". As to the last two quotations, I have always thought that only someone ignorant of the law could truly regard it as asinine, but the first two remarks, both very common, disclose one of the greatest public misunderstandings about the law, namely that it is concerned mainly with crime.

The political separation of our two countries is not so far distant that our law and yours have little in common. I imagine that from time to time you may even have occasion to refer to that great work *Halsbury's Laws of England.* At present it consists of some 56 volumes, and only one of those volumes has to do with crime. Yet it is with crime that the law is associated in the public mind. Why? Because no conscious effort has been made to tell the people about the law, the fabric upon which the tapestry of our social and political life is woven.

**Whole image of view of law should be taught**

I suggest that you ask yourselves how much you learned about the law at your own school. Not very much, probably. In years of private education all I ever gathered was some information about the respective roles of the Monarch, the House of Lords and the House of Commons in passing legislation. I learned nothing there of contracts, of the law relating to the family, of the meaning of a hire purchase agreement, a lease, a mortgage, or indeed the law about travelling on the roads. Surely a serious attempt should be made in our schools to explain such basic essentials as these? I hope you will be interested to learn of some of the activities we have undertaken at the Law Society over the past three years.

**Advertising of professional activities**

For some time we have indulged in a form of institutional advertising by producing the *See a Solicitor* leaflets to which I have already referred. The great majority of these leaflets are sold to the profession at cost price, and we also produce a metal stand designed to hold the leaflets. Solicitors buy the stand and put it in their waiting-rooms.

We also send these leaflets to the major newspapers in England and Wales, to the EEC and Independent Television companies, and to the national women's magazines. Many of these give advice to their readers, and they often send the leaflets out with their letters. The leaflets are also displayed in some libraries and Citizens Advice Bureaux.

There are over 28,000 practising solicitors in England and Wales, and a total of 120 local Law Societies. We are growing at the rate of 1000 a year. Some local Societies have as few as 40 members. Others are very large, and several are considerably older than the Law Society itself. It is through these local Law Societies that much of the profession's publicity effort is organised. The great majority of Societies have a *Press Officer,* a term preferred to "Public Relations Officer", who is responsible for contacts with the local press, also radio and television, in his area. From our Chancery Lane Office we are able to help him a good deal. We have a large and growing series of articles about the law, written by journalists and designed for local newspapers. These mention the role of the solicitor, and explain legal matters in simple language. And in case they are not simple enough we also produce a series of visual features, cartoons, each of which tells a short story, usually illustrating a particular decided case. Both articles and cartoons are available to the local press without cost, and gladly accepted by them. Also the leaflet—"Publicity for the Profession".

We offer other facilities to the press: a day does not pass without a telephone call to our Press Office, making enquiry about the legal problems of a reader, a need for law reform, a recent case or some other problem. The enquiries pour in from the National "Heavies", *The Times, The Daily Telegraph* and *The Guardian,* but also some come in from the more popular press. They come from the BBC, its national radio and television stations, and also from commercial companies. Recently we were asked within a matter of days to provide a list of solicitors in the London area who would answer telephone enquiries from Capitol Radio, to participate in a feature television programme at

Associated Television in Birmingham, and to provide a legal commentary for BBC Radio 4 on the new craze of streaking.

**Press Conferences important**

Yet effective public relations amounts to more than a reaction to stimulus. So we are holding press conferences when we feel we have something important to say; we issue press releases when our Council, or our Standing Committee on Law Reform has recommendations to make to the Government of the day; and we provide press lunches. Some of these lunches are organised so that specialist press correspondants can meet a solicitor with particular knowledge of their subject. For example, the solicitor editor of Beaumont on Air Law, Peter Martin, recently talked about his experience in dealing with the results of flying accidents. It had an excellent effect.

**Specialist training for Radio and TV**

When it comes to the provision of solicitors to appear on radio and television programmes, we came to the conclusion that we should not only select them for the purpose, but also give them specialist training. Using closed-circuit television facilities in a commercial studio, and the services of a professional interviewer, we put some 20 solicitors through their paces. A dozen of them were thought to be good enough to merit training, and this they have received. All are now appearing on television and radio programmes in their own areas of the country; we have representatives in Newcastle, Plymouth, Norwich, Manchester, Southampton, Carlisle, Cardiff, Swindon, Leeds, Birmingham and of course London. When a matter of importance to the legal profession arises, we send out a detailed note—or brief—to our trained colleagues, and they are able to express the profession's viewpoint to audiences throughout the country.

Naturally we are also in close touch with the BBC's national networks of Radio and Television. I am fortunate enough to be one of those who take part in their programmes, but I work closely with a team of experienced colleagues, for it is not desirable that only one voice or face should be identified with the profession. In a single year we are involved in literally hundreds of nationwide broadcasts. I cannot quantify the effectiveness of all this work, but I can tell you that the demand steadily increases, and that the members of our own Law Society are pleased with the increased amount of attention that the profession is receiving. My own feeling is that the more involved we are with the mass media of television, radio and the press, the better the public will understand what solicitors do.

This is the real point. We are not interested in the aggressive "selling" of solicitors' services; there is no point in trying to persuade the public to accept services that they do not want. We *are* interested in achieving a much greater degree of public understanding of the work of our profession.

**National educational programme**

So in addition to the activities that I have already described, we are setting out on a national educational programme. This programme is based on a simple belief: that the better the law is understood by the people of our country, the more the role of the practising lawyer will be appreciated. This has become the strategy of our public relations policy; now to the tactics.

We began by opening negotiations with publishers for the publication of a series of books which would explain the law in straightforward terms and would be designed for lay people. We employed the services of a literary agent, and the result was a new series of paperback books under the general title *It's Your Law,* published jointly by the Law Society and Oyez Publishing Limited. I took on the task of General Editor of the series, and wrote the first book, entitled: *Before you See a Solicitor* (6000 copies). This explains what a solicitor does, how he is trained and how he charges for his services. It even describes how people can solve some of their legal problems for themselves.

Two other books in the series have now been pubished: *The Police and the Law* and *The Company Director and the Law* (3000 copies). Both of them have started selling well, and there are several other titles in the pipeline, for example: *The Small Trader and the Law, The Homeowner and the Law, The Motorist and the Law, Children and the Law, Accidents and the Law,* and so on. The books are designed for adults, or at least for college students.

Equally important, we believe, is our schools educational programme. This began two years ago when we decided to produce a set of four filmstrips explaining the European Economic Community. The filmstrips were designed for use in schools and colleges. The full kit consist of the four filmstrips, each accompanied by a gramophone record (or a cassette tape) and some teaching notes. In each filmstrip a different aspect of the Community is described, and the role of the solicitor is explained in relation to contracts, the regulation of monopolies, the export of materials and so on.

The European filmstrips have been successful, by which I mean that they have received good reviews and are selling well. Already the Law Society has received by way of royalties a sum exceeding two-thirds the original cost, and there is good reason to expect that the full amount invested will have been recouped within a reasonable time. This success has encouraged us to go further, and we have now completed four new filmstrips under the general title *The Law of the Land.* The first, entitled *A Home of Your Own* deals with buying a house. The second—together with teaching notes—*Consumers and Contracts* explains shoppers' rights, particularly necessary following recent consumer legislation. The third and fourth strips are *On the Road,* and *Marriage and the Family.* They are already selling to the schools, and we hope to extend the series.

In addition, a simple book for schools about the origins and the development of our law is being published, entitled *The Living Law* and we have plans to produce wallcharts, recorded talks and special kits with specimen documents such as a Will, a Hire Purchase Contract and a Tenancy Agreement. Although the Law Society is in each case providing the "seed" finance, our plan is to achieve by way of royalties at least as much money as we have invested.

**The Legal Aid Scheme**

As I am sure you know, the British public have benefited since 1949 from the Legal Aid Scheme. Since 1973, when the recent Legal Advice and Assistance Act came into effect, this scheme has been enlarged so that solicitors can be paid for giving advice and other help, whether or not a court action is involved. Unfortunately, the rules relating to financial entitlements prevent many people with modest incomes from receiving the

help they need. Nevertheless, the scheme has been widely advertised on Television and in the Press. Cut-out coupons were inserted in the newspapers, so that people could obtain the help of a solicitor if they did not already know one. With the Central Office of Information and the Lord Chancellor's Department, we were very active in preparing the national advertising campaign that launched the new scheme last year. In all the advertisements, solicitors were shown in a sympathetic and helpful role, and I am sure that this has helped to improve the profession's public image. We are most anxious to help the Irish Law Society.

This catalogue of our work is not exhaustive, because we are continually developing new projects. Frequently we discuss these with members of the profession at special Workshops held in different parts of the country. Public Relations Workshops have even been held—at the expense of those who attended—in Majorca and in Malta. We have under consideration the launch of a television series and a film about solicitors. We are actively considering ways in which our relations with Members of Parliament can be improved—of great and fundamental importance. One adventurous local Law Society (Bolton) embarked on a campaign of press advertisements explaining the reason why people should seek a solicitor's advice. We helped with this campaign, and are currently in touch with several other local Societies who are considering similar local press advertising campaigns.

I believe that it is also our task to look to the future. It is not enough to describe the work that solicitors are doing today; we should be taking steps to find out what changes the profession would like to see in its pattern of work, and base our activities accordingly. The world in which we work is not static. We must adapt ourselves to the rapidly changing times. The profession of law is not merely useful; it is essential. If solicitors did not exist, it would be necessary to invent them.

**Mr. Walter Beatty,** in proposing a vote of thanks to Mr. Sanctuary, emphasised that it had been a refreshing paper and that he greatly appreciated the help that the Public Relations Committee had received from him in drawing up a scheme of pamphlets. The Dickensian image of musty lawyers who underpaid their employees was still prevalent today. Although company formation is a prerogative of the solicitor's profession, out of 52 companies formed recently, no less than 23 had not been formed by solicitors. If there were delays in Government offices, the solicitor should suggest to the client to visit the offices concerned personally. The Law Society were about to issue pamphlets, and then he hoped that the public would get a more favourable image of the profession.

**Mr. Maxwell Sweeney** emphasised that, in order not to be subsequently misconstrued, solicitors should be careful what they said in public. A survey undertaken by the Law Society of Scotland had shown that the public thought many solicitors were arrogant. The essentials of the solicitor's profession should be taught as part of the Civics course in secondary schools. It was hoped that a Law week would be held in the spring of 1975 which would emphasise to the public the importance of the profession.

**Mr. Ignatius Houlihan** (Ennis) criticised the unnecessary delays to which witnesses were often subjected in Court.

**Mr. Denis O'Riordan** mentioned a case of a client who, by attending personally at the Valuation Office, had managed to reduce a valuation of £15,000 on property to £10,000. This had not created a good impression, as the solicitor concerned had advised him to settle for £12,500.

**The President of the Law Society of Scotland** emphasised that they were now engaged in a wholesale advertising campaign to last one year which would cost £30,000 or the equivalent of £20 per member.

**Mr. T. C. G. O'Mahony,** in stressing the motto—"The Law is an asset", emphasised that urgent steps would have to be taken to combat the concerted effort that was being made, particularly by bureaucrats, to undermine professionalism.

## LEGAL EDUCATION

The President took the Chair on Sunday, March 12, when **Mr. Martin Edwards,** President of the Law Society (London) then delivered an address on Legal Education.

In January of this year my Law Society had the great pleasure of a visit of about a week from your Director-General, James Ivers. I think we gave him an insight into our business affairs and into our lighter moments. One thing is certain we enjoyed his company, and we felt that he enjoyed ours.

One thing only I recall with feelings of chagrin. He was sitting in my room one day when he said to me that we were showing a complete lack of initiative in the field of Education and Training. I suppose I showed a somewhat baffled feeling, and maybe this is the reason that today I have to stand here and speak to you on Legal Education—a subject in which I understand you are interested.

I have been concerned with this subject for the last 10 years at the Law Society, also as a Governor of the Law Society's school, The College of Law, and as a member of the Ormrod Committee, appointed in 1967 and which reported in March 1971. (The College of Law is an institution built up by the Law Society to train entrants to our profession and the Bar. It now comprises four colleges.)

Now, there has been much discussion and debate in England on this subject for at least 150 years. It is unfortunately one of those subjects on which everyone has views. Originally, the Inns of Court were the teachers of law, but they ceased to fulfil this role at the time of the civil war in the reign of Charles I and for a long time, until about the middle of the last century, apprenticeship was the *sole* method of training for the law. Then examinations were introduced and hence courses in law were formed. In England the Universities took no part. It is as a result of this history that we find the position which we have today. The Universities have, of course, now had Faculties of Law for some time but their degrees do not have the status which they have in other countries.

By fairly recent relaxation, Degree Courses, may qualify for exemptions in certain subjects covered in the Degree Course.

### Essentials for qualification

The essentials for qualification are to serve a prescribed period of articles and to pass two examinations. The Part I Examination, consisting of papers on:

(1) Constitutional Law and the Legal System.
(2) Contracts.
(3) Torts.
(4) Criminal law.

(5) Land law.

The Part II examination consists o fpapers on :

(1) Conveyancing.
(2) Accounts.
(3) Revenue law.
(4) Equity and Succession.
(5) Commercial law.
(6) Company law and Partnership.
(7) Either Family law or Magisterial law or Local Government law.

The non-degree entrant must do a years course for the Part I examination, and after passing that exam serve under articles for 4 years and then pass the Part II Examination. The law degree entrant may be exempted from any of the subjects in the Part I Examination in which he has obtained a pass in his degree examination and, subject to taking any outstanding subjects of the Part I Examination may either take the Part II Exam and enter into articles for 2 years, or he may postpone the Part II Examination until after this period of articles. The majority favour the former course and are able to enter upon their period of articles with their examinations behind them and are thus able to give uninterrupted attention to their principal's business and their own office training. There are provisions enabling those who have a degree in a subject other than law, mature students with experience in other walks of life and legal executives to serve shortened periods of articles and thus not delay their qualifications too much.

We must face the fact that our profession has challenges and competition to meet. There is a call for an ever widening legal advisory service. Legal aid is extending and will extend its spheres of work. Advice Centres will be required to be manned. There is an ever growing body of laws and regulations to deal with and our entry into Europe will bring many problems to many of us. There is no dearth of competition by persons able and willing to take over work previously considered to be ours. Tax and estate duty consultants, banks, insurance brokers, merchant banks, cut price conveyancers, etc.

It is not sufficient to consider this subject on the basis that we can jog along as we have in the past. We must seek to improve. Merely to say that the systems of training which have served us in the past are necessarily adequate is not good enough. If we can improve our training we must do so.

## The Ormrod Committee

This state of affairs has been debated, for a long time but little action has resulted. Finally in 1967 the Lord Chancellor set up the Ormrod Committee to consider the whole subject of legal education. The possibility of carrying out the recommendations of that Committee which is only now exercising the Law Society and has been put before the solicitors' branch of the profession in a Consultative Document.

Much evidence was considered by the Ormrod Committee, including evidence from The Law Society, and also "The Prospective Lawyer, Blue Print for the Future" prepared by the then National Committee of Associate Members received serious consideration. It was a document which followed a very detailed survey of articles in England and it showed their defects.

A great deal of evidence also, showed the desirability of Universities undertaking their proper role for instruction in the law, as they do in other countries, and evidence also showed the practicability of teaching practical skills in an institution. This was already being done in Canada and Nigeria and it is a matter of interest that Canada is now proposing to extend this type of training and abolish articles and that New South Wales have now established a practical training course in place of articles, and other Australian States are following.

The Ormrod Committee published its Report in March 1971, and I will briefly outline the main effect of their proposals with regard to the main stream of entrants to the solicitor's profession. There were also provisions for graduates in other subjects than law, those with experience in other walks of life and legal executives. Briefly the position is that the profession would wish to receive such entrants and to make their path as easy as possible.

## The Ormrod Course of Training

The Ormrod course of training, consists of three stages. First, the academic stage, secondly the professional stage, comprising both training in an institution and training in an office, and finally continuing education or training.

The entrant starts with a degree, then takes a year's Vocational Course at an institution, and thereafter, although admitted as a solicitor, he will not be allowed for two or three years to practise on his own account or as a partner, so that he will receive office training under supervision. The implementation of these proposals will effect a great improvement in the education of our profession.

There are two principles on which the Ormrod Report was based. First, in the words of the Ormrod Report "legal education should not attempt to equip the lawyer every subject he may encounter in practice. Instead it should concentrate on providing him with the best possible general introduction so as to enable him with the help of experience and continuing education after qualification to become a fully equipped member of the profession'. And the second principle is inherent in the firts; namely that education and training is a continuous process throughout a lawyer's professional life. The application of these two principles lead to the acceptance of a limited aim for pre-qualification training and a realisation of the enormous importance to be attached to continuing education.

Of what then should the limited pre-qualification training consist? On the academic side, a Select Committee of the House of Commons on Legal Education in 1846, in recommending the setting up of law faculties at Universities, which did not then exist, said of academic training—"Its chief end is not so much the acquiring of knowledge as creating and maintaining the habits of acquiring it. Nor is it less true that a few subjects well mastered outweigh in real utility many indifferently or partially attended to." 125 years later we find the Ormrod Report saying much the same thing—"The range of the subject matter of the law is so great that no system of education and training before qualification could possibly cover the whole of it except in an utterly superficial and useless manner. The process of acquiring professional knowledge and skills is continuous throughout the lawyer's working life." In those two quotations we find the reasoning which leads to the conclusion that the first and academic stage in a lawyer's training should be attendance at a University where he will receive an intellectual training in the critical study of the principles of some of the main

branches of our law and will equip himself for further learning in later life. There too, he will meet with students of other disciplines and increase his general educational background and his knowledge of his fellow men.

Up to the present time there has been a great tendency to regard pre-qualification training as designed to produce the complete solicitor who has been taught all the branches of law which he will need to know in practice. We frequently receive suggestions for many subjects to be added to the syllabus, but we must get away from this mode of thinking. A concentrated course designed to teach students to answer questions in a detailed examination on many subjects is not now the best way to produce a trained mind with the inclinatin to continu elearning in the years ahead. Potted law learned parrot fashion is not the best method. The same reasoning has been illustrated by Bishop Creighton, who said : "The one real object of education is to leave a man in the condition of continually asking questions" and, by Professor Skinner, who said—"Education is what survives when what has been learned has been forgotten." This is the pholosophy behind the proposal in the Ormrod Report of a Law Degree as the first stage in academic training.

**Law Degree necessary**

Now it would be possible to have a Law Degree as the first stage in training with an improved Part II Examination and then continue with two year articles, as we have now. But the Ormrod Report goes further.

Complaints by articled clerks about the quality of their articles are not new. Our old friend the Select Committee of 1846 said this—"It is a general complaint on the part of articled clerks themselves that very little attention is paid by the solicitors to the direction of their studies. In fact it can scarcely be expected from solicitors in any degree of practice, their time is so much occupied with the duties of their profession that they can scarcely take up the points which are requisite for looking after their education." And the Report goes on to say how an articled clerk is left almost entirely to his own discretion; which comes as a shock to our ideas of a more leisurely age with the solicitor as a kindly turor to his articled clerk. Today we have other problems as well, mere numbers for one thing, the narrowness of some practices and I am sorry to say the low standards of some.

In the last fifteen years there has entered a new factor in the consideration of articles. The articled clerk in England no longer pays for the advantage of being in his principal's office; he is in nearly every case in receipt of a salary. In the modern world this is right, but it has, however, brought about a basic change in attitudes. The articled clerk may have come to regard himself as an employee and to consider himself as entitled to a salary commensurate with the value of the work which he has learned to undertake. In the same way a principal may consider himself as an employer and regard the articled clerk as just another fee earning member of his staff. Such attitudes are the negation of the whole conception of apprenticeship, and the articled clerk is in danger of becoming in effect a clerk employed in one branch of work without the benefit of learning in a broader field.

**Vocational course recommended**

Therefore, after reviewing these and other imperfections of articles the Ormrod Report recommended a Vocational Course of one year, to be followed by a period of restrictive practice in a solicitor's office. The idea of the course is that it should train students in the practical work involved in the application of the law in the types of transactions commonly dealt with by solicitors at the start of their careers. During this type of course, practical instruction in law new to the student would be introduced, as it arises, such as Revenue Law. In addition there would be instruction on certain branches of law not studied at Universities, but of which an entrant to a solicitor's office should be aware, and there will also be (and I stress this) instruction on professional conduct, accounts, office organisation and a background general knowledge relating to other professions and business affairs with which a young solicitor should be equipped. There would be some degree of continuous assessment throughout this course, and at the end an examination posing problems such as are met in practice. The examination would be on matters actually taught on the course, as laid down by The Law Society. The object of the course and examinations would be—"to eliminate the incompetent and the indolent"—this again is to quote the Select Committee of 1846; as to the object of a professional examination, it is my strong belief that such teaching of sound principles and procedures as would be given to every new entrant to our profession would, as the years pass, raise the general standard of entrants to practice and be of vital importance for the future. Of course experience in an office would then be essential.

**Pilot vocational course**

The Council of The Law Society accepted the Ormrod Report in principle. They decided that (subject to exceptions for graduates in other disciplines, mature students and Legal Executives) a degree in law would become the first stage in qualification as a solicitor, and they authorised the College of Law to prepare a Pilot Vocational Course to take 240 law graduates; but there are difficulties in starting such a course, and in arranging for the expansion of similar courses to take the entire entry to the profession. I think here that our problem must be much greater than yours would be, as we estimate having to cater for about 2000 students per year. This type of course involves much more tutorial time than does the giving of lectures and leaving the reading to the students as we do at present. Hence there is a greater demand for classroom accommodation and a vastly increased demand for teaching staff, for a larger number of smaller classes. This all adds up to the major problem, that of cost—expense on buildings, the expense of salaries, etc., which will have to be met.

The majority of the Ormrod Committee thought that the Vocational Courses should be provided by a limited number of Universities employing special teaching staff. It was suggested that the College of Law might in some way be associated with or absorbed by such Universities for the provision of the special type of course required. It was conceded that the professional bodies must have a powerful influence over the courses. An optimistic view was formed that the University Grants' Committee would make funds available to the selected Universities.

**Profession to retain control of education**

The minority of the Ormrod Committee, of whom I was one, wished that our branch of the profession should retain absolute control of the courses and con-

sidered that the College of Law should be the chosen instrument. This minority felt that the solicitors' branch of the profession, having in recent years been prepared to pay articled clerks, would instead accept the idea of subsidising th College of Law by means of a levy, and at a recent National Conference such a view did appear to receive support. It was considered by the Ormrod Committee that Government assistance for the important task of training the legal profession should be forthcoming either directly or through the University Grants' Committee. It has, however, become clear that the Government will accept no financial responsibility whatever for the implementation of the Ormrod proposals.

The Education and Training Committee considered that in these circumstances they must, before coming to any decision, investigate the possibility of Universities and Polytechnics running courses in conjunction with the College of Law or indeed taking over the entire running of the courses as recommended by the majority of the Ormrod Committee, and consultations took place to explore these possibilities. There is no University which has, as yet, been able to commit itself, though some Polytechnics have expressed an interest in running Vocational Courses. The task of running the courses entirely ourselves through the College of Law would be a big task. I believed, at the time of the Ormrod Report, and I still believe now, that the College of Law should, if possible, conduct these courses so that The Law Society would, through the College of Law, be in control of the content of the courses and set the standard of entry to our profession, but this may not be possible, and arrangements with some Universities may prove possible.

In his Presidential Address to our Annual Conference at Harrogate in 1957, Sir Ian Yeaman said—"The first obligation of our profession is to secure successors who will carry on the traditions of the past and in the future provide the public with the legal services which they will increasingly want". He was then advocating the abolition of premiums on entry into articles and the payment of articled clerks. In the changed circumstances of the present, it had seemed to me that the plea which Sir Ian then made and which was accepted by the profession, should now be applied to a different form of payment; for solicitors would no longer, if the proposed new system of training came about, have any articled clerks to pay.

**Presidential address on Ormrod Committee**

Soon after the beginning of his year of office, a President of The Law Society is required to deliver his Inaugural Address to our National Conference. He may speak on a variety of topics—often of national or international concern. When my turn came, however, last October, I felt that there was to me but one compelling topic, and that I should put before the profession the proposals of the Ormrod Committee, the considerations behind those proposals, and the difficulties and expense of their implementation, and ask the profession for their views. I felt that without their support we could not go ahead. In the result the Council of The Law Society issued a Consultative Document to every member of the profession. They have since organised a series of 12 meetings throughout the country and we have recently received the views of our members through their Local Law Societies. I am bound to say that I am disappointed at the sparse attendance, both at the meetings which we arranged and at the meetings of Local Law Societies. Nevertheless I think that a general pattern of views has emerged of which we must take note. The profession it seems are generally in favour of the concept of a practical course, but as an adjunct to articles. They wish there to be also a fairly stiff test of knowledge of substantive law. They do not appear to cavil at making some contribution to the education of the future generation of lawyers, but wihin limits.

All this we shall have to consider and I cannot now tell you what the answer will be. For myself I hope that we shall be able to institute a practical course which will raise the standards of all new entrants. This could be in conjunction with some Universities or Polytechnics, but I do not consider that we should ever contemplate handing over the entire control of practical courses to such institutions. Our own College of Law must, in my view, be engaged up to the limit of its capacity, so that The Law Society through its own College may set the standard to which other courses should conform.

One other thing I told the National Conference at Torquay, I was impressed to read the other day something of the history of the formation of The Law Society. It was ot a meeting held at Serle's Coffee House on 29 March 1825 (when it was decided to appoint a Committee to draw up a scheme for submission to a General Meeting of Subscribers) that The Law Society owes its existence. This General Meeting was held quite soon afterwards on 2 June 1825 and it was on that date that our Society was born.

What impressed me was that at this very first meeting when there were only 223 members, and the entire profession consisted of 2400 practising attorneys, it was resolved to purchase land for the erection of a suitable building for the Society and to raise £50,000 for this purpose. The money was raised and the first part of The Law Society's Hall, namely the central portion including the Entrance Hall and Reaidng Room, was actually opened in 1831. I am told by a banker friend that the equivalent value of £50,000 at that date is at least £400,000 today, so that one can appreciate having regard to their number, the immense enthusiasm of our predecessors at their very first meeting. I may add they subsequently raised further monies for the extension of The Law Society's Hall and we must surely value the heritage which our predecessors left us. Have we a similar enthusiasm to theirs? Might our difficulties be in part met by a fund raised in celebration of the Society's 150 years of existence in the year 1975?

**Education and training continuous**

So far I have talked mainly of initial training before qualification, but education and training must continue throughout professional life. If we have any initial training sought to lay a foundation we must erect a building and maintain it. Much of our learning will come from our experience and from our own reading and studying, but this takes time and there can be no doubt of the need for courses to assist the profession in acquainting themselves with the new laws which are constantly introduced. There is need also, I suggest, for courses in which we can learn of particular branches of law in which we may become involved. What is called "Welfare Law" is a case in point. We require also to learn of other professions and of businesses, so that we may understand their language and how they help us and we them. Such courses are increasing and

recently the College of Law has appointed a Director of Continuing Education with a view to providing the assistance which the profession needs. I look forward to the extension of continuing education.

To sum up, our aim is the continued service of our profession to the community, and with it the continuing prosperity of our profession. We believe in an initial education which will train the mind and which, in its vocational stage, will inculcate the entrants to the profession with proper standards and procedures and we believe that those entrants so initially trained should during their growing experience in practice continue to educate themselves and should be assisted by us in that pursuit.

We shall now have to consider further, how, in the light of the profession's views, this aim may be attained. It has seemed to me that your thoughts are largely similar to ours.

**Mr. Joseph Dundon,** in proposing the vote of thanks to Mr. Edwards, emphasised that the Court of Examiners had been guided by the President, Mr. Prentice, in trying to raise legal educational standards which would be deemed to have parity in other EEC countries. It was essential that, as in England, the profession should maintain the control of practical legal subjects.

**Mr. Brendan McGrath** emphasised that he considered continuous courses in specialized subjects essential if we are to compete successfully against outside specialists. It will also be necessary to advertise the services of specialists. Since our entry into the Community, it is essential for us to learn how other professions work.

**Mr. Edwards** replied that the question of specialisatin was difficult. The Law Society had considered whether specialist Diplomas could be awarded in certain subjects, but had finally opposed it. He thought it would be a mistake to try to train a lawyer as an accountant or other profession, although he would favour short managerial courses.

**Mr. Horsfall Turner,** Secretary-General of the Law Society, emphasised that they had encouraged the local Law Societies to provide lists of specialists, which would be made available to lawyers of foreign countries, if required.

**Mr. J. M. Sweeney** (Athenry), Acting Professor of Law in UCG, stated that it would be unrealistic to provide for specialisation in Ireland. In the B.C.L. course, there were 20 subjects to be studied in three years, and this only induced excessive cramming.

**Mr. Liam MacHale** (Ballina) emphasised the difficulty of obtaining legal assistants in the country, and hoped that steps would be taken to overcome this. It might be possible to obtain financial assistance for legal education from industry.

**Mr. Lomas,** Secretary of the Incorporated Law Society of Northern Ireland, emphasised that the number of firms specialising in the North was very limited.

## THE FINANCIAL MANAGEMENT OF THE LEGAL PRACTICE

The Director-General, Mr. Ivers, presided at the first meeting on Sunday, 12 May 1974 in which **Mrs. Margaret Downes** delivered the first lecture on The Financial Management of the Legal Practice. She said :

In speaking on the Financial Management of the Legal Practice I believe that the most meaningful way in which we could all spend the next hour is that we all participate in a discussion on this subject.

I propose, to talk with you about the results of the pilot survey which we have carried out on the solicitors' earnings in Ireland and which document was circulated to you yesterday and also on the draft paper on solicitors' time costing and financial accounts, which, again, you have had since yesterday. (It is hoped to publish the text in a subsequent issue.)

It is then intended to have a general discussion with all of you and to have your views. Jim Ivers, your Director-General, Brian Barry, our Coopers & Lybrand management consultant and I will be very happy to answer any questions which you may have.

We have not mentioned in any of the documentation which has been given to you that one of the main reasons why your Society in recent years has been concerned with obtaining information on the overall earnings and profits of the profession and the profitability, or lack of profitability, of different types of work is so that it would be in a position to have meaningful information available in the event of an enquiry by the National Prices Commission into solicitors' earnings. You are all aware that this has been mentioned and written about on a number of occasions and already there has been an enquiry into the auctioneering profession.

It may well be that one category of work, conveyancing for example, may well be carrying another category of work within a solicitor's practice and, if an enquiry by the National Prices Commission should reveal that the present scale rates on conveyancing are excessive, due to the inflationary climate in which we have lived over the last many years, it might be that those scale rates would be reduced, thereby creating an all-over profitability problem within a firm, due to the fact that this particular category of work was carrying unprofitable work. The compilation by your Society of a comprehensive picture of overall earnings and profitability, and of the profitability of different types of work is, therefore, an essential step on the road to resisting an enquiry or dealing with adverse recommendations arising out of an enquiry. It is also essential for the development of a satisfactory fee structure in the profession.

The results of the pilot survey which we have undertaken on solicitors' earnings in Ireland shows, among other things :

1. Audited accounts do not always exist. Where they do, the latest accounts often refer to periods which ended up to two years ago.
2. The up-to-date value of fixed assets, particularly premises, is not always known.
3. There is among solicitors unease about certain aspects of the survey :
   (a) Solicitors do not want their individual earnings, even if given anonymously, examined by the Incorporated Law Society or by the general public or by the National Prices Enquiry.
   (b) The profits of individual practices often vary from one period to another.

   It is to be resolutely stressed that average figures only will be used and that strict and utter confidentiality will be maintained by Coopers & Lybrand.
4. There is general agreement among your profession that the earnings survey is desirable and that there is

a general willingness to co-operate with such a survey. This is most encouraging.

Apart altogether from the survey side of affairs, the availability of such information is, of course, also basic to the successful financial management of a legal practice.

It is not proposed to review in any depth the time costing and financial accounting document which was circulated to you yesterday but I would stress that, what looks like a formidable document is, in fact, a very simple system when in operation. One of the main difficulties, and perhaps the only problem area, is the discipline which each principal and chargeable member of the staff must accept of recording time each day. Once this hurdle has been passed the actual work involved thereafter is minimal. Our own experience at Coopers & Lybrand was that one girl in the time office could cater for approximately 100 fee earners and produce the management information which is available from such records. The type of management information required would be :

(1) A constant record of fees furnished showing profits and losses on those fees compared to time costing rates.

(2) A constant record of the various classifications of work showing profitability or non-profitability in those classifications; Conveyancing, Litigation, Company work, Probate.

(3) A constant record of work in progress.

(4) A constant record of work in progress on the books of the practice for more than a year, 18 months or two years—whatever information is required in this area.

(5) A record of debtors.

(6) A record of chargeable and non-chargeable time by principals and members of the staff. In these days of high rates of remuneration for staff—both professional and administration—time control is basic to the profitability of any professional practice.

Many of you may by now have decided that the above information is fine so far as a large practice with numerous principals and many chargeable staff is concerned but I would refute this, in so far as the whole concept of running a professional practice has changed enormously in recent years, due to inflation, the cost of hiring staff—both professional and clerical—the cost of carrying higher work in progress and the cost of debtors. A one-man practice would benefit substantially by having costing information, if for no other reason than to have information available as to what work is profitable and what work is unprofitable so that decisions can be made as to whether certain types of work should be taken on or whether it might be worthwhile to employ a clerk to assist in taking on some of the load of routine work which is not profitable for principal involvement.

I have no doubt that the information which would emanate from the introduction of time records and control of chargeable and non-chargeable time would contribute considerably to making any office a more profitable concern. This view will be substantiated by a few of your colleagues who have introduced the system.

When one considers that the going rate for senior assistant solicitors is now in the region of £4,000/£5,000 in the cities and it is probably not very far behind in the provinces and one looks at one's investment in premises, work in progress and debtors, I suggest that no solicitor is effectively working his practice unless he has annual earnings in excess of £8,000. You must all have experienced in recent years, as indeed have the owners of all professional practices, the constantly increasing demand for more capital investment in one's firm emanating out of the necessity to carry higher debtors, work in progress, salary costs and overheads. The professional man, unlike his brother in industry, has got to provide this capital out of his annual earnings and, as capital is provided from the top rung of annual earnings, it may well be that he is providing it out of income which is taxed at 80p in the £. Accordingly, it could be that, in order to provide an additional £1,000 worth of capital, a professional man would have to earn £5000 income before tax.

Again, unlike our colleagues or people of equal qualifications and experience in industry, we must provide from our taxed income pensions for retirement years, sickness insurance in the event of ill health and financial security for wives in the tragic event of death.

We can not, therefore, as professional people, financially survive in this inflationary and fast moving world in which we find ourselves *unless* we acknowledge the utter necessity to financially manage our practices in so far as :

1. time control is concerned—especially the control of one's own time and that of chargeable staff;
2. W.I.P. control is concerned—frequent competing competing furnishing of W.I.P., which information is readily available from time costing system;
3. profitability control is concerned—the having of information as to whether jobs are profitable or non-profitable to enable decisions to be taken regarding fees and categories of work which should be pursued or abandoned;
4. debtor control is concerned—a system of regular follow up of outstanding debts.

**Mr. John Ross,** in proposing the vote of thanks to Mrs. Downes, doubted whether it was essential to get in the costs quickly. He did not think that the profitability motive was essential in one man practices, who had to accept whatever legal work was offered. It might be necessary to hold a seminar to determine this. (Mr. Ross then presented Mrs. Downes with a walking stick on behalf of the Society.)

**Mrs. Downes** stated that most solicitors were in fact up to date with their accounts. As there is a limit to what any one man practice can take on, he should know what work is profitable.

**Mrs. Grace Blake** deplored the fact that Mrs. Downes had not expressed nearly enough generosity in her remarks, but had concentrated far too much on money and profitability.

**The Director-General** stated that it was intended to organise a one day seminar on Solicitors Time-Costing in the autumn and he was asking for volunteer lecturers.

**Mr. Pierse** (Listowel) suggested that book-keepers could be allowed to attend the forthcoming Seminar. It seemed to him that the ratio between gross profit and net profit was the correct one to apply.

**Mr. Carroll** (Fermoy) asked, if time-costing were adopted, would scale charges be abolished entirely?

**Mrs. Downes** emphasised that solicitors were bound by the statutory scale fees unless they contracted out of

them. The idea of having a special course for book-keepers is excellent, and should be pursued. The statutory charge of a solicitor at £6 per hour is far too low—this should be revised to at least from £10 to £12 per hour. Accountants had now abandoned hourly rates.

**Mr. Barry** (Accountant) stated that it was not known now whether scale charges would be abolished or not, as the National Prices Commission would shortly be holding an inquiry into solicitors costs.

**The Director-General** stressed that it was intended to adjust solicitors' costs as soon as possible. However, in order to succeed, it was paramount that the researches should be well documented, and that at least 50% of the questionnaires should be made available, otherwise we will not be taken seriously by the Prices Commission.

**Mrs. Maura O'Mahony** stressed that time-costing would not have much application in conveyancing matters.

**Mr. Liam Mac Hale** (Ballina) said that solicitors were not equally adept in their professional duties, and that they would have to take steps to improve. It was essential to project to the public an image of service to the community.

**Mr. Brendan O'Maoleoin** emphasised that the solicitors were not philanthropists, but would seek to make a profit. He thought that they should charge at least £15 per hour for their services. The nonsense of counting folios in the charge of documents would have to be stopped.

## LEGAL AID

Mr. William A. Osborne, Vice-President, took the Chair on Saturday morning, May 11th, when the Attorney-General, **Mr. Declan Costello, S.C.,** delivered an address on "Legal Aid".

The Attorney-General emphasised that the State had a responsibility to ensure that legal aid, civil and criminal, would be made available as of right to those entitled to avail of it. It would be a very complex matter to devise an efficient scheme, therefore it had been decided to set up an Advisory Committee on Civil Legal Aid, which was becoming a matter of critical importance; the members of that Committee under the Chairmanship of Mr. Justice Pringle, had been announced that morning. Mr. Costello then referred to the absence of agreed criteria for the granting of Legal Aid Certificates, and referred to the duty solicitor scheme in Scotland. In England, the system of legal aid had developed gradually. In 1930, Legal Aid was made available for the defence of poor prisoners; in 1949, prisoners could obtain legal aid by reason of the gravity of the charge; in 1962, the criterion became whether it was "desirable in the interests of justice" rather than "by reason of the gravity of the charge". The Widgery Committee in 1973 reported that it was desirable in the interest of justice to have some criteria.

In 1945, the Rushcliffe Committee had reported that it was desirable to have legal aid, civil and criminal, available to all deserving cases in all Courts—from Magistrates' Courts to the House of Lords. The scheme was to be administered by the legal profession, and all lawyers in the case were to be adequately remunerated. Under the 1949 Act, the scheme only applied initially to the Superior Courts, but it was extended in 1956 to County Courts. A Legal Advice Scheme was introduced in 1959. The 1949 Act was amended in 1960 and in 1964. A limited amount of legal aid had been granted in cases involving Magistrates' Courts in 1965, and the whole Legal Aid Scheme has recently been consolidated by the Legal Aid Act 1974.

The English Law Society drew up proposals for Advice Centres in 250 localities in England and Wales, but these were never implemented. The Statutory Advice Scheme of 1959 was eventually amended in 1972, and consequently there is now in England a very flexible scheme of legal advice and assistance. A defect in the scheme arises from the fact that som edeprived people do not like visiting solicitors' offices in the city centres. Solicitors in the country should assist in advice centres in populous areas like Ballyfermot or Ballymun, where whole time solicitors should be employed.

A distinctive feature of the English system is that it is mainly contributory. Those who can afford to pay must do so; the scheme is also financed from the costs awarded against opponents of legally assisted persons. The commitment of the British Exchequer is entirely open-ended, and the State has assumed an absolute commitment to meet the necessary costs. The total cost of the English Legal Aid Scheme in 1973 was £21 million, to which the State contributed about £13½ million, almost two-thirds of the cost. In England it is not intended to introduce any upper limits to which legal aid is not applicable.

As regards the scope of application of Legal Aid, it extends in England and Wales to all Courts, but not to administrative tribunals. Some cases like defamation are excluded from the scheme. The schemes for Legal Aid in England and Wales, in Scotland and in Northern Ireland, are administered by their respective Law Societies. There is a total staff of 1,400 employed, of which only 100 are qualified solicitors.

The Irish Criminal Justice (Legal Aid) Act 1962 had extended the right to apply for legal aid in restricted criminal cases only, but it had now been recognized that citizens had a right to apply for legal aid in civil cases.

**Mr. Gerard Doyle,** in proposing the vote of thanks to the Attorney-General, emphasised that Legal Aid had now become a civic duty. On account of the low scales of remuneration provided by the 1965 Legal Aid Order based on the 1962 Act, many solicitors had had no alternative but to opt out of the scheme. It was remarkable that Legal Aid had existed in some form in the United States since 1866, and it was paramount that any scheme of Legal Aid devised should be controlled by the Law Society.

**Mr. P. C. Moore** stated that the concept of "costs following the event" was old fashioned, and would not be practical if a scheme of legal aid were to be introduced.

**Mr. T. C. G. O'Mahony** stated it was unfortunate that the concept of charity in Legal Aid would be bolished as he feared that the concepts of humanity and sympathy would tend to be lost.

**Mr. Rory O'Connor,** in seconding the vote of thanks, commended the activities of the Free Legal Aid Committees (FLAC).

# SOCIETY'S REPORT ON COURT ORGANISATION

by W. A. OSBORNE (Vice-President)

Part 2

## DISTRICT COURT EXCLUDING DUBLIN AREA

**Allocation of Districts and of District Justices**

For the reasons set out previously the Society are firmly of the opinion that the present system of having a Justice assigned to a specific district should be continued and that no case has been made which would justify a change, whether in the District Court or Circuit Court. If work should fall into arrears in any area through the assigned Judge or Justice finding more work than he can cope with, then a temporary Judge or Justice should be appointed to deal with arrears *only*. Paragraph 56 of the Committee's Report seems to suggest that an alteration in the present system would result in the ultimate saving of at least three District Justices. While this may be so, one must weigh the saving gained in the nonappointment of three District Justices, against the additional cost and expense of having witnesses travel longer distances to Courts with the consequent loss in time as above referred to.

**Abolition of District Courts**

The reports of various Bar Associations deal with the specific recommendations in relation to the Courts in question. While it is agreed that in specific areas certain District Courts could be abolished or the number of sittings reduced, there is also a case in specific areas for an increase in the number of sittings presently held. These comments are based on practical knowledge of the difficulties and problems in the areas mentioned.

**Hearing of cases**

The recommendation that a Judge or Justice should have a discretion to hear a civil case at any one of the scheduled venues in his district, where it is for the greater convenience of the parties so to do, is one which should be adopted, not only on the civil side, but also on the criminal side, *but only* where the parties involved wish to select a venue which is convenient to the Court and to all parties who are involved in the particular trial. In practice it is the view of the Society that the number of instances in which this arrangement will be of benefit or availed of are not great.

**Court Sittings**

The recommendations in paragraph 65 are supported.

**Licensing Court**

The recommendations in this paragraph are supported and it is the opinion of the Society subject to the comments of the Dublin Bar Association that these recommendations should be implemented as quickly as possible, as they will certainly result in a substantial saving in the present inconvenience and expense incurred by the members of the public who are involved.

**Court Vacations**

The recommendations in paragraph 68 are generally acceptable, save it is felt that the existing holiday period should be adhered to, namely that the annual close down during the month of August should be continued. It is felt however that to suspend the District Court for a period in excess of one month would be too long and could create adverse public comment and would inconvenience the public generally.

**Annual leave for Justices/working week**

The Society feels that these matters can be dealt with by the Justices and the Department of Justice.

**Recommendations 73 and 74**

These recommendations are fully supported.

## CIRCUIT COURT—COUNTRY

Paragraph 115 dealing with the Dublin Circuit Court indicates how some of the arrears in the Dublin Circuit Court were disposed of, namely by a Judge of a country Circuit postponing a sitting of his Court and attending in Dublin. While this particular arrangement helped to clear the substantial arrears in the Dublin Circuit Court, it had the effect of leaving arrears in many of the country Circuits and in some areas it has not yet been possible to overtake the arrears which arose during the assigned Judge's absence in Dublin. It is suggested that this type of, presumably, temporary change to meet arrears is not one which is either desirable or assisting the efficiency of the system.

**Transport**

In recommendation 121 a reduction in the existing number of venues is indicated as being justified on the grounds of economy and efficiency taking into account improved transport facilities and the greater turnover of a larger sitting and the securing of attendance of professional witnesses. The Society disagree entirely with the reasoning contained in this paragraph. The questions of the availability of public transport, of the attendance of witnesses professional or otherwise have been dealt with already.

**Larger Sittings**

It is suggested that a turnover at a larger sitting would result in a saving of the time presumably now lost in conducting shorter sessions at occasional venues. One must question the nature and extent of the time saving involved. There may be a saving in time from the Court's point of view, but any such saving must be weighed against the loss of time involved in having witnesses travel longer distances from their homes to attend Court and must take into account the fact that the limited number of Court venues will become exceedingly busy resulting in the inevitable difficulty of listing cases for hearing on specific days. The problem of witnesses being obliged to attend at a Court some considerable distance from their homes, with the resultant expense and the probability of a case not being reached and that their attendance will be required again and again, will add to the present frustration of witnesses. The loss of public time involved and the financial loss to the witnesses concerned will far outweigh any loss which may now arise through a Court having a short session at a convenient occas-

ional venue, rather than having a large turnover of cases at a larger and more distant venue.

**Pool of Judges**

In paragraphs 126, 128 and 130 it is suggested that a pool of Judges for the entire country would leave flexibility in making Judges available to deal with extra work in any given area. Again the problem of part heard cases, of cases being adjourned for other reasons as referred to above and the interruption in the ordinary flow of work which now exists where a specific Judge deals with a specific area, would far outweigh any advantage which might be gained. It is not accepted that a Solicitor would have any partial or real difficulty in advising his client without knowing which particular Judge would be assigned to deal with a sitting and without knowing that particular Judge's outlook. These are not matters of any importance in achieving the objective named. What is important is the fact that where a Judge is assigned to a particular Circuit, it is possible to operate a system which is to the public's advantage in that a County Registrar can reasonably accurately assess with the co-operation of local practitioners, how long particular cases may take and thus list cases for hearing on specific dates. The Judge may often feel inclined to sit later than usual to complete a case to convenience witnesses. The system must also suit the Judge in his own personal arrangements. It is difficult to understand how the reassignment of Judges from time to time, to different Circuits, would bring a more uniform judicial approach. A Judge always feels responsible for his particular Circuit and in a short time becomes aware of the particular problems in his area, the state of crime and is thus generally in a better position to know what the requirements of his area are from the point of view of penalty. A common crime in one area may not exist or may not be as prevalent in another area. Meetings and discussions between the Judges on the question of penalties and crime generally would, it is believed, bring about more uniformity of approach. The recommendation in paragraph 131 that each Circuit would have one Judge assigned for a stated period and that a second Judge might be temporarily or permanently assigned depending on whether the volume of business might warrant does not appear to be necessary. The Society suggest that one Judge should be assigned permanently or for a suitable long period to each Circuit as the system now operates and that in addition, and if necessary and if and when required, two or more further Judges should be appointed on a temporary basis, the additional appointees to carry out temporary duty in the area where work has fallen into arrears. If one Circuit should become completely overloaded then it would be more desirable to remove from that Circuit some of the work and add it to an adjoining Circuit which could accommodate the extra work. This has already been achieved within the past few years. The suggestion that where necessary two Judges should be appointed to a country Circuit following each other through the various Courts in the Circuit, would, it is believed, create difficulties for the County Registrar's office, unless his office is fully and properly staffed with additional staff. At present the Circuit Court sittings in country areas occur on average four times during the year. During the sitting of the Circuit Court, the other work of the County Registrar's office and the time of local practitioners, is fully occupied by the Court during the sitting. It is essential that there be some reasonable time space between sittings, so as to enable the County Registrar's office to carry out efficiently all of the many other duties imposed upon it, which must be left in abeyance while a Court is in session.

**Criminal Trials**

The recommendations in relation to criminal work in the Circuit Court has been opposed in almost all areas through the country as being unnecessary, impractical and almost unworkable.

**Jurors**

The recommendation is that criminal trials should be held only in large centres where a pool of Jurors would be readily available within a radius of fifteen miles. This recommendation is intended to reduce the hardship caused by calling Jurors from outlying areas, thus requiring considerable travel on their part. It has been the experience of the profession through the country, which experience will, it is believed, be confirmed by the County Registrars in most Counties, that there is no real problem in finding Jurors to attend the Circuit Criminal Court, nor any basic objection by Jurors to attending or giving Jury service, save and except that the people called to serve on juries are not in any way compensated for the financial loss which they incur by giving this service and by reason of their being away from their business affairs for a day or more. If this recommendation achieved an easing of the problem for jurors, that easing must be weighed against the problems financial or otherwise which will be created for accused parties, their witnesses, state witnesses and their advisers in being obliged to attend at venues which are clearly very considerable distances from their homes. Jurors should be adequately and fully remunerated for the service which they are called upon to perform. In most areas there are sufficient jurors on the list to ensure that a person will not be called for jury service more often than once in approximately five years. The suggested changes in the jury panel will cause chaos and there does not appear to be any necessity at present for increasing the number of people who should be obliged to give jury service.

**Venue for Hearing**

While, as pointed out in recommendation 133, the present position is rather rigid in that an accused must be returned for trial to a venue which may not have a sitting for quite some time after the date of the return, nonetheless, this problem could be overcome quite easily by a District Justice being empowered to return a person for trial to some venue other than that to which he should normally be returned *provided* the accused person so consents. Most accused persons returned for trial are very anxious to have a reasonable time elapse between the date of the return for trial and the date of trial. Time is required for the purpose of considering an accused's defence and an accused may wish to have time to make arrangements in relation to his business, should it appear from the evidence, that there is a probability of conviction. In the majority of cases an accused returned for trial will opt for a reasonable space of time between his return and trial rather than seek a shortening of that period. If a District Justice was obliged to return a person to the next "convenient venue" of the Criminal Circuit Court, as is recommended, this would result in many difficulties and in

practice, one would find that, apart from the possible unsuitability of the venue named, there would be many applications for adjournment before the Circuit Court, a resultant waste of time, in relation to juries, witnesses, State Counsel and State Solicitors without any real advantage being gained, either by the accused or from the point of view of the public convenience or economy.

**Free travel for Accused Persons**

This recommendation is supported by the Society. However, to pay the accused's travelling expenses only is merely a small contribution towards the overall costs expenses of the accused person.

**Precedence of Criminal Trials over Civil Actions**

Paragraph 134 relates to the drawback in the existing system, whereby the criminal trials have precedence over civil cases. It is believed that there is no statutory authority for this arrangement but it is part of the existing system and does not create any serious problem. Occasionally there may be an exceedingly heavy criminal list, but where that occurs, the Circuit Court Judge will arrange the criminal list in co-operation with the County Registrar and the local practitioners, with a view to having the criminal trials disposed of first, which is as it should be. If this arrangement should result in civil cases not being reached, then the earlier suggestion namely, that the arrears arising on the civil side should be dealt with by a temporary Circuit Court Judge, who is not assigned to any specific Circuit, seems to be a more appropriate procedure to adopt.

**Listing of Cases**

It is indicated that the suggested recommendations would enable civil cases to be reached on appointed days. In this respect in many Circuits through the country, the County Registrar, in co-operation with local practitioners and with the Judge, will list cases for specific days during the sittings and this is feasible and practical. It can be achieved with local co-operation and with little loss of Judge's time and with great convenience to witnesses and litigants. It is appreciated that in some areas no day to day list is prepared.

**Transfer to Central Criminal Courts**

The State's right of application to have a trial transferred to the Central Criminal Court has from time to time caused public unease. Any enlargement of the right of transfer is not generally in the public interest and would not in any way achieve any of the objectives mentioned. An impossible and difficult position would be created if the transfer of cases was permitted to any venue in the State. If transfers could be made to any venues in the State or if there was any enlargement of the present right of transfer, it would be impossible, apart from other considerations to make any clear assessment of the volume of work which might arise or exist in any specific area from time to time. The position would be uncertain apart from the extra work which would be involved for the office of any County Registrar, who might find that cases from *any area* were being returned for hearing at a pending Court in his County. The suggestion that a High Court Judge be permitted to sit in the Circuit Court for the disposal of indictable crime is noted. It is difficult to understand why this suggestion should be necessary, unless there is not a sufficient number of Judges available in the Circuit Court.

**Change of Venue**

The recommendation in paragraph 137 suggesting that where there is more than one Circuit Court venue in any County, that notice of trial should issue returnable for one venue only, with liberty to apply before the Court commences to the County Registrar for a transfer. This would again create utter confusion from the point of view of endeavouring to fix a day to day list of cases for hearing at the particular venue. In addition a County Registrar would have the problem of endeavouring to fix venues and could become involved in contentious applications leading up to the opening day of the Circuit Court with no one knowing exactly what the ultimate position in relation to the listing of cases might be.

**Confining Criminal Circuit Court to Limited Venues**

In relation to the suggested reduction in number and the limitation of locations for the Circuit Criminal Court through the country, no practitioner has approved of this recommendation and all are opposed to it. Reducing the venues and placing the new venues in the areas suggested in the Report, will result in very considerable public inconvenience, excessive travelling expenses, a very considerable loss of time for all parties involved. The State Solicitors involved, the Gardai from the areas from which the crime originates, the State witnesses, the accused, his witnesses (to include professional witnesses) will be obliged to travel very considerable distances to the appropriate venue and will lose considerable valuable time in awaiting the disposal of the case. Apart from this practical objection there is the important problem of an accused person finding legal representation at the venue for the hearing of the charge, especially in cases where an accused resided perhaps far away.

The accused is entitled to have his legal advisers represent him at the District Court preliminary investigation and also at the trial. There are few practitioners in the country who could undertake a defence in a criminal trial in the circumstances suggested knowing the time which would be involved in travelling to a centre many miles away. A Solicitor in the area where the venue is located may not be prepared to take on the defence of an accused person since he may not have dealt with the depositions in the District Court. An accused standing trial in his local area will find that his solicitor will be prepared to take on the defence of his case, even though he may not be fully remunerated. A State Solicitor could find that his presence would be required at the same time not only in the far distant Circuit Criminal Court but also in his local Circuit Court or in some District Court within his County, thus giving rise to adjournment of cases, through his inability to attend each Court.

**Circuit Court Offices**

The recommendation contained in paragraph 139 that each County should have a County Registrar is fully supported. In fact, it is essential that the existing position in this respect should remain and all County Registrars' Offices should at all times be adequately staffed to enable the office to provide efficiently the many services which fall upon it.

**Number of Judges of the Circuit Court**

The Society does not feel competent to comment on the actual number of Judges required to service the Circuit Court either in Dublin or through the country. It is suggested that in the public interest it is essential to have at all times a sufficient number of Judges available to dispose of all work efficiently and without undue delay. Essentially the situation where one may have an idle Judge, is far better than the position which existed in Dublin for a number of years, namely frustrated and dissatisfied litigants by reason of the fact that there were not sufficient Judges, nor sufficient accommodation available to deal with the work which consequently fall into arrears.

**Non-contentious Applications**

The Society approve of and fully support the recommendations contained in paragraph 140 and while supporting these recommendations would like to recommend that a County Registrar be empowered to deal with the approval of settlements to a limited extent in infant cases. While the Workman's Compensation procedure operated in the Circuit Court, County Registrars dealt with the settlement of claims and the approval of settlements in a very satisfactory manner. A limit could be placed on the County Registrar's jurisdiction in relation to infants, setting a ceiling figure of One thousand Five Hundred Pounds. One of the factors which causes very great delay in the Circuit Criminal Court is the procedure in relation to the calling of the Jury List and the swearing in of a jury. A County Registrar should be empowered to take proof of service of the jury summonses and to call the list of jurors at say 10.30 a.m. and then report to the Judge the names of absent jurors, who could then be dealt with by the Court when it sits at 11 a.m.

**Courts' Time**

Paragraph 141 acknowledges that all business in the Circuit Court should be disposed of at the time and place scheduled and that great expense and inconvenience is caused by inability to do so and that the cost of judicial time is usually the cheapest factor in litigation. The Society fully support this comment and would go further and say that the cost of judicial time is now the cheapest factor in litigation and it is believed that the value of any saving in judicial time, which could arise through the implementation of many of the recommendations, would be far outweighed by the very considerable additional expense and invonvenience which would be caused to the public especially if the fundamental recommendations for change were implemented.

## THE HIGH COURT

**Appeals to the High Court and Circuit Court**

The recommendations made are acceptable and with particular reference to Recommendation 146, it is agreed that the present system is too rigid, and that a Judge should have more discretion in relation to the transfer of cases from one venue to another. The recommendation that appeals which are settled or withdrawn should be ruled on before the High Court in Dublin on an ex parte application is fully supported.

**High Court Trials in Country Venues**

The recommendations of the Committee are fully supported. In so far as Jurors are concerned if the High Court sits only in the venues mentioned in Recommendation 151, then it should be possible to have the Jury List confined to Jurors who are resident within an area of five miles of the centres named. The number of High Court actions held at country venues are not many, and hence the calls upon Jurors in this respect will not be great.

**Other Recommendations**

The general recommendations under this heading are supported and in the view of the Society should be implemented.

**Memoranda of Dissent**

The Memoranda of Dissent of His Honour Judge J. C. Conroy and of the late Mr. E. C. Micks and Mr. J. McMahon is noted. The society support the Dissenting Memorandum of His Honour Judge J. C. Conroy and in particular paragraphs 10, 11, 12, 13 and 14 thereof. The important agreed fact is that the present system has operated efficiently, and as Judge Conroy points out in paragraph 6 of his report, "in the absence of any evidence that the existing system is inefficient or unworkable, any change should be limited to those necessary to ensure efficiency and the expeditious disposal of the business of the Court'. The Society fully approves of this statement and is forced to the conclusion, having regard to the views of members of the profession through the country, that the only break-down in the present system of any real consequence arose through the non-availability of Judges to deal with the work listed for hearing. Without over-simplifying any problem, it is the view of the Society that any difficulty which has arisen could have been avoided and the objectives of the Committee could all be realized in the existing systems with less additional expense by having an adequate number of Judges and adequate Court accommodation available at all times.

**Circuit Court Rules**

The Society feels it should comment on the fact that no recommendations have been made towards consideration of the up-dating of the Circuit Court Rules. The Society is aware of the fact that new District Court Rules are pending which will assist in simplifying the existing system in the District Court without any great fundamental changes, but there is no indication of any intended revision of the Rules of the Circuit Court. It may well be that quite a number of the acceptable recommendations could be achieved by an up-dating of the Circuit Court Rules.

# UNREPORTED IRISH CASES

**Interlocutory injunction against engineers.**

Mr. Justice Kenny held in the High Court in Dublin that there was no trade dispute between the Amalgamated Union of Engineering Workers and Tipperary (South Riding) County Council, but that there was one between the union and the City and County Managers' Association.

He made the finding when he granted an interlocutory injunction, effective until further order, to the Council restraining sixteen engineers, who are members of the union, from picketing any waterworks, reservoirs or any premises owned, occupied or used by the Council.

Earlier this month the Court granted the Council a temporary injunction after being told that picketing had taken place as a result of a recognition dispute between the union who were endeavouring to have themselves represented as on the Staff Panel and the City and County Managers' Association.

**Workers refused to pass pickets**

Other grades of workers employed by the Council had refused to pass the pickets and it had left areas of the county without water and domestic refuse services.

Mr. Gerard Clarke, S.C., for the County Council, applying for an interlocutory injunction against the engineers, said that the action by the defendants had caused serious interference with the services administered by the Council. The interference with the water supply to domestic consumers and farm users in extensive areas was of tremendous importance and carried a grave threat to the users.

The picketing began on May 1 and continued until notice of the injunction was served. He said it was clear from a letter written by the union and sent to the County Manager (South Riding) Mr. Hayes on April 29 that the purpose and intention of the picketing was in pursuance of a recognition dispute with the City and County Managers' Association.

**No dispute claim**

It was the contention of the Council that they in fact had no dispute with these defendants and the nature of the contest that was alleged to exist was something which was not within the power of the Council to do anything about.

There was no trade dispute between the parties, he said. It was also his clients' contention that the employers and workers—the Council and the engineers—were not employers and workers as defined in the Trades Dispute Act, 1906 in as much as they were not employed in trade or industry.

Mr. Clarke said that when the injunction order was served along with the Council's affidavits a replying affidavit was lodged on behalf of the defendants. From the affidavit it seemed to him that there was now an effort to bring in some other matter other than the recognition dispute.

**Union lodges claim for salary increases**

Michael Murphy, engineer, of Clonmel, in an affidavit made on behalf of all the defendants, said that in March, 1972, the union to which the vast majority of engineers employed by Local Authorities in Ireland belonged, lodged a claim for increases in salary and also for the establishment of scales of long service increments and other matters touching their employment, with the County and City Managers Association.

The claim was made on behalf of all engineers who were members of the union and were employed by Local Authorities.

**Negotiations**

A reply was received from the Chief Officer of the Local Government Negotiations Board to the effect that negotiations in regard to increases were in progress between that Board and organisations representing engineers, and further that through the scheme of conciliation and arbitration for Local Authority Officers, representations could only be entertained by Local Authorities through the Staff Panel and that if the A.U.E.W. wished to participate in negotiations with the Local Authorities the first step was to seek membership of the Staff Panel.

The union, he continued, applied for representation on the Staff Panel but the Panel would not agree to the admission of the union.

Referring to the affidavit sworn by the Tipperary County Manager (South Riding), Mr. Robert N. Hayes, Mr. Murphy stated that it was not correct to say that no trade dispute existed between the defendants or their union and the County Council. The defendants wished to negotiate the terms and conditions of their employment with the Council through their union.

While it might be correct to state that the Council had no power to resolve differences between the union and such other unions as might wish to prevent it having representation on the Staff Panel, it was within the Council's power to resolve the dispute which existed between the defendants as employees and the Council as employers.

**Union did not act hastily**

He added that the union had not, by any standard been precipitate.

The union were induced to cease industrial action in the confident expectation that the problem would be speedily resolved. The position had not been resolved so that the union had no alternative but to resume industrial action.

Mr. Edward Comyn, for the defendants, said his case rested on the contention that the City and County Managers' Association were employers and he submitted that there was clear evidence of a trade dispute between the council and the engineers.

During the course of the hearing a letter was read in which it was stated that Mr. Hayes, the county manager, had invited representatives of the men's union to talks on May 30

Mr. Justice Kenny said the first question to be answered was whether a recognition dispute between the union and the City and County Managers' Association was a trade dispute. It was perfectly clear that it was not; it was the various County Councils who were

the employers. The Association was a non-incorporated body which was brought under the scheme but under no circumstances were they employers.

**Council's chance**

Even if the Association negotiated terms with the union and agreed on them as the law stood the decision could be over-ridden. On that ground alone it seemed to him that the Council had an excellent chance of succeeding when the action came for hearing.

On the second point there was an arguable case that a County Council was not engaged in trade or industry. On both grounds there was no trade dispute between the union and the County Council but between the union and the Association.

[Tipperary S.R. County Manager and another v. Amalgamated Union of Engineering Workers; Kenny J.; unreported; 20 May 1974.]

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**Part of Adoption Act preventing adoption of wife's illegitimate child ruled unconstitutional.**

A section of the Adoption Act, 1952, preventing a young Dublin couple from adopting the wife's illegitimate son, was held to be unconstitutional.

In a reserved judgment, *Mr. Justice Pringle* held that the particular sub-section clearly had imposed disabilities and had made a discrimination of the grounds of religious profession or belief and, therefore, was invalid.

The section impugned is section 12 (2) which states: "The applicant, or applicants, shall be of the same religion as the child and his parents, or, if the child is illegitimate, his mother".

The couple, whose names were not disclosed, and who were married three years after the child was born in 1967, are of different religions, the husband being a Catholic and an Irish citizen, the wife, a member of the Church of England.

The child was born in England, baptised in the Church of England but is being brought up a Catholic in Dublin. He is due to receive his first Holy Communion later this month.

During the hearing of the action last week it was stated that the child had been reared by the couple since their marriage and that the husband was not the father.

After the court had given its decision, the husband said: "We are happy with the decision. We were determined to have the boy legally adopted since the Adoption Board rejected our applications on religious grounds.

The Judge also made an order, declaring the decision of the Adoption Board, rejecting the couple's application to have the child adopted, to be invalid.

**Mr. Justice Pringle** held that the provisions of the particular section of the Act, were clearly, on their face, in contravention of Article 44 (2) (3) of the Constitution for the reasons advanced by the plaintiff's counsel. If this was not so, he held that the plaintiffs had discharged the onus of rebutting the presumption of their constitutionality.

The Judge said he could not accept the submission of counsel for the Adoption Board and the Attorney General that the legislature, in conferring the right of legal adoption, was entitled to provide reasonable restrictions.

"I do not agree that the restriction imposed was a reasonable one and, even if it were, it could not be valid if it infringed the Constitution, as I am satisfied it did."

**Decision on Costs**

After **Mr. T. K. Liston,** S.C., for defendants had asked that the costs be not granted against the Adoption Board, the Judge said he would not grant costs against them because he considered they had acted properly in the matter and had made the only order they could make in the circumstances. He awarded the costs against the Attorney General.

When the decision was announced, **Mr. T. J. Conolly,** S.C., for the plaintiffs, said he wished to thank the press for having complied with the court's request not to publish the names and addresses of his clients. The Judge, endorsing this, expressed the hope that they would continue to exercise their discretion in this regard.

With Mr. Conolly were Mr. Donal Barrington, S.C., and Mrs. Mary Robinson.

**Note—Decision removes anomaly in Irish law**

Judge Pringle's decision in the Adoption Act case, removes an anomaly from Irish law, the subject of much comment and criticism since the passing of the Adoption Act in 1952. The Act provided that an adoption order should not be made unless the persons applying for the order were of the same religion as the child and his parents, or, in the case of an illigitimate child, of his mother.

This meant that Protestant parents legally could not adopt the child of Catholic parents, or the illegitimate child of a Catholic mother. Similarly, Catholic parents could not adopt legally the child of Protestant parents, or the illegitimate child of a Protestant mother.

The Act said that parents of mixed religion legally could adopt a child, provided each of the spouses was a member of one of a number of named religions—Church of Ireland, Presbyterian, Methodist, Quakers, Baptists or Plymouth Brethern.

This specifically excluded the case where one of the parents was Catholic and seemed to conflict with the constitutional guarantee of no discrimination on the grounds of religious profession, belief, or status (Article 44) and also of the guarantees of equality before the law and the protection, given in favour of the personal rights of the citizen.

The Act also seemed to discriminate against the child, who might be denied a good home and upbringing and against the parents of a mixed marriage, who could not enjoy the privilege open to other parents of being able to apply for an adoption order under the Act.

Judge Pringles' decision introduces a more liberal note into the legal situation of parents of mixed marriages. It does not appear that any amending legislation is necessary as a result of the decision. It means merely that the offending provisions of Section 12 of the Act go by the board.

[J. McG. and W. McG. v. Adoption Board and Attorney-General; Pringle J.; unreported; 13 May 1974.]

**Garda sergeant wrong to remove bar customer—illegal act.**

A Garda Sergeant has no authority to remove customers from a bar after hours. And even if he puts his hand on them and gently ushers them out he can be guilty of assault, Limerick Circuit Court decided yesterday.

The decision followed a submission to Judge Welwood that Garda Sergeant Farrell had acted illegally when he tried to remove Mr. Anthony Halpin from a public house at Hospital, Co. Limerick, after time had been called.

The Judge withdrew charges alleging that Mr. Halpin, a 43-year-old salesman, of Knockainey, wounded Sergeant Farrell with intent to do him grievious harm and also of maliciously wounding him. Mr. Halpin was also found not guilty of assaulting the sergeant in the course of his duty on February 13

The court was told that Sergeant Farrell was checking that all the public houses in Hospital were closed at 11.10. He went into Morrissey's licensed premises on Main Street at 11.20 and found three customers there.

Two left when asked, but Mr. Halpin remained. The sergeant tried to remove Mr. Halpin who struck him twice. There was a scuffle and Mr. Halpin fell over some stools. He was alleged to have called the sergeant's wife 'a tinker'.

Sergeant Farrell said that while Mr. Halpin was not drunk in the accepted social sense, he considered that he would be unfit to drive under the terms of the Road Traffic Act.

While the publican, Mrs. Morrissey was giving the sergeant first aid, he heard a vehicle starting and rushed out on to the street.

Sergeant Farrell said that he tried to pull Mr. Halpin from his van to prevent him from driving. There was another scuffle and the sergeant was struck in the face. He fell and struck his head on the pavement. Mr. Halpin then drove away.

Mr. Gerald Goldberg, defending, submitted that it was a case of illegal apprehension and Mr. Halpin was within the law to resist.

The sergeant had no right to attempt to drag Mr. Halpin from his van without having first used the words "you are my prisoner" or "I arrest you".

Mr. Goldberg added that it was improper and outrageous that Mr. Halpin should have called the sergeant's wife a tinker. The sergeant could not be blamed for the attack he made on Mr. Halpin.

Dr. Michael Clery said that he was still treating the sergeant for injuries he received. These included a broken nose and a skull wound.

[Attorney-General v. Halpin; Judge Wellwood; Limerick Circuit Court.]

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**Order restraining picketing discharged.**

In a reserved judgment in the High Court, Dublin, Mr. Justice O'Higgins dismissed with costs an application by the proprietors of a Co. Cork ladies' clothing manufacturing company for a permanent injunction restraining five employees from picketing their main factory at Kinsale and branches in Fermoy, Bandon and Newmarket.

The court also discharged a temporary injunction granted last February to the company, Kire Manufacturing Co. Ltd., Kinsale, restraining picketing of their premises. The injunction had restrained Finbar O'Leary and others.

In a long judgment, Mr. Justice O'Higgins referred to decisions in other cases of picketing and said it was important to appreciate that these decisions had been relied on as authorities for the proposition that a threat by a group of men to leave their employment in order to induce their employer or some other person to break a contract of employment was not protected by Section 3 of the Trade Disputes' Act, because it was a threat to use unlawful means to bring about a desired result.

In *Cooper v. Millea* (1938) I.R., *Riordan v. Butler* (1940) I.R., and *Rookes v. Barnard* (1964) A.C., a threat had been made by defendants to cease work if plaintiff's employment of contract. By reason of this threat to break a contract, it was held that Section 3 of the Trade Disputes Act 1906 did not protect.

Mr. Justice O'Higgins said that in the present case, however, there was no threat. Here there was a dismissal, a consequent and instantaneous trade dispute and a walkout in almost complete silence by the workers concerned. On these facts he could not see that Section 3 had any application.

"In this case there was, in my view, a trade dispute. In furtherance of this dispute there was picketing by the defendants. Section 2 expressly provides that it shall be lawful in such circumstances to picket. Because those picketing are doing so, having broken their own contract of employment, would appear to me to be wholly irrelevant once they are doing so in furtherance of a trade dispute and once the fact of picketing is the only complaint made against them", the judge commented.

The picketing arose out of a dispute in relation to the operation of an incentive payment scheme involved with which were new methods in working.

Mr. Justice O'Higgins said : "It is a matter of regret that a good industry, enjoying good management/staff relations should have had this experience. I feel keenly the damage that has been done and may still be done. Be that as it may, the fact is that the dispute which drove a cleavage into harmonious co-operation between management and staff still continues".

[Kire Manufacturing Co. Ltd. v. O'Leary and others; O'Higgins J.; unreported; 29 April 1974.]

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**Premises are fully rent-controlled, even if part of the premises are used for business.**

The question is whether the premises concerned are controlled business premises. These were licensed premises downstairs, with living accommodation upstairs. The contention that because the premises are partly used for business, they constitute "business premises" cannot be sustained. The premises are rent controlled, and under S. 4 of the Rent Act, 1946, the application of the Act to a dwelling house shall not be excluded by reason of the fact that part of the premises was used for business. Section 54 (1) of the Rent Restrictions Act 1960 refers to controlled business premises, but does not apply to this case where the Rent Act protection of the private premises is continued by the 1960 Act.

[Mullane v. Brosnan; Supreme Court (Fitzgeral, C.J., Henchy and Griffin J.J.), per Henchy J.; unreported; 11 March 1974.]

# LEGAL EUROPE

# REYNERS v BELGIUM—Summary of Judgment

**Summary of Judgment delivered by the Court of the European Communities in Luxembourg on 21st June 1974 (translated by the Editor)**

**Facts**

The applicant, Jean Reyners, was born in Brussels in May 1931 of Dutch parents who had resided for a long time in Belgium. Reyners was educated in Belgium, and obtained the degree of Doctor of Law (equivalent to LL.M.) of a Belgian University and has continued to live there, but has at all times kept his Dutch nationality. When he tried to be admitted as a barrister in Belgium, he was confronted with a Belgian law of October 1919 which declared that no one can be admitted to the Belgian Bar unless he is of Belgian nationality. Article 428 of the Belgian Judicial Code, which came into force on 1 November 1968, has affirmed the law of 1919 but has sanctioned the King to grant exemptions in specified circumstances. The Royal Belgian Decree of 24 August 1970 set out the following conditions, under which foreign barristers are admitted to the Belgian Bar, as follows :

(a) The applicant must have been resident in Belgium for six years before applying for admission.

(b) The applicant must furthermore prove that he has not been rejected by a foreign Bar on account of dishonourable motives.

(c) Or in the alternative, produces a certificate of the Minister of Foreign Affairs of his country which details the laws conferring reciprocity.

(d) At the time of his application for admission, be not resident or domiciled or practising in the Bar of a foreign country.

The applicant Reyners does not fulfil the conditions of reciprocity stated in paragraph (c) and has asked the Belgian Conseil d'Etat by a request of November 1970 to declare that paragraph (c) violates Articles 52, 53, 55 and 57 of the Treaty of Rome, and should consequently be annulled. In an interim judgment of Dec. 1973, the Belgian Conseil d'Etat, in accordance with Article 173, has requested the Court of the European Communities to adjudicate upon the following questions :

(1) What is to be meant by the expression "activities which in that State are connected, even occasionally, with the exercise of official authority" in the text of Article 55 (1) of the Treaty which provides for exceptions to freedom of establishment.

(2) Is Article 52 of the Treaty which establishes principles of freedom of establishment, since the end of the period of transition, a law which comes into effect immediately, despite the fact that no directives have been issued in accordance with Article 54 (2) or Article 57 (1)?

**Written observations to first question**

Written observations have been submitted by the Commission and by the Governments of Federal Germany, of the Netherlands, of Luxembourg, of Belgium, and of Ireland, as by the applicant.

The *applicant* considers that the exception provided for by Article 55 to the principle of freedom of establishment does not relate fully to the profession of lawyer, but only to certain auxiliary activities. Furthermore, he pointed out, *inter alia,* that if the applicant were an English or an Irish barrister, he could if he had obtained a Doctorate in Law in a Belgian University, and fulfilled the conditions as to integrity and as to domicile, be admitted to the Belgian Bar, as there is no law as to reciprocity in those countries and furthermore that different conventions between Bar Organisations of different countries would admit interchange of pleadings and even occasional professional practice in the jurisdiction of the other State.

The *Belgian Government* as the defendant on the case considers that Question No. 1 must be considered as a whole in that in (1) Article 55 would exclude from the right of establishment only those activities which are connected with the exercise of public authority, but those activities should be specifically reserved to the nationals of the State concerned. It is stated that this alone would be the only logical solution—i.e. to interpret Article 55 in the most restrictive way. In each Member State, many professions would participate in activities which are connected with the exercise of public authority as a result of some of their activities, the right of establishment would be unduly restricted if the legal profession as a whole were to be subject to freedom of establishment.

On the juridical plan, one should be in a position to make distinctions. The notion of a profession which would be connected with the exercise of an official authority could not be the subject of a judgment as uniform Community Law, because it differs from one State to another. Article 55 can only have a broad general meaning; it could not be construed as applying specifically to a specified professional category.

The *Federal German Government* states that such an activity could in one State be construed as connected with the exercise of an official authority, and in another State could be understood to pertain to freedom of establishment. It was the intention of the signatories of the Rome Treaty to exclude from the principle of the freedom of establishment the profession of lawyer. Furthermore the rules regulating the profession of lawyer in the nine Member States would necessarily be different under German Law, several activities of lawyers, particularly in relation to criminal law, are closely connected with the exercise of official activity, which Article 55 could not exclude.

The *Government of the Netherlands* considers that Article 55 of the Treaty does not exclude from the principle of freedom of establishment the profession of lawyer in all its aspect, but only those professional legal functions which are connected with the exercise of public authority such as a lawyer acting as a temporary Judge. These functions would imply generally a certain

power, and its responsible exercise would be controlled by guarantees, and they would normally be nominated officially, the exception in Article 55 only relates to those specified activities and an official function would normally imply that the holder possesses the nationality concerned. But, as regards lawyers, to insist upon nationality as a condition of admission is in reality to fear foreign competition.

The *Government of Luxembourg* agrees with the remarks of the Belgian Government. In Luxembourg, a lawyer would inevitably participate in the judicial function, being by virtue of his office called upon to complete the judicial process and he cannot refuse it. It must be noted that the professional training of a lawyer is practically identical to that of a Judge. The lawyer, like any civil servant, must swear to be faithful to the Constitution. The lawyer, while nominally exercising a liberal profession, in effect will take an intimate part in judicial power.

The *Irish Government* considers that the exception contemplated by Article 55 would only apply to lawyers directly connected with official authority, and not to the legal profession as a whole. The *British Government* takes the same view.

The *European Commission* considers that the notion of official authority should be defined as an element of Community Law and particularly from the principles of the Treaty. All exceptions to the fundamental human rights must receive a very strict interpretation and the interpretation favouring fundamental human rights should be preferred. The only real effect of Article 55 is to ensure that foreign lawyers, benefitting from freedom of establishment, would try to exercise in another country an invalid official function. The notion of exercise of an official function can thus be defined as conferring powers of restraint against persons and goods not undertaken by a lawyer. The lawyer exercises a liberal profession characterised by independence towards official authority. In so far as a lawyer undertakes the defence of a person, he does so as a legal technician. The fact that he belongs to a professional association, or that he has to take an oath of loyalty, does not confer upon him any official authority. Most Governments and Bar Associations do allow foreign lawyers to exercise limited functions in their Courts.

In the legal profession an exception must be made in the application of Chapter Two of the Treaty only to those who exercise an official function, if this function always could be dissociated from the normal exercise of the profession.

**Second Question**

Is Article 52 deemed to be a law directly applicable to all Member States?

According to the *applicant,* Article 52 would be a clear precise and unconditional direction which would be directly applicable in the Member States since the end of the transition period. The only problem for the applicant is one of nationality. If the Treaty were to forbid from a given date a discrimination founded upon nationality, this would be directly effective then. The question should consequently be answered in the affirmative.

The *Belgian Government* as defendant sustains the contrary view. Article 52 cannot be construed by itself; it is not authorised to regulate the details of the principle of establishment. It would be unreasonable to construe Article 52 as not including nationality amongst the exceptions to the principles of freedom of establishment.

The *German Government,* adopting the same view, points out that if the appellant's contention were sustained, the Member States would not, according to Art. 52, once the period of transition had expired, have the possibility to issue their own regulations. As long as no di$ectives have been issued, the Member States have the right to subordinate the right of establishment within their territory, to the implementation of conditions of admission to a profession regulated by their internal law.

The *Luxembourg Government* agrees with the Belgian Government.

The *Irish Government* does not consider Article 52 to be directly applicable in the circumstances. In order to apply Article 52 directly, it would be necessary to issue directives under Article 54 and these would allegedly leave to the Member States the form and means of putting the Directive into force.

The *Commission of the European Communities* submits that Article 52 is as clear as Article 53, which the Court has already made directly applicable to all Member States. Article 52 is a law to be applied without conditions. The Council of Ministers should arrange a programme which would fit in respect of each activity, general conditions byq which the principle of the actual realisation of freedom of establishment would be undertaken.

Once the Council had adopted these principles, the Community institutions would no longer be in a position to intervene. The Council would have to issue directives to implement the programme, but once these became law, there would be no obstacle to Article 52 being deemed to apply directly to the Member States. The free circulation of people is a fundamental principle of the Common Market. The following answer is proposed, Article 52 of the Treaty of Rome, would produce, from the end of the period of transition, direct effects in the relations between Member States and their nationals and would enforce for individuals rights which national Courts would have to safeguard, as regards the prohibition of discrimination founded on nationality.

**Oral Procedure**

(1) First Question.

The *Belgian Bar* submits that admission in the various Member States of foreigners to the profession of lawyer can only be determined by legislation passed by the National Parliament. As a lawyer alone could assume the defence of accused *inter alia,* it would be impossible to associate the different activities of the legal profession with the principle of freedom of establishment.

(2) Second Question.

The *British and Irish Governments* consider that Art. 52 is not directly applicable to Member States, as its execution would require additional laws in order that the principle of freedom of establishment should be realised in a practical way.

**Law Stated**

(The Court has issued no less than 56 conclusions of which the following are the most important. All conclusions are preceded by the word "Whereas . . .")

**Interpretation of Article 52**

(1) WHEREAS the Belgian Conseil d'Etat asks if Article 52 is, at the end of the period of transition, a law which is directly applicable to Member States.

(2) AND WHEREAS the Belgian, Luxembourg, the British and Irish Governments have submitted that such an interpretation could not be given, because it would require additional legislation to put it into force, which implies a general programme to be subsequently implemented by directives, and that a national Judge is precluded from interpreting Community Law directly.

(3) AND WHEREAS the German and Netherlands Governments, following the judgment in *Lutticke* (June 1966), consider that the rules imposing upon Member States an obligation which they must execute within a prescribed time become automatically directly applicable if this obligation has not been fulfilled within that time, which implies that at the end of the transition period, Article 52, is a law which is itself complete and juridically perfect.

(4) AND WHEREAS, if such an interpretation is accepted, the general programmes and the directives issued pursuant thereto would only be important during the period of transition, as the principle of freedom of establishment would be fully realised once this period had ceased.

(5) AND WHEREAS the Commission considers that the principle of freedom of establishment could at least be applied in full at the end of the period of transition in relation to certain matters, such as discrimination imposed upon the ground of nationality as being a violation of Article 7 of the Treaty but that Article 54 foreshadows a general programme to be followed by directives to bring Article 52 into full effect.

(6) AND WHEREAS the principle of freedom of establishment is destined to accomplish two functions: *First,* to eliminate during the transition period, the obstacles which would impede the realisation of freedom of establishment; and the *Second,* to introduce in the national legislation of Member States laws destined to facilitate the effective exercise of that freedom and that the effect of Article 52 should be determined within the ambit of collaboration between the national competent administrations and the adaptation of practical administrative procedures foreshadowed by Article 54.

(7) AND WHEREAS the rules of national remuneration, being one of the fundamental juridical rules of the Community, can be invoked directly by the nationals of all Member States, and that thus Article 52 prescribes an obligation leading to a definite result, whose obligation should be facilitated by the execution of progressive measures, which interpretation thus conforms with Article 8 (7) of the Treaty, which states that the transition period constitutes the extreme limit for the coming into operation of the rules foreshadowed by the Treaty.

(8) AND WHEREAS consequently, after the expiration of the transition period the directives under Art. 54 relating to the right of establishment have become superfluous in order to implement regulations in regard to national remuneration, as the Treaty itself has determined that they would be directly applicable.

(9) AND WHEREAS in view of the aforementioned argument Article 52 of the Treaty is a law directly applicable within the Member States at the end of the transition period notwithstanding the absence of directives relating thereto.

**Interpretation of Article 55 (1)**

(10) AND WHEREAS in interpreting the meaning of the words in Article 55 (1) "activities which in that State are connected, even occasionally, with the exercise of official authority" the exception mentioned in Article 55 is to be interpreted as: *Firstly* the only activities inherent in the legal profession which are connected with the exercise of official authority or *Secondly* if the whole legal profession is to be deemed an exception because it is connected with that exercise.

(11) AND WHEREAS the Belgian Bar and Luxembourg Governments consider that the legal profession would have to conform to the Treaty as regards the rules relating to the right of establishment because it is connected organically with the function of the civil service relating to justice, and that such activities would make a lawyer an indispensable aid to justice.

(12) AND WHEREAS the German, Belgian, British, Irish and Dutch Governments, as well as the Commission, consider that the exception stated in Art. 55 relates exclusively to the internal rules of the different professions concerned, which may be connected effectively with the exercise of official authority, provided they are ntt associated with this exercise in the normal way.

(13) AND WHEREAS the fact that, within the Treaty the principles relating to freedom of establishment and to national remuneration are deemed essential and therefore the exceptions contemplated by Art. 55 (1) could not receive a meaning which would surpass the aim to which such an exception was to be made, and therfore that Article 55 (1) satisfies this necessity by limiting the exclusion of nationals to those activities, which taken by themselves, constitute only a direct and specific connection with public authority.

(14) AND WHEREAS it is contemplated that an exception foreseen by Article 55 may apply to a profession if the effect of freeing a profession would impose upon the Member State the obligation to admit even in a temporary way, some non-nationals to State functions connected with public authority.

(15) AND WHEREAS such a contemplated extension would be inadmissible, as within the exercise of an independent profession, the activities deemed to be connected with official authority would constitute an element which could be detached from the professional activity of the lawyer taken as a whole.

(16) AND WHEREAS the eventual application of restrictions to the principle of freedom of establishment foreshadowed by Article 55 should be considered separately by each Member State, having regard to the national laws applicable to the organisation and exercise of the particular profession—and that nevertheless the common character of the Community must also be taken into account as specifying the limits set out by Article 55 to the exceptions allowed to the principle of freedom of establishment so that the useful effect of the Treaty resulting from unilateral laws passed by Member States would be nullified.

(17) AND WHEREAS, provisions in the legal professions which would comprise regular contacts with the Courts do not constitute as such activities connected with the exercise of official authority—and that the most typical activities of the lawyers' profession, such as consultation and legal aid to clients, as well as appearing for and defending parties in Courts, are not deemed to be activities connected with the exercise of public authority, even if the presence or aid of the

lawyer is compulsory under the law.

(18) AND WHEREAS the exercise of legal activities would not interfere in any way with the free exercise of judicial authority and power—and that consequently the exception to the principle of freedom of establishment specified in Article 55 (1) should needs be restricted only to those activities contemplated by Art. 52, which by themselves necessarily include a direct and specific connection with the exercise of public authority.

THE COURT giving judgment upon the questions submitted to it by the Belgian Conseil d'Etat on 21 December 1973, states as follows :

(1) Since the end of the period of transition, Art. 52 of the Treaty of Rome, is a law which applied directly to Member States, notwithstanding the fact that no directives have been issued under Article 54 (2) or Article 57 of the Treaty.

(2) The exception to the principle of freedom of establishment set out by Article 55 (1) of the Treaty of Rome must be restricted to those activities stated in Article 57 which comprise by themselves a direct and specific connection with the exercise of public authority. It would not be possible to set exceptional limits within the rules of a liberal profession such as that of a lawyer to activities such as consultation and legal aid, and appearing for and defending parties in the Courts, even if the performance of these activities is in fact the object of an obligation or of an exclusion established by law.

Given by the Full Court of Nine Judges at Luxembourg on 21 June 1974.

Albert Van Houtte, Registrar.
Signed : Robert Lecourt, President.

# Planning Appeals not to be decided by one Person

The proposed Planning Appeals Board, to be set up under the Local Government (Planning and Development) Bill should have at least seven members and any appeal should be heard by at least three of them, according to a recommendation from the Incorporated Law Society of Ireland on the projected legislation.

The suggestion that a single member of the board should exercise decision functions is unacceptable since the Board will be the final court of appeal on planning matters.

The Law Society also recommends that the chairman of the Board should be a person with legal training and not less than seven years' experience at the Bar or as a solicitor.

Commenting on complaints under the former legislation, the Law Society says that the composition of the new Board can overcome the criticism that the person deciding the appeal was not independent and was a political appointment. Delays can be cut down by curbing appeals for the purpose of delay while work continues on a development, and also by dividing the board to sit in two divisions if the number of cases warranted it.

Reviewing the possibility of charging fees for planning applications and appeals the Law Society says that if such fees are to be charged it is important that provision should be made for no fees to be charged for persons of inadequate means.

The existing unsatisfactory position about notices of planning applications should be overcome by the placing of notices on the property and in a newspaper circulating in the area and in the vernacular of the area.

The Law Society believes that the provisions of the new Bill deal with most of the complaints made against the 1963 Act, but feels that the Minister's role in relation to the board should be one of general guidance instead of directives.

# Solicitors' Golfing Society

**Summer Meeting at Dun Laoghaire, 21st June 1974**

President's Prize : Michael Green (21) 40 points; runner-up : G. A. Walsh (12) 37 points.

Ryan Cup (Handicaps 13 and Over) : J. N. Tanham (14) 37 points; runner-up : Daire Walsh (17) 37 points.

Handicaps 12 and Under : B. G. M. Donnelly (1) 36 points; runner-up : Paul McLaughlin (7) 35 points.

First Nine : D. M. Buchalter (13) 20 points.

Second Nine : R. V. H. Downey (18) 21 points.

Competitor from more than 30 miles : F. P. Byrne (14) 36 points.

Best Score by Lot : F. G. Keane (16) 31 points.

Autumn meeting—Captain's (B. G. M. Donnelly) Prize at Tullamore, Saturday, 5th October 1974.

Henry N. Robinson (Hon. Secretary)

# CORRESPONDENCE

## CONFERENCE—COMPUTERS AND THE LAW

Dear Mr. Gavan-Duffy,

The Society for Computers and Law Limited is to hold a conference on Computers and Law in Oxford over the weekend 27 to 29 September 1974. The conference will be open to all people both in the United Kingdom and abroad who are interested in computers and law, and in particular we hope to have a large number of British lawyers present. The conference does not presuppose any prior knowledge of the topic, though we hope there will be plenty of information that will be of interest to both the ordinary practising lawyers and the computer experts. The emphasis will be on working, practical systems, and the speakers will deal with information retrieval, legislative and government systems, and other subsidiary applications for lawyers.

I should be grateful if you could find some room to give some publicity to this conference, and in any case if you are interested, make a note of the date. As soon as the speakers list is complete and other details available I shall be informing you.

Richard Morgan.
Publicity Officer

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Department of Social Welfare,
Dublin 1.
30th May 1974

Dear Mr. Ivers,

With further reference to your recent letter regarding the general question of assignments of land as raised by you, I wish to let you know that legal transfers which have been executed and stamped are being accepted in the assessment of means for old age pension purposes.

Brendan Corish.
Minister for Social Welfare

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## THE DUBLIN SOLICITORS BAR ASSOCIATION

Following a recent informal discussion between representatives of the Council of the Dublin Solicitors Bar Association, the Law Agent, Dublin Corporation, and the County Solicitor, Dublin County Council, it is proposed to prepare a memorandum for submission to the legal departments of both authorities setting out the main sources of difficulty encountered by practitioners and if possible, suggesting means whereby the work of the offices of the two authorities and of practitioners generally can be co-ordinated to eliminate or at least minimise such difficulties which frequently cause delay injurious to the interests of clients

The Council requests solicitors to furnish data and recommendations to assist in the preparation of the proposed memorandum to the undersigned as soon as conveniently possible.

Andrew F. Smyth
Hon. Secretary, Dublin Solicitors Bar Association,
1 Upper Ely Place, Dublin 2.

## Estate Duty Office Require Solicitors' Co-operation

The Estate Duty Office informed the Society that the provisional pre-grant system of assessing Estate Duties is progressing relatively smoothly, but that co-operation is required from the profession in order to see that business can be conducted without the re-occurance of delays. The following two points were stressed:

(1) Solicitors are requested to send Schedules of ets by post or to leave them with the officials in the Estate Duty Office and not to insist upon their being immediately assessed. Most cases are nowadays dealt with within two days and posted back to the solicitors concerned. However, officials say that personal callers tend to reduce the amount of work done by staff.

(2) If solicitors completed the Schedule of Assets and accompanying forms correctly it would reduce the work load of the Estate Duty Office by one-third. In this ing with each blank form of Schedule of Assets the following notice

Estate Duty Branch
Revenue Commissioners
Dublin Castle
22 May 1974

*Inland Revenue Affidavit—Provisional Assessments*

Your co-operation is requested in ensuring the maintenance of the system whereby Inland Revenue Affidavits (Form A) are provisionally assessed immediately on delivery. The system depends largely on the proper completion of the affidavit before delivery. If it is not completed properly it must be queried. The danger to the system lies in the additional work created by querying. (As an illustration of how querying clogs the system: 10,000 cases each queried once means the unnecessary and avoidable creation of a further 10,000 making 20,000 in all and requiring twice as many examiners to deal with them—or more likely causing long delays in assessment.)

In practice one out of every three cases has to be queried for one or other of the following omissions:

Page 2—failure to complete paragraph 3.

Page 3—failure to reply in detail to the question on joint property at paragraph 4.

Page 4—**Abatements** (paragraph 11A):
i—omission of date of birth of widow;
ii—omission of copy will;
iii—failure to indicate whether the widow opts for her legal right or for her benefits under the Will.

**Certain Irish Securities** (paragraph 11B):
omission of Schedule 13.

Page 10—failure to indicate that payment by instalments is intended, and
failure to enclose the copy affidavit with the original warrant when paying the duty.

Careful attention to these points will help to keep the system working smoothly. Your full co-operation will be greatly appreciated.

# THE REGISTER

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificate

An application has been received from the registered owner 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 wil lbe issued unless notification is received in the Registry within twenty eight days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 15th day of July, 1974.

D. L. McALLISTER,

Registrar of Titles

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

### Schedule

(1) Registered Owner: James Kennedy; Folio: 1475; Lands: Pollerton Little; Area: 3a. 3r. 5p.; County: Carlow.

(2) Registered Owner: Maurice Heffernan, decd.; Folio No.: 3651; Lands: Shronebeirne; Area: 1a. 3r. 2p.; County: Kerry.

(3) Registered Owner: Bridget Frances Clyne (now Bridget Frances Farrell); Folio No.: 2126; Lands: Tennalick; Area: 61a. 2r. 38p:; County: Longford.

(4) Registered Owner: John J. Delaney; Folio No.: 5297; Lands: Rahilla Glebe; Area: 69a. 2r. 34p.; County: Kildare.

(5) Registered Owner: John Brady; Folio No.: 21298; Lands: (1) Drinan; Area: (1) 19a. 2r. 5p.; Lands: (2) Lettreen; Area: (2) 6a. 0r. 0p.; County: Roscommon.

(6) Registered Owner: Brian Ward; Folio No.: 9405; Lands: Cloontirm; Area: 4a. 1r. 34p.; County: Longford.

(7) Registered Owner: James Dunne; Folio No.: (1) 10578; Lansd: (1) Tromman; Area: (1) 97a. 0r. 21p.; Folio No.: (2) 5781; Lands: (2) Tromman; Area: (2) 74a. 2r. 15p.; County: Meath.

(8) Registered Owner: Joseph Rochford; Folio No.: 13362; Lands: Thurles Townparks; Area: 13 Perches; County: Tipperary.

(9) Registered Owner: Michael Mahony; Folio No.: (1) 23257; Lands: (1) Lisduff (par.); Area: (1) 23a. 1r. 0p.; Folio No.: (2) 23257; Lands: (2) Lurgan More (part); Area: 2) 1a. 0r. 39p.; County: Galway.

(10) Resigtered Owner: Kathleen Brady; Folio No.: 34535; Lands: (1) Ovaun; Area: (1) 10a. 2r. 26p.; Lands (2) Cherryfield or Drishaghan; Area: (2) 8a. 2r. 30p.; Lands: (3) Cherryfield or Drishaghan (one undivided 19th part); Area: (3) 0a. 0r. 22p.; County: Roscommon.

(11) Registered Owner: Patrick Barry; Folio No.: 35107; Lands: Ballinvoultig; Area: 8a. 3r. 6p.; County: Cork.

(12) Registered Owner: James Barnes (Tenant in common of an undivided moiety); Folio No.: (1) 3225; Lands: (1) Lackan; Area: (1) 25a. 2r. 34p.; Folio No.: (2) 4516; Lands: (2) Kilbeg (part); Area: (2) 7a. 0r. 21p.; County: Wicklow.

(13) Registered Owner: Kevin E. O'Loughlin (Tenant in common of an undivided moiety); Folio No.: (1) 3225; Lands: (1) Lackan; Area: (1) 25a. 2r. 34p.; Folio No. (2) 4516; Lands: (2) Kilbeg (part); Area: (2) 7a. 0r. 21p.; County: Wicklow. ;

(14) Registered Owners: Patrick Griffin (Haugh); Flooi No.: 51 (now forming the lands No. 1 on Folio 14446 Co. Clare); Lands: Tuliaroe; Area: 36a. 3r. 29p.; County: Clare.

(15) Registered Owner: Edward Noone; Folio No.: 39rev.; Lands: Leitrim; Area: 19a. 3r. 13p.; County Leitrim.

# OBITUARY

**MR. GEORGE PETRIE ANDREWS** died on 15th June, 1974, in a Dublin Hospital. Mr. Andrews was admitted in Michaelmas Term 1935 and practised under the style of William Smyth & Son at 29 Lower Gardiner Street, Dublin 2, and at 7 Harbour Road, Skerries, Co. Dublin.

**MR. THOMAS JACKSON (Senior) B.A. (Cantab.),** died on 6th June, 1974, in his home at Sunnyfield, Foxrock, Co. Dublin. Mr. Jackson was admitted in Trinity Term 1931 and practised as a partner in the firm of Orpen Franks Co., first at 11 St. Stephen's Green, and subsequently at 28/30 Burlington Road, Dublin 4.

**MR. JOHN MacHALE** died in St. Vincent's Hospital, Elm Park, Dublin, on 30th May, 1974. Mr. MacHale was admitted in Michaelmas Term 1927 and practised under the style of Huggard, Lambe & Co., in Pearse Street, Ballina, and in Belmullet, Co. Mayo.

**MRS. KATHLEEN STOKES,** solicitor, died in Hollywood House, Rathangan, Co Kildare, on 10th June 1974. Mrs. Stokes was admitted in Trinity Term 1933, and practised in Rathangan.

**MR. THEODORE HERBERT SHERA** died suddenly at his home, 31 Derrynane Gardens, Dublin 4, on 23rd June 1974. Mr Shera was admitted as a solicitor in Michaelmas Term 1947, and practised in the firm of Messrs. Montgomery & Choy or in Kildare Street, Dublin, which recently amalgamated with Barringtons at 9 Ely Place, Dublin 2.

# NOTICES

**Final Arts Student, U.C.D.,** expecting to graduate in September, seeks Master. Please contact M.. W. Keller, Solicitor, Waterford. Tel. (051)4018.

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JACKSON-STOPS & McCABE, Surveyors, Auctioneers, Estate Agents and Valuers. Estate House, 8 Dawson Street, Dublin 2. Telephone: 771177.

JONES, LANG, WOOTTON, Chartered Surveyors, 60/63 Dawson Street, Dublin 2. Telephone: 771501. Telex: 4126.

LISNEY & SON, Estate Agents, Auctioneers, Valuers and Surveyors, 23 St. Stephen's Green, Dublin 2, and 35 Grand Parade, Cork, and 9 Eyre Square, Galway. Telephone: Dublin 64471.

MORGAN SCALES & CO. (Desmond G. Scales F.I.A.V.I.), Auctioneers, Valuers, Estate Agents and Managers. 24 South Frederick Street, Dublin 2. Telephone: 60701 and Rathmines 973870.

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ORCHARD AUCTIONEERS LTD. (David E. St. C. Herman, M.I.A.V.I., M.I.R.E.F.), Property Auctioneers, Valuers, Estate Agents and Rent Collectors. Specialists in the valuation of Antiques and Fine Arts. The Fountain House, Rathfarnham, Dublin 14. Telephone 909590.

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## GALWAY

LISNEY & SON, Estate Agents, Auctioneers, Valuers and Surveyors, 9 Eyre Square, Galway. Telephone: (091) 3107.

# THE SOCIETY

# Proceedings of the Council

27 JUNE 1974

The President in the chair, also present were: William B. Allen, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony E. Collins, Laurence Cullen, Gerard M. Doyle, Joseph L. Dundon, Felicity Foley, James R. C. Green, Christopher Hogan, Michael P. Houlihan, Thomas Jackson, Jnr., John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. Margetson, Gerald J. Moloney, Patrick C. Moore, Brendan A. McGrath, Patrick Noonan, Peter E. O'Connell, Patrick F. O'Donnell, James W. O'Donovan, Rory O'Connor, Thomas V. O'Connor, William A. Osborne, David R. Pigot, Mrs. M. Quinlan, Robert McD. Taylor, Ralph J. Walker.

**Land Registry map**

On a Report of a Committee the Council were informed that a Local Bar Association had passed a Resolution that Solicitors for Mortgagees should accept the Land Division Sub-Division map where its stamp is endorsed thereon in lieu of the later production of the Land Registry map. Such a Practice was not recommended by the Council as the acceptance of such maps as proving the identity of property outlined in them may be dangerous. It is advisable that maps should collate with the actual Land Registry maps or map.

**Conflict of interest**

Members wrote to the Society stating they acted for a client in a dispute with his father as to which of them beneficially owned a certain interest in a family dwelling house. The dispute was settled by the son executing an assignment of the premises to the father and an agreement by the father to make a will leaving the premises to the son. The solicitor was engaged by both parties. The Deed of Assignment was duly effected by the son. However, the father showed reluctance to carry out his part of the bargain by executing the will as agreed. The Council on a Report from a Committee felt that the solicitor should now state to both parties that he can no longer act for either of them.

**Parliamentary Committee**

This Committee put in a considerable amount of work on the direction of the Council on submitting a Report on the proposed forms of Capital Taxation including the Wealth Tax.

**Disciplinary Committee**

Mr. George A. Nolan after many years of service on the Committee offered his resignation. The Council expressed its appreciation of Mr. Nolan's services and recommended that he be replaced by Mr. Francis Lanigan. Other vacancies on the Committee were filled by the appointment of Mr. Rory O'Connor and Mr. Thomas Jackson, Jnr.

18th JULY 1974

The President in the chair, also present were: William A. Allen, Walter Beatty, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony E. Collins, Gerard M. Doyle, Joseph L. Dundon, Felicity Foley, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. Margetson, Patrick C. Moore, Brendan A. McGrath, John J. Nash, Patrick Noonan, John C. O'Carroll, Peter E. O'Connell, Patrick F. O'Connell, Dermot G. O'Donovan, James W. O'Donovan, Rory O'Connor, Thomas V. O'Connor, John A. O'Meara, William A. Osborne, David R. Pigot, Mrs. M. Quinlan, Robert McD. Taylor, Ralph J. Walker.

**Sale of registered and unregistered land transferred by the same deed**

Members wrote to the Society stating that they were engaged in sale of property consisting partly of freehold registered land and partly of unregistered land. The transaction was completed by one single deed. Members required to know the correct basis for charging costs where there is no separation of the purchase money in the Contract for Sale. The Council on a report of a Committee were referred to opinion C.40, page 222, in the Handbook 1968 edition and felt that this opinion applied. In such a case it had been held that in the sale of registered and unregistered land in one lot the value of the registered and unregistered holdings should be apportioned for the purposes of costs and treated as two separate sales.

**Standard fees for the approving of release of mortgage**

Members wrote to the Society stating that they felt the Council should recommend a standard appropriate fee for solicitors to charge in approving a release of mortgage. The Council on a report of a Committee declined to recommend standard fees as it was felt that such fees must be charged under Schedule II of the Solicitors Remuneration Act.

**Appearance of Counsel in Court without Solicitor**

The Bar Council wrote to the Society pointing out that certain abuses had grown up in connection with Counsel appearing in Court without being attended by a Solicitor. In 1971 the Bar Council had given permission to Barristers to appear in the Children's Court without being attended by Solicitors where no fee was involved for either Solicitor or Counsel. The Bar Council requested the Society to draw the attention of Solicitors to the proper ruling of the Bar which is set out on page 195.

**Solicitors failing to pay their staff the minimum remuneration as fixed by the Joint Law Clerk/ Labour Committee**

Considerable discussion occurred in connection with the publication in the newspapers that a large number of solicitors had failed to pay their staff at least the minimum rates of remuneration settled by the Law Clerks Joint Labour Committee. The Council directed the Director General to inform the Department of Labour that the Society were at a loss as to whether they should and if so how to deal with this matter because the Department was not prepared to disclose names of the firms concerned.

# UNREPORTED IRISH CASES

**Custody of three children awarded to father living with another woman.**

The facts of the case were stated in the *Gazette,* November 1973, at page 234. It will be recalled that the husband and wife married in July 1966 and they had three children, two daughters and a son, between 1967 and 1969. The marriage eventually broke up in April 1970, when the husband first took the children to his sister in Cobh until September 1971. In July 1970 the parties signed a consent by which the husband was granted custody of the children, and the wife had access to them every Sunday and on other specified dates. From September 1971 to April 1972, as the father was working in Dublin, the children lived with his parents. In April 1972 the husband went to live with another woman, who had been divorced in England, and who had had another child from the husband born in November 1971, in Dundrum, Co. Dublin.

The wife, a teacher who was living with her own parents in Cobh, applied to Kenny J. for custody of the three children, on the ground that the moral welfare of the children would be destroyed if they were to live with their father. Kenny J. acceded to this argument, and granted custody on 10 July 1973. On 30 July 1973 Kenny J.'s order was stayed pending the determination of the appeal. From the evidence, it appeared that, despite the consent, the mother tended to neglect the children, and did not visit them as required.

Section 3 of the Guardianship of Infants Act 1964 provides that, where in any proceedings, the custody, guardianship or upbringing of an infant is in question, the Court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration. Welfare in relation to the infant comprises the religious and moral, intellectual, physical and social welfare of the infant.

The three children have settled contentedly into the domestic environment of the father, and are being affectionately and efficiently looked after by the father and stepmother. As regards the *intellectual welfare* of the children, Kenny J. favoured the present arrangement on the ground that their formal education is pursued in suitable schools, and the home atmosphere is conducive to study and intellectual development, and the majority of the Court agreed. The majority also agreed with Kenny J. that the *physical welfare* of the children required that they should reside with their father, as they are in a comfortable suburban home, and their health is being assiduously looked after.

As regards the *social welfare* of the children, the majority agreed with Kenny J. that they lead an active, normal well-integrated existence with their father, and that a change to a fourth home in a large old house in the country would not be conducive to their welfare. As to the children's *religious welfare,* the majority of the Court held that as the children attend Catholic schools, attend Mass regularly, and they say family prayers together the situation is therefore satisfactory. As to the children's *moral welfare,* Kenny J. considered that the bad example of the father and stepmother living together in their present relationship was adverse to it. Furthermore, Kenny J. held that he was bound by the Supreme Court decision in *Walsh v. Walsh,* unreported, 10 Dec. 1971. But the facts in that case were different. There the mother had taken the two younger of three children and gone with them to live adulterously in England with a man who had left his wife and children. However, the father, with the help of the mother's parents, quickly received the two children and took them to live with him in Dublin. All Courts agreed that the alternative home in England that was being offered by the mother would not be to the religious and moral welfare of the children. *Walsh v. Walsh* is a decision on its own facts. Kenny J. had held that the bad example that the children will get in the household of the father and stepmother as they grow up, and are taught the importance of marriage and chastity will operate against the children's moral welfare. The majority of the Supreme Court held that the bad example will remain a tragic fact of life which the children will have to come to terms with. To state this is merely to recognise the inevitable. The father and stepmother treat the children with care for their physical and moral needs, and the children responded with feelings of affection and confidence, and have become used to a domestic regime which has a degree of order, discipline and stability. The appeal was accordingly allowed by the majority of the Supreme Court (Henchy and Griffin J.J.).

Walsh J. (dissenting) would have held that the social, physical and intellectual welfare of the children should be considered globally, and not separately; the totality of the picture presented must be considered, and "welfare" must be taken in its widest sense. In the *Nicolaou case* (1966) I.R. 567, it was held that, in the provisions of the Constitution relating to the family, the family is one founded on marriage, and the household in which these children now reside is not a family in that sense. Walsh J. did not think that *social welfare* meant happiness in the sense that the children were going to enjoy more pleasure, or have greater material benefits, or more interesting or stimulating company—but rather what is best calculated to make them better members of the society in which they lived. The present atmosphere in which the children lived is a manifest repudiation of the social and religious values with which they should be inculcated. The relationship of a mother to her very young children is one that cannot be usurped by any other woman. In his view, the welfare of the children requires that they should be returned to their mother to form a natural family unit. It was to be noted that the Guardianship of Infants Act 1964 had adopted the definition of "welfare" which was to be found in Article 41 of the Constitution relating to the family.

Accordingly the custody of the children was awarded to the father.

[Supreme Court (Walsh, Henchy and Griffin, J.J.), Walsh J. dissenting; separate judgments by each Judge; unreported; 5 April 1974.] – M. B. O'S v. F. O'S

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**A prisoner on bail cannot be re-arrested to complete his sentence if the warrant has expired.**

The prisoner, having been released on bail by the Supreme Court, served 18 months of a sentence of 3

years penal servitude. The period of bail expired on 31 July 1972, and no step has been taken since to serve the balance of his sentence. The question submitted is whether the whole sentence is remitted. O'Keeffe P. held that the prisoner should not now be compelled to serve any further part of his sentence. The warrant under which the prisoner was detained stated that "he was to be kept in penal servitude for a period of three years from this date—9th February 1970". Since that period has now run out, the warrant is spent. It follows that, for the purposes of this decision, the order admitting the accused to bail is now immaterial, and there is no necessity to consider whether there was any jurisdiction to grant bail to anyone serving penal servitude. The appeal is dismissed.

[The State (Langan) v. Governor of Portlaoise Prison; Full Supreme Court, per Henchy J.; unreported; 5 April 1974.]

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**Applicant entitled to compensation for malicious injuries as a result of destruction of motor vehicle loaded with explosives by Irish Army.**

The vehicle had been stolen in August 1972 and had been driven to Dundalk by two miscreants for the purpose of being loaded with gelignite, and had been there handed over to a third person to accomplish that nefarious purpose. Undoubtedly the loading of the vehicles with explosives was an unlawful purpose, and the meeting of persons concerned in Dundalk did constitute an unlawful assembly. Once the vehicle was loaded with explosives, it is highly improbable that it would have been used in any other way than as a bomb. The vehicle was in fact detected on its way to the North, and was stopped and examined by the Irish Army. As a direct consequence of its being loaded with gelignite, it was blown up and destroyed. The applicant claims £1,375 damages from the defendant County Council. As the unlawful act led to the destruction of the vehicle, the applicant is entitled to succeed in his claim for malicious injuries.

[McRandal v. Louth Co. Council; O'Higgins J.; unreported; 2 April 1974.]

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**Scheme to alter conditions of Reid Professorship proposed by Board of Trinity College rejected, and alternative scheme suggested.**

The testator, R. Touthill Reid, deceased, had practised law in Bombay, and was wealthy when he died in February 1883. His estate was then valued at more than £25,000. He had made a will in September 1881 and amongst other bequests, left his shares in Indian Railway Companies, in order to found a Professorship of Penal Legislation in Trinity College, Dublin, which was not then taught there to be called Reid Professorship.

This Professor would be bound to deliver at least 12 public lectures per year, and to publish at his own expense at least 6 of those lectures, failing which a vacancy would be declared. There were also provisions for prizes and the salary was not to exceed £200 per annum, and to be confined to Irish barristers with a degree in Arts or Law. At first Trinity College only conferred a Doctorate in Law, which was admitted to be merely formal. A Professorship of Jurisprudence and International Law was only established in 1877, but all professors of law were part-time. The Board decided that the subjects of Criminal Law and Evidence were to be added to that of Penal Legislation. As result of an application, the Master of the Rolls varied the scheme in 1920; the salary of £200 remained unchanged, but the period of tenure of the Reid Professorship was fixed at five years. The Professor was still bound to deliver 12 lectures, but no longer to publish any at his expense. If the Professor was given additional duties, he was to be paid from fees from the College. There is an undoubted distinction between Penal Legislation and Criminal Law, but Penal Legislation was rarely taught. The duties of the post had developed to such an extent that in 1963 the Reid Professor delivered no less than 93 lectures in a year, but only one public lecture on Penal Legislation.

The investments have been managed with excessive and not commendable parsimony, inasmuch as out of an income of £1,407 in 1971, only a mere £471 was spent; out of an income of £1,513 in 1972, only £726 was spent, and in 1973, out an income of £2,022, only £813 was spent. Gradually the subject of Constitutional Law was added to the duties of the Reid Professor.

The Board of Trinity College have now applied for a new scheme. They suggested that a visiting lecturer from England or abroad be accorded the title of Reid Professor, that he be appointed for a period for 3 years, and that he be required to give not less than 6 lectures on Penology, which the College would publish. In addition the Board appoint a full time lecturer in Criminal Law, who would not need to be an Irish barrister. It was contended by the Attorney General and by the Irish Bar Council that no circumstances warranted the amendment of the schemes of 1888 and of 1920, and that it was essential that the teaching of Criminal Law should be entrusted to a member of the Irish Bar, as Irish Criminal Law has developed on independent lines since 1922.

The original purpose, the provision of lectures in Penal Legislation, cannot be carried out, because, as members of the Bar do not receive any training in Penology, they cannot lecture on that subject. There is no course in Penology in the State, and there is no person in the State who claims competence in this highly specialised subject. The fact that a visiting Professor would give two lectures a term would hardly be adequate to cover the whole of Penology. Furthermore modern legal education tends to be much wider in scope and more thorough than formerly. Nowadays the tendency for professors and lecturers is to be whole-time. For these reasons, Kenny J. rejects the proposed scheme. The Professor should be appointed by the Board, and not as a result of an examination. A whole-time Professor of Criminal Law, who would have a limited right to practise in Dublin would be preferable; in any event it is essential that he should be an Irish barrister. The appointee should take a special course

in penology for nine months on full pay, and his duties would then be carried out by the present holder, Senator Robinson. It is proposed to amend the scheme as follows; The Professorship will be full-time; the appointee will be a graduate called to the Irish Bar; all previous holders shall be eligible. The appointee will be appointed by a specified Board, and must then deliver at least 60 lectures in Criminal Law, 30 lectures in Penology, and 30 lectures in Criminology. The salary of the Professor shall be determinated by the Board. If the candidates who apply are not suitable, the Board may appoint any suitable graduate. As this appointment cannot be made in a hurry, Senator Robinson can retain the Professorship until the appointment is made.

Re: Trusts of Richard Touthill Reid and of the Reid Professorship; The Provost, Fellows and Scholars of Trinity College v The Attorney General and others.
Kenny J.; Unreported; 21st June 1974.

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**Plaintiff's amateur status as an international horse show jumper upheld**

The plaintiff, a well known rider in show jumping competitions, regards himself as an amateur in horse jumping competitions outside Ireland. He owns a large farm in Kilkenny, and is also director of Dublin Bloodstock Ltd. The defendants are an unincorporated Association affiliated to the Federation Equestre Internationale hereafter called F.E.I. Regulations provides that every rider, amateur or professional who wishes to take part in competitions held under the rules of the F.E.I. must be in possession of an annual licence, which may be refused without assigning reasons.

The plaintiff competes in competitions outside Ireland, and, when he does, he is paid a sum to cover his expenses, and has occasionally got presents such as a set of Waterford glass or a motor car, and even money sometimes, although the plaintiff has no legal right to receive them. In January 1974 the F.E.I. sent a standard questionaires to be completed by riders who applied for an amateur or a professional licence. Article 144 of the F.E.I. Regulations defined an amateur as one who does not attempt to make a profit through competition, and whose main and substantial sources of income are not derived from equestrian sport. Amateurs wishing to ride competition horses not belonging to them regularly must obtain permission from the defendants. Article 145 of the F.E.I. Regulations defines a professional as one who accepts renumeration for riding competition horses in show jumping or dressage, deals in competition without the permission of defendants, and receives allowances on the scale of horses he rides. In reply to the query as to what were his main sources of income he said they were 80% farming, and 20% as a director. The plaintiff answered "No" to the question whether he had accepted remuneration for riding competition horses in show jumping and dressage. In answer to the question whether he had received payment for training competition horses or an allowance on the sale of horses he rode, he said that he had received an occasional present when horses were sold so as to cover his expenses.

When the Defendants met on 10th May 1974, they decided that, in view of the answers to the questions, they could only issue a professional licence to plaintiff; they appointed a sub-committee to interview the plaintiff who came to the same conclusion. The defendants accordingly wrote a letter to that effect to the plaintiff on 13th May. The plaintiff issued a plenary summons on 28th May in which he sought a mandatory injunction directing the defendants to issue an amateur horse riding show jumping licence to him. Kenny J. directed that the defendants should have notice of the application.

It is the company, Dublin Bloodstock Ltd. which deals in competition horses, and the plaintiff does not, but the plaintiff had not informed the sub-committee that he was only a director of the company. As regards payments made to plaintiff to reimburse him for travelling expenses, this is not remuneration, nor is payment for riding horses in competitions, which are not rewards for services rendered. If a grateful owner cares to show his appreciation for the plaintiff's skill in riding his horse by making him a present, he is not remunerating him. Accordingly Kenny J. did not grant the injunction but gave a declaration that the plaintiff is an amateur within the Regulations of F.E.I. Each side will have to bear their own costs.

[Brennan v Equestrian Federation of Ireland; Kenny J.; Unreported; 30th May 1974.]

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**Order of County Council to grant planning permission for the erection of houses void**

On 5 November 1969 the second named defendants, Traditional Homes Ltd., applied to the Dublin County Council under the Planning Act 1963 for outline permission to erect 34 houses on land in Shankhill. The application was objected to by many local residents, one of whom was the plaintiff. On 13 November 1969, Dublin Co. Council refused to grant this permission. On 17 December 1969, the plaintiff and local residents, opposed the application for planning permission, when Traditional Homes had appealed against the refusal. On the appeal the plaintiff appeared and objected on behalf of 23 residents to the granting of permission. This appeal was conducted orally by an Inspector of the Department in February 1970, and the Inspector submitted his report to the Minister one year later, in March 1971. Here the Inspector recommended that before any decision was made concerning drainage arrangements, trial holes should be opened and the soil tested for soakage by the County Council. If these tests proved satisfactory, permission to build not more than 13 houses on the site should be granted subject to specified conditions. This Report was not made available to the plaintiff or to the residents. However arrangements were made between the County Council and Traditional Homes to carry out the tests for soil conditions and soakage, on 28 May 1971. In the opinion of engineering experts the soil conditions were found to be satisfactory, and therefore the septic tanks could be used without risk of injury to the public. Accordingly the County Council on 21 September 1971 made an order granting outline planning permission for the construction of 27 houses. The basis of the plaintiff's action

is that planning permission was granted upon evidence not contained in the Report, in violation of the plaintiff's right to have tests carried out on his own account if necessary. The plaintiff claims that the order of 21 September 1971 is *ultra vires* inasmuch as it disregards the principles of constitutional and natural justice.

The defendants had the audacity to contend that, as the plaintiff was not a party to the hearing by the Inspector, he could not maintain this action. In view of the fact that the plaintiff had taken such an active part in the proceedings from the start, his position at the hearing was indistinguishable from that of a defendant in a civil proceeding who prevented a plaintiff from recovering in the action. Accordingly Mr. Law's participation in these events and his interest as a resident in preventing septic tanks from being used near his house, gives him a legal right to have that interest protected.

It was also contended by the defendants that the plaintiff has no legal right to sue, for the purpose of establishing that the planning authority has erred in a matter of legal procedure, as the right to enforce provisions of the planning legislation is exclusively vested in the planning authority. But here the plaintiff has shown a right in law springing from the appeal hearing procedure, which he says has been infringed by the wrongful act of the Council in granting permission and this has damaged him. The plaintiff has a perfect right to make this claim.

The Minister's decision must have been based not only on the report but also on additional material. The Minister's decision is accordingly vitiated by irregularity. Accordingly the order of the County Council of 21 September 1971 is void. Costs awarded against both defendants.

[Law v. Minister for Local Government and Traditional Homes Ltd.; Deale J.; unreported; 27 May 1974.]

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**In a Vendor and Purchaser contract, clauses which are for the benefit of one of the parties only, may be severed from the rest of the contract, and that party may waive performances and insist on completion**

Plaintiff agrees to sell lands in Ballymorris, Bray, for £67,350 in March 1972 to defendant and signs a written contract as prepared by the Law Society, but the gate lodge was excluded. A deposit of only £2,000 was paid and the completion was subject to the purchaser obtaining full planning permission for residential development of not less than 17 houses per acre within 17 months of the contract. If the planning permission is not obtained within that period, the contract would terminate, save that £100 would be deducted for each month's delay beyond date of determination. The deposit of £2,000 was paid to Ansbacher in the joint names of the Solicitors for the Vendor and the Purchaser, with provision for a further payment of £2,000 if planning permission is obtained within 8 months of the signing of the contract. The closing is to take place within two months of the purchaser receiving notification that full planning permission has been granted, and the balance of £57,360 is to be paid in respect of the property which is then to be handed over. The balance of the property and of the purchase money is to be handed over within six months of that date. In August 1973 solicitors for defendants wrote to plaintiffs that full planning permission had not yet been obtained but that the purchaser was nevertheless prepared to treat the contract as absolute, and that completion should take place within two months from then. The plaintiff's solicitors refused to accept these terms, and pleaded that the contract had determined, as 17 months had elapsed from signature. Accordingly the plaintiff issued a Summons under the Vendor and Purchaser Act 1874 to determine this. Per Kenny J. "On principle it seems to me that when a clause in a contract (whether it is a condition or a term) is inserted solely for the benefit of one party, and is severable from the other clauses when the other party on completion will get everything that he contracted for, then the party for whose benefit the clause was inserted may waive performance of the clause, and insist on completion, despite the non-performance of the condition or term."

The provision that the planning permission was to be obtained by the defendant indicated that he was the person whom the parties contemplated would apply for it, who would prepare the necessary plans, and would undertake the development. If the defendant completes the sale the plaintiff gets everything she stipulated for, because her interest is in getting payment of the purchase money. The contract was void for uncertainty, because the date for completion was to be calculated by reference to the grant of full planning permission, and could not be determined otherwise. With doubt Kenny J. held that the defendant's offer to complete despite the absence of planning permission made part of the contract severable. The severable clauses were solely for the benefit of the defendant who may waive them, and insist on completion.

Accordingly the contract did not determine and the summons must be dismissed.

[Nora Healy v. Daniel Healy; Kenny J.; unreported; 3 December 1973]

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# No Change in Search Law Ruling

Glasgow magistrates yesterday refused to give the police powers to stop and search anyone suspected of carrying an offensive weapon.

By 8-5 the magistrates rejected the recommendation of a joint sub-committee that they should seek a meeting with the Secretary of State for Scotland to discuss the advisability of amending the Prevention of Crime Act, 1953, relating to the carrying of offensive weapons.

This committee was formed following observations made at a sitting of Glasgow High Court by Lord Cameron some time ago. He said that in the vast majority of cases concerning assaults that came before the courts there was a use of offensive weapons.

Bailie Albert Long said after the decision: "We should not allow ourselves to be panicked by what to me are publicity statements by Lord Cameron."

As the law stands police can stop and search people thought to be carrying firearms, drugs, poaching equipment or stolen goods, but they cannot search them for offensive weapons.

Balie Gerald McGrath, senior magistrate, said that the use of weapons in crimes was very much on the increase and the magistrates would be failing in their duty if they did not take account of what Lord Cameron had said.

# LEGAL EUROPE

# Wexford Seminar on EEC Company Law

## THE FIRST DIRECTIVE AND THE PROPOSED FOURTH DIRECTIVE

**By Dr. C. W. A. Timmermans, Principal Administrator of the European Comission**

The Third Lecture was delivered by Dr. C. W. A. Timmermans, Principal Administrator of the European Commission, especially competent for current and future proposals on consolidated accounts and groups of companies. The subject was the First Directive and the proposed Fourth Directive. The *First Directive* had been adopted by the original Six Members of the Community in 1968, and came into force, as regards the three new Member States, on 1 July 1973. The *First Directive* dealt essentially with disclosure of documents, and the principles underlying nullity of incorporation and the ultra vires rule which for Ireland were not of much practical value. According to the Irish Companies Act 1963 the delivery of the certificate of incorporation is already conclusive evidence of the formation of the company. As regards disclosure, it is important to note that all relevant statutory notices must be filed in the Gazette, "Iris Oifigiuil". Section 9 of the Irish Companies Act 1963 is similar to the first part of Article 9 of the First Directive. The Second Part of Article 9 states that limitations on the powers of the organs of the company can never be relied upon against third parties, even if they are disclosed; it follows that the rule of constructive notice has been abandoned. In the Irish European (Companies) Regulations 1973, the notion of awareness appears to be substituted for the former notion of good faith. The question arises therefore if this article of the directive has been correctly implemented into Irish Company Law.

The *Fourth Directive* deals with the presentation of accounts and the valuation of the Company's assets and liabilities. There are many systems of presentation of accounts in the different Member States, and they are so various that they present a real hindrance to capital investment. Accountancy is essentially an art and not a science. Two tendencies have shown themselves. In Ireland, Britain and the Netherlands there has broadly been a very liberal tendency in which no specific rules were enacted. The essential principle laid down in Section 149 of the Irish Companies Act, 1963, requires a true and fair view to be given of the companies position and results. Here much is left to the discretion of companies who are advised by highly competent accountants. On the other hand in France, Germany and Italy there are very detailed provisions which are narrowly construed.

The adoption of the Fourth Directive as it stands would imply many changes. A very detailed Profit and Loss Account would have to be provided, and specified rules as to valuation of assets and liabilities would have to be adhered to. The present flexibility of the lay-out and valuation rules will have to be tightened. But this directive is not complete, inasmuch as, many companies belonging to a group, want to obtain a true and fair view of the situation of the group and therefore require the presentations of group accounts. A decision will have to be made as to which companies will have to be taken into the group accounts. The Irish and British definition of a subsidiary is very precise. On the other hand, in German law, the notion of a Group Company is much broader, there must first be a relationship of dependency and furthermore the holding company must at all times exercise its dominating influence.

It is difficult to forecast the final implications on the directive of group accounts. Proposed consolidated balance sheets and consolidated profit and loss accounts are wider than those foreshadowed by the Irish Section 151. Henceforth the obligation to present group accounts will also extend to foreign subsidiaries. Furthermore all Holding Companies, whether public or private, will henceforth be compelled to present group accounts. (At the moment the interests of shareholders are protected, as long as the company does not join a group. Usually the directors of a holding company then appoint the directors of the subsidiary company; this may lead to damages on behalf of outside shareholders and to a transfer of liquidities by creditors or stop activities as between one subsidiary and another).

The remedies of classic company law only protect the above mentioned interests to a limited extent. German Law and the Statute of the Euro-Company provide for specific new remedies. These problems also have to be tackled by the forthcoming harmonisation. Many rules of Company Law will have to be adapted to subsidiary companies. Another question in this context, concerns the reciprocal holdings for which specific legislation exists in France and Germany. In France two Companies may not hold up to more than 10% of each other's shares. All this shows that the programme of harmonisation is an ambitious one and that its achievement can only be foreseen in a relatively long period of time.

## LAW MAKING PROCEDURE OF THE COMMUNITY

**By Dr. Ivo Schwartz**

Dr. Schwartz emphasised that one of the main characteristics of the European Communities is precisely the fact that there existed a *separate body of law* distinct from Public International Law called *Community Law*. While other International Organisations operate on an inter-governmental basis, the Community Treaties created a new legal order with an independent existence. The citizens of the Member States are directly affected, and the Sovereignty of these States has been partially transferred to the Communities.

In considering the Organs of the Communities, it must be stressed that the Council of Ministers and the Commission possess legislative and administrative powers conferred upon them by the Treaties.

Attention was drawn to the so-called "Omnibus" clause of Article 235 which provides that—"If action by the Community should prove necessary to attain, in the course of the operation of the Common Market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission, and after consulting the Assembly, take the appropriate measures."

As regards the European Company Statute, it was a first thought that this proposal could be adopted by means of an international Convention. In 1970, however, the Commission decided to avail of the procedure laid down by Article 235, and it sent a draft regulation embodying a European Company Statute to the Council of Ministers. Upon receiving it, the Council, following the normal procedure provided for by the Treaty, sent the draft to the European Parliament, as well as to the Economic and Social Committee.

As *Regulations* made by the European Communities are directly binding upon the citizens of the Member States, as if they were Statutes of the National Parliament, it follows that these citizens can directly invoke these Regulations before their national Courts. *Directives* are essentially means of approximating the laws of the Member States; under Article 189, they are binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

The *Commission* is a Collegium of 13 independent politicians nominated by the Governments for 4 years; there are 6,000 European Civil Servants working under them. These civil servants are completely independent of their National Governments, and cannot take instructions from them. It is the European Commission alone that has a right to make proposals to the Council of Ministers, and none of the Governments of the Member States is entitled to do so.

In the Commission, apart from the specialist civil servants on Company Law, who form part of the Directorate General of Internal Market, recourse is also had to 6 Specialist Advisers on Company Law, who are eminent Professors and lawyers. The expert on the Statute on European Companies was Professor Sanders of the Netherlands. In order to ensure harmonisation, a very exacting concrete comparison, article by article, takes place. Eventually a Report of from 150 to 200 pages is produced; this is duly translated into all the official languages of the Communities, and sent to the erperts in the national Government ministries.

The National Civil Servants are invited to present themselves before the Commission as experts; here they will speak in their own name, and they will not bind their Governments. On an average, there is a meeting in Brussels on a particular topic every 4 to 6 weeks; the special advisers are invited to these meetings, and furnish excellent collaboration. The comparative research reports previously noted are sent officially to the interested *European Groups* of National Organisations for consultation. As soon as the complete material has been submitted to the Commission, its staff will draft a first proposal for a Directive. When completed, the draft will be sent to the national experts, as well as the European organisations. The draft will then be discussed at length, modified again, and finally, it will be sent to the 13 Commissioners of the Commission for a political decision. If the Commissioners are not satisfied with the draft, they will issue detailed instructions as to how the draft is to be completed. Eventually, when the Commissioners approve of the final draft of the proposal it will be sent on to the Council.

At this stage, the Council sends it first for a preliminary opinion to the *Economic and Social Committee.* This is a body of 144 members, consisting of representatives of the said partners and others (9 of these members are Irish). The opinion eventually arrived at is naturally a compromise.

The *European Parliament* is also sent a copy of the draft directive by the Council. This body consists of 198 members, of whom 10 are Irish. The members are grouped according to parties (mainly Christian Democrats, Socialists and Liberals), but at the moment they are not directly elected by the people. All proposals sent to the European Parliament are explained and discussed in detail in the various committees. But it must be noted that the Parliament has only an advisory function, and cannot change the text of the proposals submitted by the Commission; however their advisory opinions do subsequently influence the Commission.

When the Commission receives the opinions of the European Parliament, and of the Economic and Social Committee, it reconsiders its initial proposal and eventually submits an amended proposal to the Council. Then the debate on the subject starts before the Council of Ministers; in this case the experts sent by the National Governments are not deemed independent, but receive definite instructions from their Governments. As regards the Council of Ministers, it should be noted that there is a total of 58 votes, and, if decisions have to be taken by a *qualified majority,* which is the normal majority, this will consist of a minimum of 41 votes out of 58, and, as the 4 large countries, each have 10 votes, they cannot be themselves outvote the smaller countries (Ireland is entitled to 3 votes). As previously stated, the Council will first convoke the Government experts from the Member States, but these experts hardly ever produce unanimity. If the questions are still open and unresolved, then it is brought in the first instance before the Permanent Representatives of the Member States in Brussels. If no definite agreement is reached, the proposal is sent direct to the Council of Ministers. On all these levels Commission officials participate at the meetings within the Council. Absolute unanimity of all the Council members is required, if it is to depart in any way from the proposals of the Commission.

Once a Regulation or a Directive become law, the European Court of Justice in Luxembourg has the final say in interpreting it.

A discussion then took place, to which **Mr. Temple Lang** and **Mr. Timmermans** also contributed. **Senator Mary Robinson** emphasised that, at these discussions, there was an open and flexible approach, and that it would be quite wrong to consider the Eurocrats as Dictators. There is in fact a very wide preliminary consultation as much in the Commission as in the Council. In National Parliaments on the other hand, the legislation is prepared with the utmost secrecy, and is usually finlly passed without much change. As regards introduction of European Law by means of Conventions **Dr. Schwartz** emphasised the disadvantages of this procedure. Conventions require unanimity, and have subsequently to be ratified by the National Parliaments. Up to now, only one Convention—that on the Reciprocal Recognition of Judgments—has been ratified and this Convention took 14 years—from 1959-

1973—to bring into effect. The Second Convention on mutual recognition of Companies has been ratified by 5 out of the original 6 Member States. So far this process has taken 15 years, and it is not anticipated that this Convention will come into force soon. The Copenhagen Summit Meeting of 1973 has encouraged the procedure under Article 235, instead of relying on Conventions. The position furthermore is that, when any international Convention is presented before a 'National Parliament', then that Parliament can either ratify the Convention or decline to ratify it, but it cannot change it in any way. There is, on the other hand, plenty of discussion undertaken, when the Commission introduces Regulations, and the advice of the European Parliament undoubtedly influences Community legislation.

Most of the lobbying before the Commission, as **Dr. Schwartz** pointed out, is carried out by Banks, Insurance Companies, Employers and Trade Unions (whether Christian or Socialist) who group themselves in European associations. Many visitors from different organisations in the new Member States have come to the Commission in Brussels, and have been received by the relevant official experts, who are always willing to give the necessary information. Unfortunately for lawyers, there is no European Lawyers Organisation representing them at European level, and lobbying can only be effective if such a body existed. **Mr. Temple Lang** stressed that there would henceforth be a European impetus to reform Company, Law and that the distinction between public companies and private companies, so beloved by British and Irish lawyers, would gradually tend to disappear in practice as soon Irish Private Companies will have to publish some form of Accounts. **Mr. Mac Liam,** of the Department of Industry & Commerce deprecated the remarks about secret legislation. He said that the Restrictive Practices (Groceries) Act 1973 had arisen as a result of a lengthy public inquiry before the Fair Trade Commission followed by a lengthy report. As regards Insurance, a wide and representative Committee would report upon the problem soon. There will also be an uninhibited Report on Consumers Protection which has been financed by the Minister. An informal Committee of experts advises the Minister on Company Law reform, and organisations can make suitable representations at all times.

## CREATING A COMMON MARKET FOR COMPANIES

By Dr. Ivo E. Schwartz, LLM.

A lecture entitled "Creating a Common Market for Companies" was delivered by Dr. Ivo E. Schwartz, LL.M., Director for Approximation of Laws: Companies and Firms, Public Contracts, Intellectual Property, Fair Competition, General Matters, Commission of the European Communities, Brussels, at Wexford on 9th March 1974.

### Part I

The European Commission has initiated or is elaborating proposals to approximate national laws covering many aspects of the activities of commercial enterprises in the Common Market. Its programme ranges from customs matters, exchange controls, technical standards and safety requirements, food and veterinary laws to taxation, banking, insurance, company law, and professional standards. The Communities' legislator, the Council of Ministers, has before it a volume of proposals for approximation of national laws far exceeding the usual workload of a national parliament. High on its list of priorities are several proposals concerning company law. The Commission's programme of company law approximation has attracted comments and criticism at every level, particularly from the three new Member States. Such a reaction is quite understandable.

The programme and the proposals have been drafted by the former Commission without benefiting from the participation of experts from the new Member States. Because these draft directives were intended to bring the national laws of the Six into closer alignment, it was only natural that they should reflect the traditions and aspirations of these countries. It is equally obvious that the accession of countries with a somewhat different tradition of law and practice should pose difficulties. It should be made clear from the beginning, that, not only the Commission, but also its staff, realise it would be unfair, unwise and not realistic to press proposals formulated in view of the Six without benefiting from the fullest possible discussion of these proposals with all interested circles from the three new members.

There is still very little known in Ireland about the law making process of the Community and on its programme and proposals concerning Company Law. And the Commission's staff have still very much to learn on Danish, British and Irish law and practice. In this effort, we feel privileged to be now assisted by very able colleagues from your country. Lack of mutual information is probably the most important reason for most misunderstandings on both sides. It is interesting to note that most of the problems raised at the moment in relation to Company Law are problems the Commission discussed already with the original Member States at the beginning of approximation in the early sixties. The problems are:

—why is it necessary to approximate company laws,
—which problems should be dealt with first, and
—how far should approximation go, in other words how detailed and how rigid should a directive be, and whether or not it should merely contain common minimum rules or fixed rules to be incorporated into the nine national legislations.

### Fundamental differences between Civil and Common Law

Let us first comment briefly on one objection of principle directed against our effort to approximate company law. The argument is the following: The British and Irish legal systems differ fundamentally from the systems of most other Member States. This difference is of real significance in the field of company law. Irish and British Company Acts do govern the life of companies only in part and in response to experience under the Common Law which continues to regulate many aspects of company law.

My answer to this is that such a situation seems not to be peculiar to Britain and Eire. In all other Member States, too, Company Law does not regulate all the legal problems of companies. There is an extensive body of case law on companies in the other Member States, too. A comparison of British and Irish Company Acts with Continental Acts shows that the former has practically the same contents as the latter, even where the solution retained for a particular problem may be different. Moreover, it can be said that the questions covered by

the five directives are all essentially dealt with in the British and Irish Company Acts.

But there seem to exist quite fundamental differences in at least two other respects. On the Continent, industrial companies tend to look to the Banks as the primary source for new capital funds, and these moneys are raised as long-term loans rather than as share-capital or equity, which in many countries, particularly France, tends even in quite large companies to remain in family hands. The new issue and stock markets thus have a less important role than in Britain, and disclosure requirements tend to be less austere. On the other hand, Continental Company Law tends to have a somewhat more zealous regard for creditors' rights.

Secondly, both Eire and Britain have a long tradition of supplementing statute law with a complex system of extra-statutory self-regulation and discipline imposed by the accountancy bodies, the stock exchange, and the panel on take-overs and mergers. It is in this area where real difficulties lie.

## The need to approximate

Now, what have the European Communities to do with national company laws? Is there a real need for their approximation? What are the objectives of Community policy in this field? The two divisions concerned with company law at the Commission are part of a Directorate General called "Internal Market". This reference is significant.

It underlines the fact that the Communities have from their very beginning been based on the creation of an area of open commercial competition with all the important characteristics of the internal markets of an individual country. Clearly, the abolition of trade barriers resulting from tariff rates and quotas was its necessary first step. So is the harmonisation of other direct measures affecting the price-competitiveness of trade between Member States such as export credit guarantee, State aids, special tax rebates, restrictions or premiums on exchange with other Member States.

However, the EEC-Treaty envisages this common market area as one :

—where not only goods, but also services, capital and persons, that is individuals and business enterprises, could cross frontiers between Member States free from being discriminated by law, regulation or administrative action (Article 3 lit. (a) and (c), 52-73),

—an area where these basic freedoms can be exercised within a system (of law and economic policy) ensuring that competition is not distorted (Article 3 lit. (f), 85-102),

—and where the establishment and the proper functioning of the Common Market are not negatively affected by diverging national laws (Article 3 lit. (h), 54 para. 3 lit. (g), 56, 57, 66, 69, 70, 99, 100).

In one phrase : creating the common market means ensuring conditions for trade within the Community similar to those existing in a national market (cf. Article 43 para. 3 lit. (b). This huge task clearly asks for approximation of important aspects of company laws, particularly in relation to public companies.

## Freedom of capital movement

Without such approximation, there will be no common market for capital investment. The free movement of capital is one of the four basic freedoms to be attained within the Community. Only if investors know and are sure that they have equal rights and equivalent safeguards under any of nine company laws, will they be ready to buy shares from companies incorporated in other Member States. Consequently, only then will public companies have real access to the capital markets of other Member States, and thus be enabled to both contribute to the creation of a common capital market and benefit from it. And there can be little doubt that this aim calls for a system of common legal rules offering a high degree of protection to investors and thereby attracting investment in public companies. Unfortunately, common principles and general rules will not suffice to reach these results.

## Freedom of establishment

Another freedom basic to a common market is the free movement of persons, including legal persons. The Treaty of Rome grants the right of establishment not only to natural persons but also to companies. This is the right of a company incorporated in one Member State to operate in the territory of another without being discriminated against, that is under the same rules as domestic companies.

Freedom of establishment includes :

—the right *firstly* to set up and manage undertakings under the conditions laid down by the law of the host country for its own nationals (Article 52 (2), 53),

—*secondly,* to set up agencies, branches and subsidiaries in other Member States (second sentence of Article 52 (1), 54 (3) (f), 53),

—*thirdly,* freedom of establishment includes the right of existing companies themselves (Article 58 (1)),

—*fourthly,* to transfer their registered office to another Member State without being discriminated against as a foreign company,

—and *fifthly* to merge with a company established in another Member State as if it were a company in the same country (Article 220 subpara. 3).

But unless in all these cases the foreign company is subject to a company law which provides much the same safeguards as those provided by its own company law, Member States could not be expected to grant this right of establishment in all sectors of the economy. This is a major reason why the original Member States insist on approximation of company laws.

Moreover, only through co-ordination can be avoided another consequence of this freedom : the establishment of companies in Member States where there are less stringent safeguards. The companies' choice of location should be made from an economic point of view and not a legal one. This is very difficult when a company is confronted with different rules in each Member State where it wishes to set up a subsidiary, a branch or an agency.

In other words : smaller and medium-sized companies will hesitate to make the fullest possible use of freedom of establishment. If the fact that a company is incorporated in one of the Member States comes to mean that it is subject to a company law which provides standard basic safeguards for those who trade with it and invest with it, there will in every Member State be more confidence than there is now in companies incorporated in the other Member States. This greater confidence will be one of the factors which enable companies to make use of the increasing opportunities which the Community will provide. This is the benefit which the Community see in the approximation of company laws. It could be a very real benefit. This is why industry and

commerce in the six original Member States insist on approximation of company law.

And it is for all these reasons that Article 54 para. (3) lit. (g) of the Treaty of Rome provides for the co-ordination of "the safeguards which, for the protection of the interests of members and others, are required by Member States of companies with a view to making such safeguards equivalent throughout the Community". It is to be stressed that approximation of national laws is not being treated as an end in itself and that long-standing legislation on important aspects of commercial life is by no means to be disrupted for the sake of an academic desire for uniformity. On the contrary, approximation of company law has an important part to play in ensuring the effective delivery of the economic benefits that can flow from Community membership. The sooner we can adjust ourselves to the importance of adopting a positive approach to this task the better it will be.

**Means of approximation**

Approximation is accomplished by directives issued by the Council of Ministers, the legislator of the Community. **Directives are not company laws in the ordinary sense.** Private parties cannot normally invoke them in disputes with corporations, or vice versa. Rather, directives are directed to the Member States who are obliged to comply with a directive by transforming it into a national law. Thus, **directives fix Community standards to which the national statutes must be adapted.** Therefore, a directive is less rigid than a unitary federal law. Nor is a directive a uniform company law as used by the States of Australia, to be introduced in each Member State. The difference is that a directive is binding only as to the result to be achieved. A directive does not ask for the introduction of the same wording in the national acts. It is up to the national legislator how to implement a directive. Thus, each national legislator can adapt the law in a way which suits its legal system and corresponds to tradition. In a word: **approximation (harmonisation, co-ordination) is not unification, nor does it mean uniformity.**

In instances where there is no need to introduce more than minimum standards, the directive will leave it to each Member State whether to maintain or to introduce stricter requirements. On the other hand, a directive with its minimum or fixed rules protects against excessive laxity.

**The present state of approximation**

So far, only one directive on companies has been enacted. Four others have been formally proposed by the Commission to the Council of Ministers for adoption. In addition, three or four further draft directives are being worked on by the staff of the Commission.

The **first companies directive** sets up Community-wide minimum standards of protection for creditors and investors, dealing with the disclosure of documents and particulars to do with a company, and the validity of obligations entered into by a company, and the nullity of the company. This proposal was submitted by the Commission in 1964. In 1968 the Council adopted the directive.

The **second companies directive** was submitted in 1970. It deals with incorporation requirements, with safeguards on the maintenance of share capital, and with increases and decreases of share capital. It fixes a minimum capital of 25,000 units of account for Sociétés Anonymes and similar types of companies and contains strict rules on the purchase by companies of their own shares. The European Parliament and the Economic and Social Committee of the European Communities which represents business, workers' and consumers' interests welcomed the proposal in their opinions. Since about one year and a half ago, a group of government and Commission representatives in the Council of Ministers are discussing a version revised by the Commission on the basis of the opinions just mentioned.

Difficulties have arisen over the Irish and British desire to exclude private companies entirely from the operation of the directive. The private company does not have to include words in its name showing that it is different from a public one. In the other Member States this is obligatory for the "Société à responsabilité limitée" or its equivalent, and those words or a contraction of them must form part of the company's name. Could this not be achieved for the private company by introducing a statutory classification of companies and by providing that a private company and a public company are to be separately distinguished by different designations in their names?

The second point is that under the present laws a private company can be converted into a public company simply by altering its articles of association and that there is no formal procedure under which the Registrar of Companies verifies that the company now conforms to the requirements applicable to a public company. Could this point not be met by providing that a private company wishing to become a public company will in future have to change its articles, change its name, and comply with the minimum paid-up capital requirements applicable to a public company; and that the Registrar will have to issue a new certificate of incorporation in the new name, and before doing so he would check that all the relevant documents had been received.

These difficulties will doubtless be overcome soon; and it is significant in this respect that the Council of Ministers recently fixed December 31st, 1974, as the latest date for the adoption of the second directive.

The **third companies directive** deals with mergers between public companies taking place within a single Member State. The object of this directive is to provide equivalent guarantees throughout the Community to the shareholders, workers and creditors of merging companies. An important innovation will be that the workers of the two companies and their representatives must be consulted before the general meeting takes a decision on the merger. The directive will introduce into all national laws a common concept of merger. Under the directive's definition a merger is the operation whereby a company, winding up without liquidation, transfers to another company all of its assets and liabilities, in consideration of which the bidding company assigns some of its own shares to the shareholders in the company being wound up. In other words where a merger takes place, there is only one company which continues to exist. *Take-over bids* do not come under the proposal because in the case of a take-over, the absorbed company continues to exist as a wholly owned subsidiary of the bidding company.

Belgium, France, the Netherlands, Britain and Ireland all have some form of public or private regulation of take-overs and other bids with a similar desire to protect investors and sometimes also workers.

Since in Ireland, Britain and the Netherlands opera-

tions of this type in fact play a much more important part than mergers, the Commission is currently examining the appropriateness of extending Community rules to cover in some form or another take-over bids as well.

The third companies directive has been proposed by the Commission to the Council in 1970. Again, the European Parliament and the Economic and Social Committee have given on the whole favourable opinions. The Council's group responsible for company law started discussing a revised version of the proposal at the end of 1973. The Council's recently agreed timetable for company law fixed 1st July 1975 as the latest date for adoption.

[to be continued]

# Statutory Instruments

**Solicitors Act 1954 (Apprenticeship and Education) ( Amendment No. 1) Regulations 1974**

The Incorporated Law Society of Ireland in exercise of the powers conferred on them by Sections 4, 5, 25 and 40 of the Solicitors Act, 1954, hereby make the following Regulations.

(1) These Regulations may be cited as the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) No. 1 Regulations 1974, and shall be read together with the Solicitors Act, 1954 (Apprenticeship and Education) Regulations 1955 (S.I. No. 217 of 1955) (hereinafter called "the Principal Regulations"), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1956 (S.I. No. 307 of 1956), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1960 (S.I. No. 94 of 1960), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1965 (S.I. No. 201 of 1965), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1966 (S.I. No. 230 of 1966), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1968 (S.I. No. 17 of 1968), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1969 (S.I. No. 110 of 1969), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1970 (S.I. No. 108 of 1970), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1971 (S.I. No. 218 of 1971), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1972 (S.I. No. 49 of 1972), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1973 (S.I. No. 47 of 1973), the Solicitors Act, 1954 (Apprenticeship and Education) (Amendment) Regulations 1973 (S.I. No. 333 of 1973), and shall insofar as they are inconsistent therewith alter and amend the same. The Regulations hereinbefore mentioned may be cited collectively as the Solicitors Act, 1954 (Apprenticeship and Education) Regulations 1955-1974.

(2) Paragraph 7 of the Principal Regulations is hereby amended by the addition thereto of the following:

"(5) The examination for the Degree of Bachelor of Laws or Bachelor of Arts in any of the Universities of Ireland, England, Scotland or Wales shall be deemed to be equivalent to the Preliminary Examination of the Society pursuant to Section 41 of the Solicitors Act, 1954.

"(6) No person (other than a person to whom Paragraph 4 or Paragraph 5 of the Second Schedule to the Solicitors Act, 1954, applies) shall enter into Indentures of Apprenticeship unless (a) he shall have been conferred with or shall have passed the examination entitling him to be conferred with the degree (not being a degree honoris causa) of Bachelor of Laws or Bachelor of Arts in any of the Universities of Ireland, England, Scotland or Wales or a University Degree (not being a degree honoris causa) which in the opinion of the Council is equivalent to such a degree of one of the said Universities or (b) he shall have passed the Preliminary Examination of the Society or (c) he shall have been exempted from the Preliminary Examination of the Society under Section 41 or Section 42 of the Solicitors Act, 1954.

"(7) In addition to the Certificates and evidence required to be lodged with the Society under Paragraph (2) and (4) of this Regulation an intending apprentice shall where appropriate lodge with the Society evidence of his having been conferred with the University Degree relied upon for the purposes of Clause 6 hereof *or* such evidence as the Society may require of his having passed the appropriate University Degree examination entitling him to be conferred with the said University Degree relied upon for the purposes of Clause 6 hereof.

"(8) The provisions of Paragraphs (5), (6) and (7) of this Regulation shall come into operation on the 1st day of October 1975."

Dated this 16th day of May 1974.

Signed on behalf of the Incorporated Law Society of Ireland.

PETER M. D. PRENTICE
*President of the Incorporated Law Society of Ireland*

**Explanatory note**

This note is not part of the instrument and does not purport to be a legal interpretation thereof.

**Legislative background to legal education**

Paragraphs 1 and 2 are covered by the President's speech, see page 142, starting with "The present educational requirements . . ."

(3) To be eligible for admission to the Roll of Solicitors, under existing regulations the apprentice is required to have passed:

(i) *First Law Examination*: Paper 1, The Law of Tort; Paper 2, The Law of Contract; Paper 3, The Law of Real Property.

(ii) *Second Law Examination*: Paper 4, Equity; Paper 5, Company Law and Partnership; Paper 6, Conveyancing and Registration of Title; Paper 7, The Practice and Procedure of the Superior Courts (including Bankruptcy); Paper 8, Criminal Law and the Law of Evidence.

(iii) *Third Law Examination* Paper 9, Tax Law; Paper 10, Commercial Law; Paper 11, The Practice and Procedure of the Circuit and District Courts; Paper

12, The Law and Practice in connection with Wills and the Administration of Estates; Paper 13, Land Law.

(iv) Examination in Book-keeping.

(v) Second Irish examination.

**Present arrangements**

Paragraphs 4 and 5 are covered by the President's speech, see pp. 142-143, starting with "Under existing arrangements, the Society requires apprentices to attend University lectures ..."

**Reform of legal education**

Paragraphs 6 and 7 are covered by the President's speech, see page 143, starting with "Since 1961, it has been the stated policy of the Society ..."

**New education regulations**

Paragraph 8 is covered by the President's speech, see page 143, starting with "Following consultation with the Universities, the Society proposes that as from 1st October 1975 ..."

**Details of Society's course**

Paragraphs 9 and 10 are covered by the President's speech, see p. 143, starting with "The Society has agreed the outline of its course (Appendix B) ..."

(11) It is to be understood that in the making of the further regulations spelling out in detail the scheme of training, the future regulations will be substantially in accordance with the scheme now outlined in this explanatory note and at Appendix B.

**Conditions of admission to Society's Law School under new arrangements**

(12) (i) Applicant with Law Degree.

Subject to passing the statutory First Irish Examination and obtaining a master, the applicant will be allowed to commence the three year apprenticeship and will be given an exemption from the Society's First Law Examination (new form).

(ii) Applicant with other degree.

Subject to passing the statutory First Irish Examination and obtaining a master the applicant will be allowed to commence a three year apprenticeship. Before being admitted to the Society's Law School, he will be required to pass an examination at degree level in Contract, Property, Tort, Constitutional Law and two optional subjects. It is hoped in discussion with the Universities, to arrange that such persons will be in a position to attend the appropriate University lectures and sit the appropriate University examinations, which would be recognised for the Society's purposes.

**Ratio of Apprentices to Solicitors**

(13) At present there are approximately 600 apprentices in training and some 1,500 solicitors in practice. By comparison Scotland with a population of 5,212,000 and a comprehensive system of legal aid, has 3,500 solicitors in practice. Notwithstanding the high apprentice/solicitor ratio, there is an unsatisfied demand for apprenticeship. The Society being conscious of the problem of obtaining masters, agreed on 7th February 1974 that in these special circumstances, it would be prepared to consider applications from solicitors generally for second apprentices. Also, as an exceptional measure, it agreed to allow solicitors of five to seven years standing to take apprentices subject to the Society's approval in each case.

**Length of apprenticeship**

(14) Criticism has been voiced over the length of apprenticeship—three years for a person with a University degree. This is a statutory requirement provided for under Section 26 of the Solicitors Acts 1954-1960 and the Second Schedule to the Act. It cannot be altered without amending legislation. It is a factor which will be borne in mind in any future amendment of the legislation.

**—Continued on next page**

# Congress of French Notaries

The 71st Congress of the Notaries of France will be held in the International Congress Hall, Porte Maillot, Paris, from Sunday, 27, to Wednesday evening, 30 October 1974, inclusive. The subject matter of the Congress will be "The Practice of Law in Europe and in the Common Market". Eight Commissions will examine different aspects of the problem. Instantaneous translation into five languages including English is assured. A volume containing all the reports of the Commission will be sent to each participant. Accommodation for participants has been reserved by the committee in two hotels of 1,000 rooms each, the Concorde Lafayette and the Meridien, adjoining the meeting hall. The rates are 155 francs (£15) per day for a single room, including continental breakfast, and 190 francs (£18) per day for a double room. The total extras include two lunches on Monday, 28, and Tuesday, 29, for 130 francs altogether (£11.50). An official banquet in the Intercontinental Hotel on Monday, 28, for 180 francs (£16), a foreign participants dinner in the Palace of Versailles on Tuesday, 29, for 250 francs (£22), and a gala evening on Wednesday, 30, for 90 francs (£8.50). The registration fee for a participant in the Congress is 450 francs (£40), and for each member of his family 200 francs (£18). A prospective participant should write before September 15 to Madame Boulanger, Boite Postale 149, 62520 Le Touquet, France.

## Appendix A—Law Degree Course Content

| T.C.D. | U.C.D. | U.C.C. | U.C.G. |
|---|---|---|---|
| *Year One*<br>1. Legal Systems and Methods.<br>2. Criminal Law.<br>3. Constitutional Law.<br>4. Inrtoduction to Private Law. | 1. Introduction to Legal System.<br>2. Criminal Law.<br>3. Constitutional History and Comparative Constitutional Law.<br>4. Introduction to Real Property. | 1. Introduction to Legal System.<br>2. Roman Law.<br>3. Constitutional Law.<br>4. Criminal Law and Procedure.<br>5. Contract. | 1. Jurisprudence.<br>2. Roman Law.<br>3. Real Property.<br>4. Personal Property.<br>5. Equity.<br>6. Criminal Law.<br>7. Contract.<br>8. Tort.<br>(Four subjects to be taken) |
| *Year Two*<br>1. Contract.<br>2. Torts.<br>3. Real Property.<br>4. International Law. | 1. Contract.<br>2. Torts.<br>3. Real Property II.<br>4. Roman Law.<br>5. Constitutional Law. | 1. Torts.<br>2. Law of Property.<br>Two of<br>(i) International Law.<br>(ii) Evidence.<br>(iii) Commercial Law.<br>(iv) Law of E.E.C. | 1. Jurisprudence.<br>2. Roman Law.<br>3. Law of Contract.<br>4. Torts.<br>5. Constitutional Law.<br>6. Public International Law.<br>7. Euqity.<br>8. Criminal Law.<br>9. Real Property.<br>10. Personal Property.<br>11. Evidence.<br>12. Private International Law.<br>(Four subjects to be taken which are not included in first year) |
| *Year Three*<br>1. Jurisprudence.<br>2. Personal Property.<br>3. Administrative Law.<br>4. *One* of the following:<br>Evidence.<br>Criminology.<br>Roman Law.<br>European Law.<br>Family Law. | 1. Jurisprudence.<br>2. Equity.<br>3. Three of the following:<br>Administrative Law.<br>Evidence.<br>Criminology.<br>Personal Property.<br>Politics.<br>Family Law.<br>Labour Law.<br>Public International Law.<br>Legal History.<br>Private International Law.<br>Comparative Law.<br>Law of European Institutions. | 1. Jurisprudence.<br>Four of—second year options not already taken:<br>Land Law.<br>Company Law.<br>Industrial Law. ...<br>Legal History.<br>Family Law.<br>Conflict of Laws. | Four subjects to be taken from second year list but excluding any four taken in year two. |
| *Year Four*<br>1. Equity.<br>2. Labout Law.<br>3. Two of the options above *and* below excluding any taken in year three.<br>Advanced Private Law.<br>Legal History.<br>Revenue Law.<br>Company Law.<br>Conflict of Laws. | | | |

## Appendix B—Outline of Society's Course of Study

*First Year*

(a) Revenue Law—including instruction in handling taxation matters.

(b) (i) Law of and practical instruction in Conveyancing e.g. Investigation of Titles, Purchase of Lands, Landlord and Tenant, Mortgages and building of houses.
(ii) Wills and Administration of Estates—the drawing of Wills and Codicils, the winding-up of Estates and the administration of Trusts.

(c) Business Law.
(i) Instruction on Company Formation and Partnership Agreements and respective advantages of each.
(ii) Outlines of Bankruptcy and Liquidation.
(iii) Financial aspects of Company Law. Instruction in the interpretation of balance sheets, accounts generally and financing of companies, including the operations of the Stock Exchange. General commercial knowledge.

(d) Family Law—Practice and Procedure.
The practical aspects of family work, e.g. property rights, infants, matrimonial problems, legal aid arrangements (as and when they operate).

(e) Administrative Law—Practice and Procedure.
The practical aspects of Local Government Law, including Town Planning, Administrative Tribunals under the Social Welfare Acts, the Land Commission and Land Acts.

(f) Criminal and Civil Litigation.
(i) Practice and procedure of Criminal Courts.
(ii) Practical instruction in the preparation of a prosecution case and the case for the defence, including instruction in the drawing of briefs and writing of opinions.
(iii) Practice and procedure in the Superior and Inferior Civil Courts.
(iv) Practical instruction in the drawing of pleadings, preparation of cases for advice and opinions.
(v) An advocacy course in both civil and criminal proceedings.

(g) Ethics and Professional Conduct—probably based on the revised edition (now in preparation) of Sir Thomas Lund's book *A Guide to Professional Conduct and Etiquette* adapted for Irish conditions.

*Final three to four months after eighteen months in master's office*

(a) Office administration—including staff assessment, management and training, filing procedure, office systems, etc.

(b) Cost drawing (including time costing, computer application to office practice).

MINIMUM OF ANY TWO OF THE FOLLOWING

(c) Conveyancing, Land Law, the Law of Landlord and Tenant.

(d) Company Law.

(e) Tax Planning and Estate Duty Planning.

(f) Financial Planning including Banking, Investment and Tax advice.

(g) Consumer Law.

(h) Labour Law (including the Factories Acts, Social Welfare Acts, the Labour Court, etc.).

(i) Criminal Law and Evidence.

(j) E.E.C. Law and Practice.

(k) Bankruptcy and Liquidation.

*Note*—Under the new arrangements an apprentice will not be allowed to spend more than three months in the town agent's office. The remainder of the twenty-one month period in an office *must* be spent in the master's office.

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## REGISTRY OF DEEDS (FEES) ORDER, 1974

### (S.I. No. 160 of 1974)

I, Patrick Cooney, Minister for Justice, in exercise of the powers conferred on me by section 35 of the Registry of Deeds (Ireland) Act, 1832, as adapted by the Registry of Deeds (Ireland) Act, 1832 (Adaptation) Order, 1956 (S.I. No. 281 of 1956), and section 9 of the Land Transfer (Ireland) Act, 1848, as adapted by the Land Transfer (Ireland) Act, 1848 (Adaptation) Order, 1956 (S.I. No. 280 of 1956), hereby order as follows:

1. This Order may be cited as the Registry of Deeds (Fes) Order, 1974.
2. The Interpretation Act, 1937 (No. 38 of 1937), applies to this Order.
3. This Order shall come into operation on the 1st day of September 1974.
4. In lieu of the fees specified in the Schedule to the Registry of Deeds (Fees) Order 1970 (S.I. No. 238 of 1970), the fees specified in the second column of the Schedule to this Order shall be charged in the Office of the Registrar of Deeds in respect of the items specibed in the first column of the Schedule to this Order.

| *Item* | *Fee* |
|---|---|
| **(1) Registration of Memorials** | |
| Upon every memorial registered ..... | £4.00 |
| **(2) Certificates of Registration** | |
| For every special certificate of registration ..... | 0.20 |
| **(3) Common Search made by Office under a Requisition** | |
| (a) Upon names | |
| (i) or each different name for any period not exceeding ten years ..... | 0.50 |
| (ii) for each different name for every additional ten years or additional part of ten years ..... | 0.40 |
| (b) Upon lands: The like fees for each denomination or alias denomination of land commencing with a different initial letter. (See also paragraph 7) | |
| **(4) Negative Search made by Office under a Requisition** | |
| (a) Upon names | |
| (i) for each different name for any period not exceeding ten years ..... | £1.00 |
| (ii) for each different name for every additional year beyond ten ..... | 0.10 |
| (b) Upon lands: The like fees for each denomination or alias denomination of land commencing with a different initial letter. (See also paragraph 7) | |

(5) **Search by Members of the Public**

(a) General search without limitation, each day by every person ..... £3.00

(b) Search upon names only

(i) each day by every person for every different name for any period not exceeding ten years ..... 0.50

(ii) each day by every person for every different name for every additional ten years or additional part of ten years ..... 0.20

(c) Searches upon lands only: The like fees as for searches upon names for each county, city or corporation town.

(d) Continuation by a member of the public of each negative search ..... 0.50

(6) **Search by Members of the Public of Indexes and Recorded Copies of Negative Searches**

Each day by every person ..... 0.10

(7) **Copies**

(a) Memorial

For every copy of a memorial

(i) for the first five folios or part thereof ... 0.50

(ii) for every additional folio or additional part of a folio in excess of five ..... 0.10

(b) Abstract of memorial

For every copy of an abstract of a memorial whether included in a certificate of search or otherwise ..... 0.10

(c) Certificate of negative search

For every attested copy of a negative search

(i) for the first five folios or part thereof ... 0.50

(ii) for every additional folio or additional part of a folio in excess of five ..... .100

(d) Duplicate negative search

For every copy of a duplicate negative search

(i) for the first five folios or part thereof ... 0.50

(ii) for every additional folio or additional part of a folio in excess of five ..... 0.10

(8) **Entry of Satisfaction of Mortgage**

(a) Entry of certificate of satisfaction of judgment mortgage ..... 1.00

(b) Entry of satisfaction of mortgage (Building Societies Act, 1874) ..... 0.13

(9) **Inspection of Original Memorial or Affidavit**

For every original memorial or affidavit produced for inspection in the Office ..... 0.10

(10) **For Attendance of Officer to Produce Memorial or other Document in Court**

Each attendance ..... 3.00

(and travelling and subsistence expenses as actually incurred.)

[**Note**: A folio in this Schedule means 72 words.]

**Explanatory Note**

(*This note is not part of the Instrument and does not purport to be a legal interpretation thereof.*)

This Order, which comes into operation on 1 September 1974, provides for revised fees to be charged in the Registry of Deeds in respect of searches by members of the public and restates in decimal currency the other fees currently authorised. It replaces the existing provision for charging fees, which is the Registry of Deeds (Fees) Order, 1970. The Minister for Industry and Commerce has, under section 2(2)(a) of the Prices (Amendment) Act, 1972, consented to the exercise by the Minister for Justice of his statutory power to determine the fees contained in this Order.

S.I. No. 216 of 1974

## IRISH LAND COMMISSION
## LAND PURCHASE ACT. Rules 1974
### Rules and Orders under the Land Act, 1933
### The 9th day of July, 1974

It is this day ordered by the Minister for Lands, in pursuance of the powers conferred on him by Section 3 of the Land Act, 1933, and of every other power him enabling in this behalf, with the concurrence of a mjority of the Committee constituted pursuant to the provisions of the said Section and after consultation with the President of the Incorporated Law Society of Ireland, that the following Rules shall from and after this date (except where otherwise stated) and until further order take effect and be in force in relation to proceedings under the Land Purchase Acts and that all existing Rules and Orders made under the same Acts, in so far as they are inconsistent with these Rules but no further, are hereby amended or revoked.

TOM FITPZATRICK,
Minister for Lands.

We hereby concur in the making of the following Rules.

Members of the Committee:

Seán de Buitléir,
T. O'Brien
John Kelly.

S.I. No. 216 of 1974

### ORDER I

**Title** 1. These Rules and Orders may be cited as the Land Purchase Acts Rules of 1974.

**Interpretation** 2. (1) The Interpretation Act, 1937 (No. 38 of 1937) applies to the interpretation of these Rules and Orders in like manner as it applies to the interpretation of an Act of the Oireachtas.

(2) In these Rules and Orders— "The Rules of 1964" means the Land Purchase Acts Rules of 1964 (S.I. No. 230 of 1964) dated 23rd September, 1964.

**Saving of existing Rules** 3. All Rules heretofore made under the Land Purchase Acts shall continue in force save in so far as they are revoked by, or are inconsistent with, these Rules.

### ORDER II

**Amendment of existing Rules** Article 7 of the First Schedule to the Rules of 1964 is hereby amended by the substitution for Rule 3 thereof of :—

**Registered Land** 3. If the title to the estate is registered under the Registration of Title Acts, 1891 and 1942, or the Registration of Title Act, 1964, the Land Certificate, if issued, and an attested copy of the Folio written up to the latest date shall be lodged with the Affidavit of Title.

### ORDER III

**Amendment of Second & Third Schedules to the Rules of 1964**—The Second and Third Schedules to the Rules of 1964 are hereby amended as follows :

(a) by the addition of the words "or the Registration of Title Act, 1964" after the words "the Registration of Title Acts, 1891 and 1942" where they occur.

(b) by the substitution for the words "Where the property has a Notice of Equities or of Possessory Title

in the register that cannot be cancelled except after the examination of title prescribed by Rules 36 and 37 of the Land Registration Rules, 1959 (S.I. No. 96 or 1959)" where they occur, of the words "Where the property is registered with a Possessory Title that cannot be converted into an Absolute Title except after the examination of title prescribed by Rules 36 and 37 of the Land Registration Rules, 1972 (S.I. No. 230 of 1972) or where, but for the fixing of the Appointed Day by the Land Commission, an application under Rule 46 of the said Rules would be required to establish title by possession".

(c) by the substitution for the words "Where the property has no Notice of Equities or of Possessory Title or has a notice thereof that may be cancelled on an application under Rules 34 or 35 of the Land Registration Rules, 1959 (S.I. No. 96 or 1959)" where they occur, of the words "where the property is not registered with a Possessory Title or is registered with a possessory title that may be converted on an application under Rules 33, 34 or 35 of the Land Registration Rules, 1972 (S.I. No. 230 of 1972)".

EXPLANATORY NOTE

(This note is not part of the instrument and does not purport to be a legal interpretation).

These Rules adapt the Land Purchase Acts Rules of 1964 having regard to the provisions of the Registration of Title Act, 1964, and the Land Registration Rules, 1972, and additionally they amend the method of ascertaining legal costs prescribed by the said Land Purchase Acts Rules of 1964.

# Explanatory Memoranda to Legislation

## MAINTENANCE ORDERS ACT 1974

### General

1. The object of the Bill is to enable effect to be given to a proposed Agreement for the reciprocal Enforcement of Maintenance Orders (including Affiliation Orders) as between the State and Britain and Northern Ireland. It is envisaged that the Agreement will come into operation after the Bill is enacted and the (British) Maintenance Orders (Reciprocal Enforcement) Act, 1972, has been applied by an Order in Council in relation to Maintenance Orders made in the State.

2. The proposed Agreement will be an interim one pending accession by the new member States to the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which came into force between the original six members States of the EEC on 1st February, 1973. The Convention provides for the reciprocal recognition and enforcement throughout the Community of judgments of the Courts of Member States in certain civil and commercial cases (including maintenance and affiliation proceedings) and for this purpose prescribes rules of jurisdiction to be observed by those courts. The new Member States are obliged by the Treaty of Accession to accede to the Convention in due course, subject to negotiation of the necessary adjustments. These negotiations are proceeding but it is not expected that accession can take place before 1976.

3. The Agreement will provide an opportunity to see how the EEC Convention will operate in practice between the State and Britain and Northern Ireland in relation to Maintenance Orders. Accordingly, the text of the Bill follows, as far as practicable and appropriate, the recognition and enforcement provisions of the Convention. For convenient reference, an English translation of the Convention is set out in the Appendix to this memorandum.

4. The main features of the Bill are—

(1) It will apply to Maintenance Orders made either before or after it comes into operation but not as regards arrears accrued before then (*section 4*).

(2) British and Northern Ireland Maintenance Orders will be enforced in the State with a minimum of formality. The decision whether or not to order enforcement will be taken by the Master of the High Court on the basis of his consideration, privately, of a certified copy of the Maintenance Order and supporting documents sent to him through the appropriate authority in the jurisdiction concerned (*section 6*).

(3) An appeal can be taken against the Master's enforcement order in the High Court. During the time allowed for appeal no measures of execution may be taken against the property of the party against whom enforcement is sought (*section 7*). There is a similar right of appeal where the Master refuses to make an enforcement order (*section 8*).

(4) Enforcement will be mandatory except in three specific instances, i.e. (a) where recognition or enforcement would be contrary to public policy, (b) where, in the case of an order made in default of appearance, the defendant was not served with notice of the proceedings in time to enable him to defend them and finally, (c) where the order would be irreconcilable with a judgment given in a dispute between the same parties in the State (*section 9*).

(5) The actual enforcement will be effected by the District Court. Maintenance payments will be made to the District Court Clerk for transmission to the creditor (e.g., a deserted wife or unmarried mother) or to a public authority authorised by her to receive the payments. If the debtor defaults, the clerk will, if requested by the creditor, take proceedings to enforce the order (*section 14*).

(6) Documents relating to the institution of maintenance proceedings against defendants residing in Britain or Northern Ireland and to the enforcement there of maintenance orders made in the State and the appropriate authorities in those jurisdictions (*section 16* (3) and *18* (3)).

(7) Provision is made for obtaining evidence from Britain or Northern Ireland for the purpose of maintenance proceedings here and for the taking of evidence here in corresponding circumstances (*sections 19 and 20*). Provision is also made for the admissibility in maintenance proceedings, here of evidence taken in Britain or Northern Ireland, of the documents relating to requests for enforcement and of statements contained in other documents likely to be produced by or on behalf of parties to such proceedings (*section 21*).

*Section* 4 provides that the Act shall apply to Maintenance Orders whether made before or after the date of its commencement. Arrears which may have occurred before that date will not be enforceable.

*Section* 10 (a), following Article 28.3 (*part*) of the EEC Convention, provides that in recognition and enforcement proceedings the Jurisdiction of the Court which made the maintenance order may not be examined. *Section* 10 (b) reproduces Articles 29 and 34.3 of the Convention. It provides that the maintenance orer which it is sought to have recognised and enforced may not be examined as to its substance.

*Section* 12 is based on Article 45 of the EEC Convention and is designed to prevent discrimination in the matter of security for costs against a person seeking the enforcement of a maintenance orer in the State, solely on the ground of non-residence in the State.

**Maintenance orders made in the State**

*Section* 16 (1) gives jurisdiction to a court in the State in proceedings under the Married Women (Maintenance in Case of Desertion) Act, 1886, or the Illegitimate Children (Affiliation Orders) Act, 1930, where the defendant is residing in Britain or Northern Ireland. Under *subsection* (3) the Registrar or clerk of the court will send the notice of the institution of proceedings and supporting documents to the Master of the High Court for transmission to the appropriate authority in Britain or Northern Ireland, where the notice will be served on the defendant.

*Section* 18 provides for the transmission of a Maintenance Order made in the State for enforcement in Britain or Northern Ireland. The maintenance creditor must apply to have this done (*subsection* (1). On receipt of the application, the Registrar or Clerk of the Court will send a certified copy of the Maintenance Order and various supporting documents to the Master of the High Court and also a notice of the making of the order direct to the debtor by registered post. The Master will transmit the documentation to the appropriate authority, if it appears to him that there is sufficient information available about the whereabouts of the debtor to justify that being done.

**Evidence**

*Section* 19 enables a court in the State to obtain evidence from Britain or Northern Ireland for the purpose of Maintenance and Enforcement Proceedings under the High Court Act. The Court's request will be sent to the Master of the Hight Court for transmission to the appropriate authority there. Provision is made in *section* 21 (1) (c) for the admissibility of such evidence.

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## FINANCE ACT 1974

**Explanatory Memorandum**

**Method for changing Income Tax for 1974-75 and Subsequent Years**

Chapter 1 and the First and Second Schedules give effect to the new unified system of personal taxation for 1974-75 and subsequent years. The new system, broadly speaking, involves (a) the Abolition of the distinction between Earned and Unearned Income, (b) the introduction of a reduced rate of tax of 26 per cent on the first £1,550 of taxable income to compensate for the abolition of earned income relief and (c) the introduction of higher rates of income tax in substitution for sur-tax which is being abolished with effect from April 6, 1974. Many textual amendments and repeals of provisions in the Income Tax Acts are required and these are contained in the First and Second Schedules to the Bill.

*Section* 3 provides for the new rate structure for 1974-75 and subseqent years. A reduced rate of 26 per cent. will apply to the first £1,550 of taxable income of an individual. The next £2,800 of taxable income will be charged at the rate of 35 per cent. which will be known as the standard rate. The standard rate will also apply in the case of companies, trustees and other bodies. Higher rates, which take account of the former sur-tax rates, will apply to the excess of the taxable income over £4,350 as follows:—50 per cent. on the first £2,000 of the excess, 65 per cent. on the next £2,000 and 80 per cent. on the balance.

*Section 4* contains provisions regarding the treatment of taxed income for the purpose of charging an individual's total income to tax. The gross amount of the taxed income is to be added to the taxpayer's other income and the tax liability on the aggregate income, after deduction of the pesonal allowances and reliefs, is computed at the rates set out in section 3. A credit will then be given for the tax sufferred by deduction in order to determine the net amount of tax which the taxpayer will be liable to pay on his total income.

*Section* 5 abolishes the "accruing" rate of deduction of tax on payment of dividends, interest, annual payments, etc. It provides that tax will be deducted from such payments at the standard rate in force at time of payment.

*Section* 7 contains the amendment necessary to raise the amount of the dependent relative allowance from £60 to £80 as set out in the table to section 6. It also

increases from £347 to £409 the income limit of a dependent relative in respect of whom the maximum deduction of £80 may be given. This ensures that a taxpayer who maintains at his own expense a dependent relative having no income other than a non-contributory old age pension (personal rate) will not have the allowance reduced because of the increase in that pension announced in this year's budget.

*Section 8* provies an additional personal allowance for persons aged 65 years or over. For a single or widowed person the additional allowance is £25 and for a married person it is £50.

*Section 9* imposes a limit of £1,000 on the amount of life assurance premiums which may qualify for income tax relief. The limit will apply to the total premiums on all policies whether taken out before, on or after April 3, 1974 (Budget Day) but in any case where a taxpayer before that date was paying premiums in excess of £1,000 those premiums will continue to qualify for relief subject to the existing restrictions.

*Section 10* is self-explanatory. As from 1974-75 surtax is being abolished and replaced by the higher rates of tax set out in section 3.

**Tataxion of Farming Profits**

*Section 13* to *28* are concerned with the charging to tax of farming profits. Also included are provisions restricting tax relief in respect of certain farm losses and restricting personal allowances in certain circumstances.

The tax charge on farming profits will not apply in the case of an individual who shows that, as respects any year of assessment, the rateable valuation of all farm land occupied by him did not at any time during the year amount to £100 or more. A sliding scale will apply where the rateable valuation for the year of assessment amounts to, or does not greatly exceed £100.

An individual who is chargeable on his farming profits may elect for a notional basis of assessment, namely, forty times the rateable valuation less deductions for rates, wages and similar payments for work done and depreciation of machinery and plant.

*Section 29* amends section 496 of the Income Tax Act, 1967, which provides relief for bank, etc., interest paid. The section which extends section 496 to include yearly interest generally restricts relief for 1973-74 to £500 in respect of interest paid in the period from January 10, 1974, to April 5, 1974, and to £2,000 in respect of interest paid in 1974-75 and subsequent years. Interest incurred for business purposes will not be affected by the restrictions.

*Sections 32 to 34* are designed, broadly speaking, to ensure that the restriction on income tax relief for interest paid will not apply to interest on borrowings by a company or an individual for the purpose of purchasing an interest in a trading company in a case where the company or individual is subsequently involved in the direction or management of the trading company.

*Section 35* provides that unrestricted relief is to be given to an individual for interest on money borrowed to enable him to acquire a share in a partnership or to contribute or advance money to a partnership. The main condition to which the section is subject is that the individual, throughout the period from the application of the proceeds of the loan until the interest was paid, has personally acted as a partner, in the conduct of the trade or profession carried on by the partnership. There are provisions to restrict the relief where the individual has recovered any capital from the partnership.

*Section 36* is an anti-avoidance provision. It is intended to prevent an individual from withdrawing capital from his business and replacing it with loan capital, the interest on which would qualify for relief as a business expense.

*Section 41* permits annual interest to be deducted as an expense in computing the profits of a trade or profession. The provision is consequent on the removal of the entitlement to deduct tax on payment of such interest.

*Section 52* is designed to counteract a tax-avoidance device under which remuneration is paid, in the form of tax relieved dividends, to directors on certain employees of companies qualified for export sales and "Shannon" relief. So much of those dividends as, in the opinion of the Revenue Commissioners, is in consideration of services rendered will be regarded as emoluments and assessed to tax under Schedule E. The normal appeal provisions will apply with respect to any opinion of the Revenue Commissioners under this section.

*Section 53* is intended to prevent the avoidance of tax on interest arising from certificates of deposit or other assignable deposits. Certain depositors have avoided the payment of tax in respect of such interest by selling certificates or assigning deposits shortly before the maturity date and obtaining what is in effect the accrued interest in the form of a non-taxable capital sum. Such sums will now be brought into charge. The section applies to any such sum arising from a certificate of deposit or assignable deposit acquired from April 3, 1974 (Budget Day), and to so much of any such sum as is attributed to the period after that date where the deposit was acquired before that date.

*Section 55* provides that where an individual ordinarily resident in the State has made a transfer of assets as a result of which income becomes payable to a person abroad and the Irish resident has the power to enjoy that income it is to be treated as his for tax purposes unless he shows that the transfer was carried out for a genuine business reason and not for tax avoidance purposes. The section provides that the charge to tax is to apply for 1974-75 and subsequent years irrespective of whether the transfer of assets took place before or after the commencement of the Act.

*Section 60* closes a loophole whereby a company, by leasing an uncompleted property at a nominal rent, creates a situation under which it claims tax relief in respect of interest on borrowed money and certain other payments made in the period prior to letting the building at an economic rent. By charging these expenses against the nominal rent arising in that period, the lessor creates deficiencies occupied by a lessee for the purposes of a trade or profession or for use as a re-

sidence. The section provides that no deduction will be allowed in respect of rent or interest paid by the lessor prior to premises being brought into use.

*Section 61* amends section 20 of the Finance (Miscellaneous Provisions) Act, 1968, which was designed to prevent avoidance of tax on land development profits by the sale of shares in a company formed to construct a building rather than by the sale of the building itself. The objective of the section has been avoided, however, by the device of reconstructing an existing building, or by demolishing an existing building and then selling the shares of the company. The present section widens the provisions of section 20 to counteract such devices.

*Sections* 63, 64, and 65 expand the scope of the provisions under which an individual engaged in a trade or profession, or holding a non-pensionable employment may obtain relief from tax in respect of payments made by him under approved contracts to secure a life annuity for himself on his retirement.

*Section 67* empowers an inspector of taxes, following an application for the rehearing of an appeal by the Circuit Court, to give effect to an agreement between him and the appellant in relation to the assessment. This will enable such cases to be settled by agreement without recourse to the Circuit Court.

### Stamp Duties

*Section 79* restricts the increased rate of 15 per cent. stamp duty, imposed on contracts for the construction of office buildings by section 65 of the Finance Act, 1973, to buildings in the City and County of Dublin.

*Section 81* doubles the rates of stamp duty chargeable on the transfer of securities. The increased rates do not apply to Irish securities or to foreign securities on a branch register here.

The *First Schedule* effects the textual amendments in the Income Tax Acts which are consequent on the introduction of the new system of charging tax. *Part I* makes the amendments arising from the changes in the personal allowances and reliefs referred to in section 6. *Part II* effects amendments consequent on the enactment of the higher rates of tax which are set out in section v.

*The Second Schedule* specifies the repeals which in the main are those necessitated by the introduction of the new unified system of personal taxation.

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## PROSECUTION OF OFFENCES ACT 1974

### Explanatory Memorandum

1. Article 30.3 of the Constitution provides as follows:—

> "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose".

2. This Bill will provide for the office of Director of Public Prosecutions. The Director would perform the functions of the Attorney General in Criminal Matters and in relation to Election and Referendum Petitions, subject to

(1) the functions of the Attorney General being unaffected in relation to any question as to the validity of any law having regard to the provisions of the Constitution;

(2) the Attorney General, in addition to the Director, having the right to

(*a*) certify, under section 29 of the Courts of Justice Act, 1924, that a decision of the Court of Criminal Appeal involves a point of law of exceptional public importance and that it is desirable in the public interest that an appeal should be taken to the Supreme Court; or

(*b*) refer, under section 34 of the Criminal Procedure Act, 1967, a question of law to the Supreme Court for determination, where, on a question of law, a verdict in favour of an accused person is found by direction of the trial judge;

(3) no further proceedings being taken (except remand in custody or on bail) without the consent of the Attorney General, against a person charged with an offence under section 3 of the Geneva Conventions Act, 1962, the Official Secrets Act, 1963, or the Genocide Act, 1973;

(4) the Government's power from time to time, in the interests of national security, to declare that, in relation to specified criminal matters, the functions conferred on the Director should be performed only by the Attorney General.

3. *Section 1* of the Bill provides for necessary definations.

4. *Section 2* provides for the establishment of an office of Director of Public Prosecutions, with a Director appointed by the Government from among persons who have been practising barristers or practising solicitors for at least ten years. There is provision for the setting up of a committee consisting of the Chief Justice, the Chairman of the General Council of the Bar of Ireland,, the President of the Incorporated Law Society, the Secretary to the Government and the Senior Legal Assistant in the Office of the Attorney General, to select candidates for appointment as Director and inform the Government of the candidates selected and their suitability for appointment. The Director, who will be a civil servant, will hold office upon such terms and conditions as may be determined by the Taoiseach after consultation with the Minister for the Public Service. The Director will be independent in the performance of his functions. *Section 2* (6) provides for consultations between the Attorney General and the Director. The provision would not confer on the Attorney General any right to give directions to the Director as to how he will perform his functions in relation either to particular cases or generally. At the request of the Government, a committee appointed by them and consisting of the Chief Justice, a Judge of the High Court nominated by the Chief Jus-

tice, and the Attorney General shall investigate the condition of health or conduct of the Director. The Government having considered the report of this Committee, may remove the Director from office.

5. *Section* 3 (*1*) confers upon the Director all the powers, duties and functions capable of being exercised by the Attorney General in relation to Criminal Matters and Election and Referendum Petitions. The section also provides for certain transitional arrangements and preserves the position of the Attorney General in relation to the Constitutional validity of any laws, and to decide whether a point of law is of public importance on appeal from the Court of Criminal Appeal.

6. Certain functions have been conferred on the Attorney General by statute which are more or less routine and which are performed many times each day, e.g. the giving of consent to summary disposal in appropriate cases. It has been suggested, in the context of section 47 of the Offences against the State Act, 1939, that a function so conferred must be performed personally by the Attorney General. This situation has been dealt with up to the present by obtaining the personal directions of the Attorney General in these cases. Under *section 4*, the function will, in law, continue to be performed by the Attorney General or the Director, as the case may be, but may be performed, on his behalf, in accordance with particular or general instructions issued by him.

7. *Section* 5 provides for the possibility that at any time the Government might consider it necessary for reasons of national security, to exclude certain criminal matters e.g. schedule offences within the meaning of the Offences against the State Act, from the scope of the functions of the Director. Under this section, this could be achieved by Government order, which would re-transfer the matters to the Attorney General.

8. *Section* 6 makes it unlawful for any person, other than a person who has a legitimate interest, to attempt to influence the making by the Attorney General, the Director, their officers, State Solicitors or the Gardai, of a decision not to initiate or to withdraw criminal proceedings.

9. *Section* 7 provides for the distribution by the Attorney General and the Director of State briefs to barristers in a fair and equitable manner. Consultation between the Attorney General, the Director and the General Council of the Bar as to the best manner in which this objective can be achieved is provided for. There is also provision for a complaints procedure in the event of individual barristers feeling aggrieved in relation to the distribution of State briefs.

10. *Section 8* provides for proof in Court of documents issued by the Attorney General or the Director.

11. *Section 9* provides for the possibility of a sudden vacancy in the office of Director and for a period of incapacity of the Director. There is provision for publication of appointments and terminations of appointments in *Irish Oifigiuil* and for minimum qualifications of a temporary Director and an acting Director. The minimum qualifications for their appointment are lower than those for an appointment under Section 2, in order, amongst other considerations, to underline the fact that the temporary Director would have no claim to succeed as permanent Director.

12. *Section 10* enables the Taoiseach to make regulations to enable the Act to have full effect. *Section 11* provides for a consequential repeal. *Section 12* provides for the laying of regulations before the Oireachtas, *section 13* for administration expenses and *section 14* for citation and commencement.

# Presentation of Parchments to Newly Qualified Solicitors

The following address was delivered by Mr. Peter D. M. Prentice, President, on Thursday, 6 June 1974, on the occasion of presenting parchments to new solicitors.

Ladies and Gentlemen: This is one of our most pleasurable occasions—a family occasion—where we can relax in the knowledge that the end of the apprenticeship road has been reached, all examinations over and nothing remains but to receive the parchment which proclaims success to all effort.

We are gathered here to congratulate our latest body of newly-qualified solicitors and in this little ceremony to wish them well in their future, whether it be in practice, in business in industry or whatever road they may now take as a result of qualifying.

You who have now qualified can in a sense treat yourself as among the last products of an educational system which is about to change radically. As and from Octobery 1975—next year—it will not be possible to enter into apprenticeship unless and until the student has had a university degree conferred. In most cases it will be a law degree although certain other degrees will be acceptable. A three-year post-graduate law training will be necessary, commencing with a year's intensive training with the Law Society, followed by nearly two years of practical training in your master's office and ending then with a final examination.

These changes which necessarily have had to be tailored to fit into the Society's powers under the existing Solicitors' Acts—which are technical and restrictive in many aspects—are designed to give a much better emphasis to training and experience in a practical manner in offices. We on the Council of the Society, feel that they are a vast improvement on the present system the defects of which are the overlapping of university and the Society's courses and lack of time for practical training.

You may be unique in another sense in that possibly you are the last to get parchments written on actual parchment. It seems to be disappearing. The law may be an ass but it is no longer being served by goats!

I would like to make a plea to solicitors to review their affairs to see how they may take apprentices and so accommodate what is a great problem of finding

vacancies at present. Mind you our total of some 1,500 solicitors are carrying a float at present of some 650 apprentices and the number is growing rapidly. This is no mean feat when you consider that threequarters of the solicitors' offices in the State are one-man offices.

Freely now a solicitor of five years standing or upwards can take two apprentices—(the law does not allow him any more)—and I do appeal for every effort to be made in this direction. I hope that you who are newly-qualified will bear this in mind and do your bit in due course by helping to put back something into the welfare of the profession.

May I say to you newly-qualified solicitors what my predecessors have said: "Do not launch out into practice on your own before you have some years of experience and may I add—adequate capital—something which is now a major factor in practising."

Please when you can, join the Solicitors' Benevolent Association to help your distressed brethren—and there are many from time to time. Join the Law Society and your local Bar Association and partake in their affairs.

You are commencing practice at an exciting time, when the impact of the EEC is reaching us, and we are becoming Europeans as is evidenced by my visit to the European Court in Luxembourg. There is great scope here and furthermore in industrial management there are considerable opportunities opening up for qualified men who have the inclination to go that way and there are considerable openings in the public service.

As President of the Society may I be the first to congratulate you publicly on becoming solicitors and wish you well in the future. We will now award the parchments to:

Donal Ashe, "Hurst", Grange Road, Rathfarnham, Dublin 14.
Rosemary P. Bolger, Portlaoise, Co. Laoise.
Dermot G. Byron, B.C.L. (NUI), 10 St. Enda's Villas, Navan, Co. Meath.
John Carroll, B.C.L. (NUI), 14 Killarney Parade, North Circular Road, Dublin 7.
John Coughlan, 13 Main Street, Naas, Co. Kildare.
Martin D. Cellier, B.C.L. (NUI), 17 Frankfort Park, Dundrum, Dublin 14.
Daniel Fagan, 28 Castle Ave., Clontarf, Dublin 3.
Raymond Finucane, "Charnwood',' N.C.R., Limerick.
Daniel Gormley, Aghaloughan, Glaslough, Co. Monaghan.
Edward G. Hall, B.A. (NUI), Drumherriff, Castleblayney, Co. Monaghan.
Joseph D. Haugh, 9 Cypress Grove Road, Templeogue, Co. Dublin.
Michael Hayes, 76 Griffith Rd., Glasnevin, Dublin 9.
Edward F. Hickey, 51, Loughbollard, Clane, Co. Kildare.
Michael Irvine, B.A., B.B.S., LL.B., St. Anne's, 7 Alma Road, Monkstown, Co. Dublin.
Michael Molloy, B.A., St. Mary's, Rockbarton, Salthill, Galway.
Stephen Miley, 33 Castlepark Rd. Sandycove, Co. Dublin.
Petria McDonnell, B.C.L. (NUI), The Park Hotel, Virginia, Co. Cavan.
Madeleine McGrath, B.C.L., LL.B. (NUI), 23 St. Alban's Park, Glenageary, Co. Dublin.
Brian D. O Briain, Green Road, Carlow.
Daniel J. O'Connell, B.C.L. (NUI), St. Michael Street, Tipperary.
Matthew O'Donohoe, 54 Kincora Avenue, Clontarf, Dublin 3.
Martina O'Gorman, 1 St. James's Tce., Sandymount, Dublin 4.
Mrs. Anne Ormond, B.C.L. (NUI), 53 St. Kevin's Park, Dartry, Dublin 6.
Michael O'Shaughnessy, 31 Manor Street, Dublin 7.
Mary Regan, B.C.L. (NUI), Glencar, Letterkenny, Co. Donegal.
Nicholas K. Robinson, B.A. (Mod.), M.A. (TCD), 17 Wellington Place, Dublin 4.
Edward M. Sheehan, B.C.L. (NUI), "Carrigdubh", Townview, Mallow, Co. Cork.
Paul D. Traynor, 19 St. Assam's Avenue, Raheny, Dublin 5.
John Wood, Wicklow Lodge, Delgany, Co. Wicklow.

# Library Acquisitions–Additional List

(1) **Books Purchased**

**Archbold (J.)**—Criminal Pleading, Evidence and Practice (37th edition, 1969—with Supplement).
**Bower (George Spender)**—The Law of Actionable Misrepresentation (3rd edition by Sir Alexander Turner, 1974).
**Campbell (Alan)**—Common Market Law (Volume 3, 1974).
**Blundell (Lionel A.) and George Dobry**—Planning Appeals and Inquiries (2nd edition by Paul Rose and Michael Barnes, 1970).
**Cretney (S. M.)**—Principles of Family Law (1974).
**Cross (C. A.)**—Principles of Local Government Law (5th edition, 1974).
**Curtis (Sir George) and Theodore Ruoff**—The Law and Practice of Registered Conveyancing (2nd edition, 1965).
**De Smith (S. A.)**—Judicial Review of Administrative Action (3rd edition, 1973; two copies).
**Dicey (A. V.) and J. H. Morris**—The Conflict of Laws (9th edition, 1974).
**European Communities**—Treaties Establishing the Communities and Documents concerning Accession, 1973 (Brussels, 1973).
**Farrar (J. H.)**—Law Reform and the Law Commission (1974).
**Ganz (Gabrielle)**—Administrative Procedures (1974).
**Halpern (Lionel)**—Taxes in France—An English Adaptation of Lefevre's French Text (1974).
Irish Catholic Directory, 1973.
**Ivamy (E. R. Hardy)**—Personal Accident, Life and Other Insurances (1973).
**Matthews (E. J. T.) and A. D. M. Oulton**—Legal Aid and Advice under the (English) Legal Aid Acts of 1949 to 1971.
**Ogus (A. I.)**—The Law of Damages (1973).
**Riddall (J. C.)**—Equity and Trusts (2nd edition, 1974) —Cracknell's Law Student's Companion.
**Schmitthoff (Clive M.)**—The Harmonisation of European Company Law, 1974 (United Kingdom Comparative Law Series—No. 1).
**Schmitthoff (Clive M.)**—European Company Law Texts, 1974 (British Institute Studies in Comparative

and International Law, No. 7).
The Statesman's Year Book—1973-74.
**Thom**—Dublin Street Directory (1973).
(2) **Exchanges**
Butterworth's Law List—Commonwealth and International—1972.
Dublin University Calendar—1973-74 (Trinity College).
Edinburgh University Calendar—1973-74.
Queen's University of Belfast Calendar—1973-74.
University College, Cork, Calendar—1973-74.
University College, Dublin, Calendar—1973-74.
University of Manchester Calendar—1973-74.
University of Wales Calendar—1973-74.
**Additional Series**
**Halsbury (Earl of)**—The Laws of England (4th edition, Editor in Chief—Lord Hailsham of St. Marylebone, Publishing Editor—Paul Niekirk.
**Vol. 1**—Administrative Law; Admiralty Affiliation and Legitimation; Agency; Agriculture (1973).
**Vol. 2**—Allotments and Smallholdings; Animals; Arbitration; Auction; Aviation; Bailment (1973).
**Vol. 3**—Banking; Bankruptcy and Insolvency; Barristers (1973).
**Vol. 4**—Betting, Gaming and Lotteries; Bills of Exchange and other Negotiable Instruments; Bills of Sale; Boundaries; British Nationality, Alienage, Immigration and Race Relations; Building Contracts; Architects and Engineers; Building Societies (1974).
**Vol. 5**—Capital Gains; Carriers; Charities (1974).
**Vol. 6**—Choses in Action; Clubs; Commons; Commonwealth (1974).
**Vol. 7**—Companies (1974).
**Halsbury (Earl of)**—The Laws of England—Cumulative Supplement 1974 for use by Replacement Subscribers.
(1) Volumes 1 to 4 (Fourth Edition) and Volumes 4 to 19 (Third Edition). 1974.
(2) Volumes 20 to 43 (Third Edition)—Edition by F. M. Walster, 1974.

# BOOK REVIEWS

**Bower (George Spencer)—The Law of Actionable Misrepresentation**—Stated in the form of a Code followed by a Commentary and Appendices. Third Edition by Rt. Hon. Sir Alexander Kingcome Turner, President of the Court of Appeal of New Zealand. London, Butterworth, 1974; £16.

The learned President of the Court of Appeal of New Zealand is a specialist in the writings of Mr. Spencer Bower, as, apart from editing this work, he has also edited recent editions of *The Law of Estoppel by Representation,* and *The Principles of Res Judicata.* The learned President has been too modest in presenting this work, as Mr. Spencer Bower had originally produced the first two editions in 1911 and in 1927 respectively, and, even in the limited field of misrepresentation, one would have to consider a reasonable amount of case law within the last forty-seven years. Yet the learned President has such a regard for the original work of Mr. Spencer Bower that he has changed it as little as possible. Our own Professor Heuston had already been criticised for sticking too closely to Sir John Salmond's text on Torts, and the reviewer believes that, regardless of its former fame, a modern lawbook should be rewritten to conform with current ideas. This is not to say that Mr. Spencer Bower's knowledge of the classics is not of value, though occasionally one might think that the learned author is somewhat prolix. An example is par. 55: "In the present place it is proposed to consider the other class of implied representation—that which is inferred from acts and conduct—a class which in the growing complexity of modern life, assumes ever increasing proportions and importance."

The learned President may have performed a filial task in declining to revise the text, but his occasional illuminating remarks about the more recent cases have greatly enhanced this work. By far the largest number of prolific and valuable footnotes were inserted by the industrious Mr. Bower, and we even get lengthy descriptions of cases which are now classified under the heading of "Mistake" such as "Cundy v. Lindsay", and "Smith v. Hughes". Naturally "Derry v. Peek" and "Peek v. Gurney" are fully considered. But it is precisely because the work is written in the form of a code that these numerous footnotes are required. Sometimes one can detect a note of humour—in par. 238: "The representee may keep the sword of Damocles suspended over the contract as long as he pleases; but if he takes it from its place, he can never put it aack again; and if one the other hand, he cuts the thread and lets the sword fall, whether he destroys the contract or not he loses the sword." Any lawyer who wishes to specialise in this difficult branch of law could not do better than to try to master this enlightening volume.

**Cretney (S. M.)—Principles of Family Law.** 8vo; pp. xl plus 382; London, Sweet & Maxwell, 1974; paperback £3.75.

The learned author, a solicitor, is a Lecturer in English Law in Oxford, and has rightly stressed that he had endeavoured not only to explain Family Law as it is, but also to analyse the reasons for its development; he has wisely decided to omit matrimonial tax matters. In view of the strong wording of Article 41 of the Constitution, the primordial role of the family in Irish Law is obvious; the prohibited degrees are much more numerous than in England. The Irish Marriages Act, 1972, provided for an age of maturity of 16 years, but it is strange that the Statutory Instrument implementing this has not yet been enacted. In considering duress, Griffith's case (1944 I.R.), is mentioned, but the unreported Kelly case (O'Keeffe P.; 16 Feb. 1971) is not.

It is rightly stressed that both parties must consent to the marriage, and that the parent's consent for minors under 18 (in Ireland 21 years) is paramount. In Ireland, the aggrieved party is entitled to recover damages from the guilty third party who has committed adultery; this special Irish Tort is called *"Criminal Conversation"*, and is in any event a form of monetary compensation for the fact that no divorce can be entertained under the Constitution. This textbook stresses the English Divorce Reform Act, 1969, which substituted the doctrine of irretrievable breakdown for the former Matrimonial Offences of adultery, cruelty and unnatural practices, which are still necessary to obtain a full judicial separation in the Irish Courts. The Married

Women's Status Act, 1957, deals with the Irish position in regard to matrimonial property, and all remarks made in regard to this subject will have to be construed in relation to that Act. Mr. Cretney has written a useful book which will have to be used with care by the Irish practitioner.

**Schmitthoff (Clive M.), editor—The Harmonisation of European Company Law.** 8vo; pp. xvi plus 243; London, United Kingdom Comparative Law Series, 1973; £5.00.

The papers appearing in this volume were presented at a colloquium organised by the publishers in Sept. 1972 in Leeds University. Each topic is presented by an expert, and the work is divided into two parts.

Part 1 deals with the *Harmonisation of Company Law in Europe,* and comprises the following six papers:

(1) The Future of the European Community Law Scene by Professor Schmitthoff.

(2) A Comparison of European and British Company Law by Professor Andre Tunc (Paris). (This lecture is vitally important.)

(3) The EEC Directives on Company Law Harmonisation by Dr. Hans Claudius Ficker of the Commission of the European Communities, Brussels.

(4) Structure and Progress of the European Company by Professor Pieter Sanders (Rotterdam).

(5) Co-Determination in European Company Law by Professor Fritz Fabricuis (Bochum).

(6) Company Laws of the European Community from an American Viewpoint by Professor Alfred Connard (Michigan).

Part 2 deals with the *Perspectives of Harmonisation* and comprises the following six papers:

(7) The Reform of Dutch Company Law by Professor Sanders.

(8) A Theory of Co-Determination by Professor Fabricuis.

(9) Comment on a Theory of Co-Determination by Mr. Maurice Kay, Lecturer, Manchester.

(10) Company Law in the Common Market from a Swiss Viewpoint by Professor Alain Hirsch (Geneva).

(11) A European Company Law—The Australian Lesson by Professor Robert Bovxt (Monash).

(12) Canadian Perspectives on Company Law Reform by Professor Bernard Davies, Windsor (Ontario).

It will be seen from this list that a considerable amount of comparative Company Law has been covered in this volume, which will be of invaluable assistance to those who wish to specialise in the subject.

**Weir (Tony)—A Casebook on Tort.** Third edition. 8vo.Pr. xxiv, 576p. London, Sweet & Maxwell, 1974. £4.50 (Paperback).

The fact that in a period of seven years three editions of this work have been published speaks for itself. The fact that citations of cases on negligence occupy 190 pages shows that there is little danger of this important action decreasing in the future. The cases of Spartan Steel v. Martin & Co. (1973), in which an industrialist successfully sued a highway contractor in respect of lost profit, and of Dutton v. Bognor Regis U.D.C. (1972), in which a purchaser of a house successfully sued the local authority for negligence by passing inadequate foundations, are fully noted. Many extracts from other well known judgments are included; there are also many perspicacious remarks by the learned author, who is a Fellow of Trinity College, Cambridge, at the end of each judgment. Many students confine themselves to textbooks, and do not realise the importance of studying the reasoning in the judgements themselves. Those who persevere in reading this work fully, and understanding it, will be rewarded to the extent that they will have acquired a knowledge of all important judicial dicta in tort.

**Statute Law:—** A Radical Simplification—being the second Report appointed to propose solutions to the deficiencies of the Statute Law System in the United Kingdom—8vo. Pr. vi, 57p. London, Sweet & Maxwell on behalf of the Statute Law Society, 1974. £1.00.

Practitioners who have endeavoured to construe difficult sections of a Finance or Income Tax Act will appreciate how important it is to construe statutes as simply as possible. The purpose of this Report is precisely to achieve that object. Statutes should become an integrated body of law to be if possible found in one place, by providing one Act for each subject. There should be an accelerated programme of consolidation, which, as far as Ireland is concerned, is intended to be achieved in the far distant future. "The Statute Law of England" should be separated from "The Statute Law of Scotland". As far as possible, existing Principal Acts should be amended, and no new legislation should be introduced. Titles of Acts should be most carefully chosen. Any amending legislation should be so named by reference to the Principal Act. The referential method of amendment, is inefficient, inconclusive and the cause of much confusion; the textual method of drafting should be substituted for it. Eventually codes could easily be integrated into the system. The staff should be increased by judicious employment of academic lawyers. A regime of "Plain Words" should be introduced by and for legal draftsmen, and facilities should be given for prior consultation with interested parties. The use of computers should be investigated, and adjustments should be made in drafting to bring it into accord with Community Law. These recommendations are all most praiseworthy, but we will doubtless have to wait for the Greek Calends before they are ever put into force here.

**Woods (James V.)—Guide to the Intoxicating Liquor Acts.** 8vo., 26 cm. Pr. vii, 144p. (1974). £4 including postage. (Obtainable only from Mr. Woods, "Summerville", Bendemeer Park, Magazine Road, Cork.)

Mr. Woods is already well known for the most useful 'District Court Handbook', which he published in 1973. We are indebted once more to him for producing a very practical volume on that difficult branch of law, full of traps for the unwary called "Licensing Law". As a District Court Clerk in Cork City, the learned author has acquired a vast amount of practical experience which he has freely placed at the disposal of practitioners. The volume is divided into 14 parts as follows: (1) Licensed Premises; (2) Music, Dancing and Restaurant Certificates; (3) Hours of Trading; (4) Exemptions and Occasional Licenses; (5) Prohibited Hours; (6) Endorsement and Forfeiture of Licenses; (7) Renewal of Retail Licenses; (8) Transfer and Confirmation of Licences; (9) Wholesale Licences; (10) Wine Retailers' Licences; (11) Clubs; (12) When New Retail Licence may be granted; (13) Court Procedure in New Retail Licence; and (14) Appeals under Licensing Acts. Every part is carefully subdivided and up to date statute law and case law is cited. This volume is invaluable and cannot be dispensed with by any practitioner who has to deal with the intricacies of licensing law.

# CORRESPONDENCE

13 Lr. Ormond Quay,
Dublin 1.
19/7/1974

Dear Sir,

We think it well to bring to your attention a decision of His Lordship Judge Kenny delivered on the 11th July, 1974 in a case entitled Dardis and Dunns Seeds Limited—Plaintiffs, Hickey—Defendant which will appear in the Law Reports in due time. The matter relates to the statement of the situation of premises sought to be charged in an Affidavit for Judgment Mortgage.

The Plaintiffs, with a view to converting a Judgment obtained by them against one James Hodgins procured the swearing by their Secretary of an Affidavit under the Judgment Mortgage Act, 1850 in which the premises were described as "a plot of ground situate at Robinstown in the Barony of Upper Navan and County of Meath" which was duly registered under the Act. They did not know the name of the Townland in which the said plot was situate and hence could not state this in the Affidavit. On a subsequent date the said James Hodgins sold the plot to the above-named Defendant it being described in the Contract and Conveyance as "Bective Schoolhouse in the Townland of Balbradagh, Barony of Upper Navan and County of Meath."

In the action brought by the Plaintiffs seeking a Declaration that their Judgment Mortgage was well charged on the land so sold by James Hodgins to the Defendant, evidence was given that a Search had been made in the Index of Names by an eminent firm of professional Law Searchers against the said James Hodgins the Requisition setting out the description of the premises given in the Contract for Sale.

The learned Judge whilst dismissing the action on other grounds held that the description of the land contained in the Judgment Mortgage Affidavit was sufficient to comply with the provisions of the Act which do not require that the Townland be stated.

It would therefore appear that in order to be reliable a Search in relation to property situate outside corporate towns should disclose the acts of the party occurring anywhere inside a given Barony.

Reid and Reid

**Conference Computers And The Law**

The Society for Computers
An dLaw Limited
82 London Road,
Leicester.

Dear Mr. Gavan Duffy,

Earlier this year I gave you advance warning of the Conference "Computers and Law" to be held at Oxford from the 27th to 29th September, 1974. The programme for the Conference is now complete and I attach a copy. I shall be extremely grateful if you could bring this to the attention of your readers as soon as possible.

The emphasis in the Conference is on *Working Systems,* and as such will include speakers on Lexis, the leading North American system and also Credoc the well-known Belgian system. In addition we will have speakers dealing with H.M. Land Registry's System and also a little-known but a very important system dealing with Local Land Charges for the Corporation of Leeds. We have also been fortunate enough to secure Mr. Stephen Skeely, who is the full-time expert on Computers and Law for the Federal Government of Canada.

In addition to our speakers, we also have a number of hand-picked demonstrations of leading systems, which will enable delegates to test the competing systems for themselves. Finally, on the last morning of the Conference, we have a general session when delegates will be able to put their questions (and complaints!) to the various experts we will have present. The fee for attending the conference is £30.

If you require any further information about the Conference, please contact Mrs. D. Wilson, 6 Latton Close, Nr. Didcot OX11 OSU. Rowstock 433 (STD code 023 583)

Yours faithfully,
Richard Morgan,
*Publicity Officer.*

The General Council of The Bar of Ireland
Law Library,
Four Courts,
Dublin 7
779684.
13/7/1974

J. J. Ivers, Esq.,
Director General,
Incorporated Law Society of Ireland
Solicitors 'Buildings,

Dear Mr. Ivers,

At its meeting on the 24th May the Bar Council made the following ruling which may be of interest to the Law Society. The ruling had been sought in the following circumstances:—

When visiting a prison to consult with clients held in custody pending appearance before the Special Criminal Court, the prison authorities had refused access unless the legal advisers submitted to a search of their bags and papers. Should Counsel submit to such searches of their bags and papers; and should they submit to searches of their person, if such were demanded?

The Council ruled :—

In the present exceptional circumstances the searching of barrister's brief cases and bags cannot be objected to, provided :—

i) That in no circumstances should counsel's instructions, papers or documents be examined; or removed from the custody of the barrister;
ii) That the search be carried out in the presence of the barrister; and
iii) That the search is carried out by a person of responsibility and standing.

In the present exceptional circumstances barristers may also have to submit to personal searches in the interests of public safety.

Yours sincerely,
G. D. Coyle,
*Secretary*

# NOTICES

## Barristers Appearing in Court not Attended by a Solicitor

The permission given by the Bar Council in 1971 for Counsel to appear in the Children's Court without being attended by a Solicitor or his clerk in cases where no fee was being paid, has been abused. Counsel are not being instructed by a Solicitor; they are appearing unattended when receiving a fee; and they have extended the practice to other Courts, both civil and criminal. These practices are contrary to the rule and practice of the Bar, and are contrary to the best interests of the profession.

The Council therefore reiterates that:

(1) In the Children's Court:

(i) Counsel must always be instructed by a Solicitor and not by the client;

(ii) Counsel must always be attended by a Solicitor or his clerk, unless it is a case where neither Solicitor nor Barrister is receiving a fee.

(2) In all other Courts Counsel must be instructed by a Solicitor, and must be attended by the Solicitor or his clerk.

G. D. COYLE (Secretary)

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## Orders Against Solicitors

William W. BloodSmyth of 39 Castle Avenue, Clontarf, Dublin 3, and Harbour Road, Skerries, County Dublin, has been struck off the Roll of Solicitors pursuant to an Order of the High Court made on July 1st 1974 and perfected on July 8th 1874.

By order, James J. Ivers (Registrar of Solicitors)
9th July, 1974

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re/*Jeremiah A. Reidy, Solicitor of Listowel and Ballybunion, County Kerry*

By Order of the High Court dated 28th day of June, 1974 (upon a motion ex parte by the Society) it was directed that the Bank Accounts of Jermiah Reidy solicitor (practising as Matthew J. Byrne & Company) be frozen and that no banking company shall without leave of the High Court, make any payment out of a banking account in the name of the solicitor or his firm.

By order, Patrick Cafferky (Assistant Secretary)
28th June, 1974

# THE REGISTER

## REGISTRATION OF TITLE ACT, 1964

### Issue of New Land Certificate

An application has been received from the registered owner 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 wil lbe issued unless notification is received in the Registry within twenty eight days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 31st day of August 1974.

D. L. McALLISTER,
Registrar of Titles

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

### Schedule

(1) Registered Owner: Mary Frances Coleman. Folio No. 11873. Lands: Part of the Lands of Ballymote. Area: 12 perches. County: Sligo.

(2) Registered Owner: Timothy Egan. Folio No. 757R. Lands: Coshla. Area: 21a. 0r. 20p. County: Galway.

(3) Registered Owners: Thomas Glynn and Helen Teresa Glynn. Folio No. (1) 20076. Lands: (1) Caheronaun (part). Area: (1) 8a. 2r. 12p. Folio No. (2) 20076. Lands: (2) Cuscarrick (part).

(4) Registered Owner: John McDonnell. Folio No. 7036. Lands: Part of the lands of Garristown, containing 50 acres. 3 rds. 3 perches Statute Measure, and Part of the lands of Garristown containing 3 acres 1 rd. and 25 perches, Statute Measure. Area: (1) 50a. 3r. 3p; (2) 3a. 1r. 25p. County: Dublin.

(5) Registered Owner: Michael D. O'Shea. Folio No. 9477 Rev. Lands: Beechmount Demesne. Area: 113a. 1r. 37p. County: Limerick.

(6) Registered Owner: Henry Longworth. Folio No. 10046. Lands: Loughandomming. Area: 2a. 3r. 30p. County: Westmeath.

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**Young Man** (24), B.A., two years in other employment, desires apprenticeship with city firm of solicitors. Ruaidri Mac Grainne, c/o St. Anthony's, Strandhill, Co. Sligo.

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### Statutory Notice to Creditors

**In the goods of Very Reverend Hugh Canon O'Byrne,** lage of New Ross, in the County of Wexford, deceased. Pursuant to Section 49 of the Succession Act, 1965, all persons claiming to be creditors or otherwise to have any claim against the assets of the above named deceased who died on the 30th day of December 1973 at James Connolly Memorial Hospital, Blanchardstown, Dublin, are hereby requested to furnish particulars of their claims on or before the 23rd day of August 1974 to the undermentioned solicitors for the executors.

And notice is hereby further given that after the 23rd day of August 1974 this estate will be distributed having regard only to valid claims then notified.

Dated this 31st day of August 1974.

Signed: M. J. O'Connor & Co., Solicitors, 2 George Street, Wexford.

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**Correction**—It was erroneously stated in the *Law Directory* that the late Mr. George Andrews had been practising at 7 Harbour Road, Skerries, Co. Dublin. In fact Mr. Andrews had never practised at that address. The error is regretted.

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## Federation Internationale Pour Le Droit Europeen

Association internationale

## International Federation of European Law

International Association

The International Federation of European Law (FIDE) will be holding its 7th International Congress in Brussels, from 2nd to 4th October, 1975, on the theme "The Individual and European Law".

Three aspects will receive special attention:

—**The Jurisdictional Protection of Fundamental Right**s (European Communities, Council of Europe, Member States)—General Rapporteur: *Judge C. A. Colliard*; Community Law Rapporteur: *Judge P. Pescatore;* Council of Europe Rapporteur: *Judge J. E. S. Fawcett*

—**The Economic policy of the community and of the member states and company law**—General Rapporteur: *Judge A. M. Donner*; Community Law Rapporteur: *Judge A. Pappalardo.*

**The Role of the citizen in decision-making in the community and in the member states**—Community Law Rapporteur: *Senator Mary Robinson.*

Most of the national rapporteurs have already been designated by member associations of FIDE.

The languages of the Congress are the languages of FIDE, French, Engish and German.

Cost of attending the congress is 2,500 Belgian francs.

Further information may be obtained from *M. I. Verougstraete,* Secretary General of FIDE, Narcissenlaan, 2, B—1640 Sint-Genesius-Rode, Belgium. Telephone: 02-358.45.97.

# FORTHCOMING SEMINARS

(1) A seminar on taxation will be held in Solicitors Buildings, Four Courts, Dublin 7, on Thursday, 26th September 1974. The attendance at this seminar is strictly limited and, in order to secure a place, it is advisable to send the registration fee of £10 to the undersigned as soon as possible.

(2) A seminar on recent developments in the E.E.C. will be held in Jury's Hotel, Sligo, from Friday 1st November, to Sunday, 3rd November 1974. Further particulars will be given in the next issue of the *Gazette*.

James J. Ivers (Director-General)

# NOTICE

**Professional Development Course**

A professional development course organised by the Institute of Chartered Accountants, will be held in the Burlington Hotel, Upper Leeson Street, Dublin 4, on Friday, 13th September 1974, from 9.30 a.m. to 5 p.m., and in the Galtee Hotel, Cahir, Co. Tipperary, on Friday, 20th September 1974, from 9.30 a.m. to 5 p.m.

The subject is "The Finance Act, 1974, and The Finance (Taxation of Profits of Mines) Act, 1974". The speakers, who are all accountants, will be Messrs Norman Ball, James Gallagher, Kevin Kenny and James O'Sullivan.

Solicitors who wish to attend will be welcome.

Fee, £14 (covers morning coffee, lunch, afternoon tea and course documentation).

Application forms can be obtained from The Secretary, Institute of Chartered Accountants, 7 Fitzwilliam Place, Dublin 2.

# LEGAL EUROPE

# The effects of Community Law from the point of view of the National Judge

by LORD MACKENZIE STUART, Judge of the European Court of Justice. Delivered in Luxembourg, May 1974.

**Scope of talk**

One of the most characteristic and paradoxical features of the European Economic Community is its reliance upon national agencies. An obvious example is to be found in the working of the Common Agricultural Policy. While the regulations governing its operation are the responsibility of the Council and the Commission. the intervention agencies, which are at the heart of its daily operation, are the creation of each Member State—the various Einfuhr und Vorratsstelle in Germany or the Hoofproduktschaps in the Netherlands and now, in Great Britain, the Intervention Board for Agricultural Produce. It is here that the producer seeks the intervention price; it is this national agency which he sues in the national Court if he thinks that he is not getting his entitlement. Community policy as regards the social security of what were formerly known as migrant workers (now "employed persons") is to be found in the Council Regulation 1408/71 of 14 June 1971 (O.J. L 149/2, p. 416), but it is to the office of the national agency which the individual turns for payment and it is to the relevant national Court or Tribunal that he turns if he is not satisfied.

In each of these instances the national Judge is called upon to apply Community law as part of his own law and in his own Court. Certainly, when there is a question before him concerning the interpretation or validity of Community law he can, and sometimes must, refer such a question to the Court of Justice here in Luxembourg but, save in direct actions before this Court, the application of Community law is almost always a concern of the national Judge. Indeed the only exception lies in the field of competition where, if the Commission has already begun the procedure laid down by Regulation 17, certain national Courts may have their competence withdrawn, but in a very recent decision of the Court of Justice this exception has been narrowly construed (Case 127/73, Belgian Radio and Television, decision of 12 February 1974).

The purpose of this talk, then, is to emphasise the importance of the role of the national Judge and to select certain aspects of Community law with which, from the past experience of this Court, he is likely to be faced.

**The nature of Community Law**

As a preliminary it may be helpful to say something of the nature of Community law and to stress certain features of it.

Those of you who are familiar with the detective novels of Dorothy Sayers may remember that on one occasion her hero, in quoting Lord Peter Wimsey, says, "Have a quotation for every occasion; it saves original thinking." May I take a well-known passage from one of the earlier decisions of the Court of Justice, *Van Gend en Loos v Nederlandse Tarifcommissie* (Case 26/62 Rec. 1963, p. 1, at p. 23; (1963) C.M.L.R. 105 at 129. English text cited is, however, the version shortly to be published as the official English text):

> "The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.
>
> "In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national Courts and Tribunals, confirms that the States have acknowledged that Community law has an authority which can be invoked by their nationals before those Courts and Tribunals ...
>
> "The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly-defined way upon individuals as well as upon the Member States and upon the institutions of the Community."

Within this passage are gathered together a number of concepts which during the last decade have been further refined and analysed in an ever-increasing volume of case law not only here at Luxembourg but, again I emphasise this, also in the Courts of the Member States.

In the first place we are told that **"the Community constitutes a new legal order in international law"**. "In international law", perhaps, because the Community has been created by a Treaty, a concord reached by sovereign States, but the emphasis falls properly on the words "a new legal order" since what the Treaty of Rome set out to do was to create a body of rights and obligations not merely binding on the Member States but, in certain major sectors of the economy, intimately affecting the inhabitants of those countries.

In the second place, the passage emphasises that the **terms of the Treaty, affecting not only Member States but also their citizens, creates rights as well as obliga-**

tions. "Community law, therefore, ... not only confers on them legal rights" and this "apart from legislation by the Member States".

Finally in this passage we find recognition of the fact that by the Treaty the **Member States have accepted Community law as an authority capable of being invoked by a citizen before the Courts of his own country.**

It is this latter aspect which is sometimes described as the "direct effect" or "direct applicability" of Community law. These terms can, however, be a source of confusion. In one sense all provisions of all treaties have direct effect upon their signatories; all provisions of the Treaties instituting the Community are binding according to their terms and thus may be said to be directly applicable.

From the point of view of the national Judge, however, this view of direct applicability is of little assistance. The question for him must always be "Has Community law given a party in a case pending before me a right or interest which I must recognise and vindicate?"

Alternatively, to use a phrase consistently to be found in judgments of the Court of Justice, **is there a relevant rule of Community law "apt to confer on the individual rights which the national Courts have an obligation to protect?"** (See for example case 93/71 *Leonesio* 1972 Rec. 287; (1973) C.M.L.R. 343).

**Sources of Community Law**

The sources of Community law are, of course, the Treaties, the Regulations, Directives and Decisions of the Council or the Commission according to their respective competences, and what has been described as "the unwritten general legal principles which are part of the Community legal order" (Judge Hans Kutscher, "Community Law and the National Judge", *Law Quarterly Review,* October 1973). The exact limits of the latter have not been defined, and are probably not capable of exact definition, but they are those fundamental principles which, in the words of the late Advocate General, Dutheillet de Lamothe (Case 11/70 *Internationale Handelsgesellschaft,* 1970 Rec. 1125 (1972) C.M.L.R. at 271):

> "Contribute to forming that philosophical, political and legal substratum common to the Member States from which emerges through the case law an unwritten Community law, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual."

This source of Community law is a theme in itself and the Community Judge must, therefore, in addition to the Treaty and to the acts of the Institutions, have regard to those fundamental principles as he finds them expressed in the case law of the Court of Justice or of the Member States. However, in the normal situation it will be the Treaty itself or the Regulations, Directives or Decisions made under it which will concern the national Judge in his search for those rights which it is his duty to protect.

**Individual rights under Community Law**

(a) *The Treaty*

In the Treaty itself no rights are expressly given to individuals, but there are a number of provisions prohibiting certain types of conduct with varying degrees of peremptoriness. Typical instances are Article 12: "Member States shall refrain from introducing between themselves any new customs duties on imports"; or Article 53: "Member States shall not introduce any new restrictions on the right of establishment in their territories on nationals of other Member States." That is to say "standstill" provisions and where the prohibition is addressed to Member States. In two articles, 85, which prohibits agreements and concerted practices restricting or distorting competition within the Common Market, and 86, which prohibits the abuse of a dominant position, the person addressed is not defined and in one article only, 85, are we told, in terms, what the effect of the prohibition is to be. The prohibited agreement "shall be automatically void".

Where, however, there has been a prohibition clearly and precisely worded and which is not coupled with any power reserved to a Member State to subordinate its operation to an act of internal law or which requires the intervention by one of the Community institutions, the Court of Justice has had no difficulty in so interpreting it as giving to an individual a right which the national Court must protect (see e.g. Case 33/70 *S.A.C.E. v Italian Finance Minister* 1970 Rec. at 1223).

The leading case on standstill provisions is that of *Van Gend en Loos.* The facts of the case were as follows.

The plaintiff, a Dutch company, imported a quantity of fertiliser into the Netherlands from Germany and was required to pay customs duty at the rate of 8 per cent *ad valorem.* It later claimed back the duty paid before the Dutch Tarifcomissie, arguing that the imposition of 8 per cent infringed Article 12, since before the date of the entry into force of the Treaty the import duty on fertiliser from Germany was 3 per cent.

It was common ground that this infringement could have been the subject of an action by the Commission against the Netherlands under the relatively elaborate procedure of Article 69. Could Article 12 be invoked by the affected company? The European Court held that it could. It is worth quoting its reasoning on this point:

> "The wording of Article 12 contains a clear and unconditional prohibition which is not a positive, but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of States which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.
>
> "The implementation of Article 12 does not require any legislative intervention on the part of the States. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation."

**The Lütticke case**

It is, however, not only provisions which prohibit a State from certain courses of conduct which can be invoked by an individual before his national Court. Provisions which require a State to do a particular act by a particular time and which leave the State no discretion may similarly be prayed in aid. One such example is to be found in *Lütticke* (Case 57/65 *Firma Alfonse Lütticke GmbH v Hauptzollamt Sarrelouis,* 1966 Rec. 293).

The defendant, the customs authority of Sarrelouis, levied German turnover equalisation tax from the plaintiff on the importation into Germany from Luxembourg of milk powder. German turnover equalisation tax was imposed on imported goods in order to compensate for

the ordinary turnover tax imposed on domestic goods.

In an action to recover this tax the plaintiff company argued as follows:

> Article 95 of the EEC Treaty provides that "No Member State shall impose, directly or indirectly on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products."

No turnover tax was imposed on powdered milk produced in Germany. Therefore it was said that the turnover equalisation tax levied on imported powdered milk infringed Article 95. The tax in question, however, was not a new imposition but ante-dated the commencement of the Treaty.

The European Court found that Article 95 (1) had direct effect since Article 95 (3) provided that Member States should, by a date then past, *repeal or amend* any existing provisions which conflicted with the preceding rule.

This paragraph obviously left a certain discretion to the Federal Republic. For example, the German Government could have fulfilled the Treaty provisions by imposing turnover tax on the domestic product or by removing the compensatory amount from the imported product or by imposing equal amounts on both.

The Court, however, was not persuaded by this argument. In its analysis Article 95 was not only a requirement not to introduce new discriminatory taxes, but a positive obligation to remove discriminatory effects from the existing tax system by a given date. The Court held, therefore, that Article 95 (1) had direct effect and conferred on individuals rights which the national Court had to protect but that, with regard to discriminatory taxes existing at the date of entry into force of the Treaty, the rights conferred by Article 95 (1) could only be invoked under Article 95 (3) from the date at which they fell to be eliminated.

Two further cases concerned with Article 95 highlight the problems of application which can arise for the national Judge out of what on the face seems fairly simple provisions: *Firma Molkerei Zentrale Westfalen Lippe v Hauptzollamt Paderborn* (Case 28/67 1968 Rec. 211 (1968) C.M.L.R. 187) and *Fink Frucht GmbH v Hauptzollamt München* (Case 27/67 1968 Rec. 328 (1968) C.M.L.R. 228). The facts of the first case were substantially similar to the facts of *Lütticke* but the German Court which made the reference advanced a number of additional reasons why Article 95 could not produce direct effects in the German Fiscal Courts. It argued, in particular. that the interpretation of the European Court in *Lütticke* would oblige the national Courts to treat the individuals concerned as if the Member State had already performed its duties under Article 95 whereas the rights of the Commission in a direct action was limited to establishing that the Member State had failed to fulfil its obligations and to requiring the State to fulfil them by such means as seemed appropriate.

The Court rejected this argument. "The purpose of an action brought by an individual is to protect his individual rights in a particular case, whereas intervention by an EEC institution is intended to ensure general and uniform observation of a rule of Community law."

It may be concluded therefore that a standstill provision does not differ from a provision requiring the modification of national law, such as Article 95 (3), since in the absence of modification the national law is automatically inapplicable, at least in so far as it causes discrimination.

In the *Fink Frucht* case the Court was asked to interpret the second paragraph of Article 95, which prohibits Member States from imposing on the products of other Member States any internal taxation of such a nature as to afford indirect protection *to other products*. The difficulty which the Munich Finanzgericht found in applying this provision is clearly demonstrated by the formidable list of questions which it referred to the European Court. Nonetheless, in its judgment the Court of Justice held that:

> "It may be that the provision in question contains certain elements which make it necessary for discretion to be exercised on economic questions, but that does not exclude the right and duty of national Courts to ensure that the Treaty's rules are observed whenever they can ascertain ... that the conditions necessary for the application of the Article have occurred in the case before them."

**The Defrenne case**

One could continue with many other examples, especially in the fiscal or parafiscal sector. One more must suffice, taken from a very different field in order to demonstrate how diverse may be the direct effect of the Treaty. This concerns Article 119 on the equality of remuneration between the sexes: *Defrenne v Belgium* in 1971 (Case 80/70, 1971 Rec. 445).

The plaintiff, who had been retired against her will as an air hostess by the airline SABENA brought an action against her former employers before the Conseil de Prud-hommes in Brussels. Under the relevant Belgian Royal Decree in force at the time air hostesses were retired at an earlier stage than male stewards and with inferior pension rights. She claimed that she was discriminated against financially on the grounds of her sex, in a manner which infringed Article 119. She also brought a separate action before the Belgian Conseil d'Etat for the annulment of the Royal Decree which she said infringed Article 119. In the result on a reference to the European Court it was decided that a social security retirement pension was not remuneration in terms of Article 119. However, the Advocate General, Dutheillet de Lamothe, in giving his opinion on the questions referred by the Belgian Court, considered that there could be no possible doubt that this provision of the Treaty was directly applicable nor that the Belgian decree implementing Article 119 was therefore "superfluous in law although the intention was much to be praised".

As the Belgian Court had raised no doubts as to the direct effects of Article 119 the Court itself was not required to rule on the direct effect of Article 119.

It might be helpful at this point to indicate circumstances in which a provision of a Treaty does not have direct effect.

**The Capolongo case**

In the recent case *Capolongo v Maya* (Case 77/72 (1973) E.C.R. 611) the plaintiff was required to pay a tax on imported cardboard to a national organisation which was designed to fund State aids for the national production of cardboard, cellulose and paper. The plaintiff argued before the national Court that the aid scheme infringed Article 92 of the Treaty, which provides that certain State aids liable to distort competition are incompatible with the Common Market.

On being asked whether this provision produced direct effects which could be invoked in national proceedings, the Court held that the terms of Article 92 (1), which contained the declaration of incompatibility, were intended to take effect in the legal systems of Member States only when they had been put in concrete form by acts having general application of the Commission or Council, as provided for in subsequent articles of the Treaty.

Here, in contrast to the foregoing examples, was a situation where the incompatibility of the aids with the Common Market depended on an elaborate assessment of the many conditions and exemptions mentioned in Article 92. Moreover, it is only after reading the whole of the section on aids that it becomes clear that it is for the Commission or Council to adopt legislation or make decisions providing for the abolition or the suppression of such aid schemes and the laying down the time table for such action.

That is to say we have an example of a Treaty provision where the interdiction was not of itself sufficiently precise and where its operation required the intervention of a Community institution.

The situation, of course, may be very different if there has been intervention by, say, the Commission. It would then be for the national Judge to read the relevant regulation together with the Treaty in order to decide whether there was a prohibition sufficiently precise for him to see whether or not there had been non-compliance.

[*to be continued*]

# Creating a Common Market for Companies Part II

By DR. IVO E. SCHWARTZ, LL.M.

*Part II of a lecture delivered by Dr. Schwartz, who is Director for Approximation of Laws: Companies and Firms, Public Contracts, Intellectual Property, Fair Competition, General Matters, Commission of the European Communities, Brussels. The lecture was given in Wexford on* 9 March 1974. *Continued from July-August "Gazette"* pp. 178-181.

A truly European industry must depend on a European capital market, and funds will only be tempted across national boundaries on a larger scale if the methods of presentation of the financial state and performance of companies are more strictly comparable. Thus the demand for **European methods of accounting** is a strong one. In a common market with characteristics similar to those existing in a national market it is also necessary to establish throughout the Community equivalent legal requirements as regards the extent of the financial information that should be made available to the public by companies that are in competition with one another and have the same legal form.

Moreover, insufficient disclosure requirements in some of the Member States do not favour rationalisation and will not strengthen the competitiveness of the companies concerned in those countries.

### The Fourth Directive

Thus the **Fourth Company Directive** regarding the annual accounts of limited liability companies is of considerable importance. The proposal dates from 1971 but has been amended in February 1974 to take into account the situation in the new Member States and the opinions delivered by the European Parliament and the Economic and Social Committee which highly welcomed the Commission's proposal.

The main changes include a clear statement that accounts shall give "a true and fair view" of the company's assets, liabilities. financial position and results—a principle on which British and Irish accountants had strongly insisted.

It implies that limited companies would be legally obliged to provide additional information, over and above the minimum laid down in the Directive, if the figures provided did not amount to a "true and fair view".

Greater flexibility would also now be allowed in the lay-out of accounts. Additions have been made to the general principles of valuation listed in the Directive, so as to take account of current practice in the United Kingdom and Eire. The amended version also offers a much-wider scope for using new valuation methods, such as those allowing for the effects of inflation.

Following the British example, the Commission also wants now information on net turnover to be accompanied by an indication of the contribution of the company's different commercial and industrial activities to the turnover and to the year's results.

The amended Directive is thus largely an amalgam of both continental and British and Irish best accounting practices.

However, it maintains the earlier Directive's insistence on a strictly schematised presentation of accounts, as against the flexible current British and Irish approach.

It remains to be seen when the Council's heavily charged groups of government representatives will find time to start the discussion of the Commission's proposal.

The 31st of December 1975 has been fixed by the Council as deadline for the adoption of the Directive.

When a company belongs to a group, only the presentation of **consolidated accounts** can give a true and fair, as well as a complete view of the situation of the companies concerned. Therefore the Commission has committed itself to submit a proposal for a Directive on consolidated accounts of groups of companies not later than next year. At the same time, we are working on

another draft Directive that would introduce into the national legislations of the nine common rules on *groups of companies.*

**The Fifth Directive**

If adopted without change, this Fifth Directive, as proposed in 1972, would replace the traditional board system existing at present in a majority of Member States, by a **two-tier board system** based on the German model, and with employee representation on the Supervisory Council.

This is a collegial organ which supervises, hires and fires the executives who run the company, that is the members of the management board. Since the Supervisory Council members cannot be themselves salaried executives, they are in a position to take an independent view of how the company is being operated. Several of them are the chosen representatives of large investors, or of banks which represent investors. They are likely to represent faithfully and vigorously the interests of these groups.

The most obvious advantage of this institution is said to be that it provides a group of independent observers to decide how well the managers are doing. "Outside directors" are likely to be much more effective in this separate council than when compelled to meet always with the very persons whose acts they ought to appraise. The bigger the company and the more successful the chief executive, the more difficult it is for anyone on the board to stand out against his decisions. In fact the only effective way a non-executive director can mark his disapproval of the board's action is by resigning, but this is no safeguard against the erroneous use or abuse by the chief executive of his very considerable power. In large companies this is difficult to accept given that company actions may have a powerful effect on the employees and the community in which they operate.

**The Two-Tier Structure**

The two-tier structure frees non-executive directors from responsibility for the ordinary management decisions which are the proper business of the full-time executives. Outside directors cannot often judge wisely in these matters, and are likely to become "yes-men" when they sit on a board that discharges management functions. Thus, the two-tier system would introduce a clear-cut division of functions and responsibilities. In providing for management control, it could help to make management more efficient. The Supervisory Council will not only have the right to appoint and remove the members of the management board but will have to be consulted on all major issues. It will also receive regular reports at short intervals on the financial status of the company from the management board. The Supervisory Council will thus form a kind of permanent shareholders' committee.

Whether Supervisory Councils for public companies include members who represent employees or not, the presence of members who are appointed to supervise the executive directors in the interest of the shareholders will do much to strengthen their position. At present the law usually intervenes to give relief to shareholders in respect of abuses of power by directors only after harm has been done to the company and the value of shareholders' investments has fallen in consequence. Proper supervision of management should ensure that shareholders are warned before their interests have been damaged. History has shown that it is futile to expect the shareholder to take a managerial interest in the affairs of his company unless these affairs are in a very bad way.

A Supervisory Council, although by no means an ideal solution, provides at least some control of the management and is better than none. The large institutional investors who sit on the Supervisory Council would be compelled to take a closer interest in the management of the company than hitherto. At present, when they notice that the management of a company in which their institutions hold a substantial share interest is not satisfactory they are often inclined to scuttle rather than to fight, i.e., to sell the shares rather than to insist on changes in the management.

The view of the Company Affairs Committee of the Confederation of British Industry that "the sense of collective responsibility for the conduct of business is best preserved where all the directors meet in a single board", is no valid argument against the dual board system. It does not prevent the directors, supervisory and executive, from sitting as a single board if the occasion demands it.

Supervisory directors can thus exactly like non-executive directors bring a breadth of experience and knowledge of commerce, industry or finance generally to discussions of major matters of policy at joint meetings of the two boards. But the dual board system admits the division of the legal and business responsibility between executive and non-executive directors according to their function in the company; it avoids the consequence which would logically ensue if they were both members of a single board, as the Confederation suggests, that, on principle, they should bear the same responsibility although their functions in the company are different.

**Participation of workers**

The second distinctive feature of the proposed Fifth Directive is **participation of workers** in the Supervisory Council. For public companies employing more than 500 workers, the Member States could choose between the introduction of two systems.

**First system:** At least one-third of the members of the Supervisory Council are appointed by the workers or by their representatives. The other members are appointed by the general meeting of the shareholders (German system).

**Second system:** The Supervisory Council appoints its own members. However, the general meeting or the workers' representatives can object to the appointment of a proposed candidate. In such a case the appointment can only be made after an independent body in public law has declared the objection unfounded (Dutch system). Thus the Commission does not aim at promoting one specific type of workers' participation.

In 1972 there existed only two models in the Community. In the meantime Denmark introduced its proper system with at least two employees on the Directorate, an organ which accomplishes predominantly supervisory functions. Presently, Luxembourg is engaged to introduce workers' participation in the framework of its traditional board system, close to the French system. Perhaps other Member States will follow later and develop their proper type of workers' participation linked with their respective historical and social environments.

What the Community will then have to do is to make sure that the different solutions are being adapted so

as to become equivalent. The time when the company was merely regarded as a means of profit maximisation has gone. The company has become an instrument of social progress which can fulfil its functions only if the forces of capital, management and labour are institutionally joined together and work harmoniously and smoothly within the framework provided by the law. In the Commission's view, the European economy should be built upon a system of co-operation between capital and work rather than on confrontation and conflict.

**Shareholders' meetings**

Apart from these minimum rules on workers' participation in management control, the Fifth Directive defines the organisation of and procedures of **shareholders' meetings,** the matters on which the shareholders must decide, the conditions under which somebody may act as proxy for shareholders, and the role of the **auditors.** As you will appreciate, these proposals may have to be reconsidered in the light of the accession to the Community of the new members, and the Commission are certainly open to new suggestions and ideas. It is certainly not easy to find appropriate solutions to the problems of regulating the structure and affairs of public companies, which we regard of great importance in view of the crucial part they play in the economic life of the Community.

**Why were so many Directives required?**

Perhaps you are wondering why the European Commission proposed several Directives and not just one or two and why two or three more Directives are in the making There are several answers to this.

Firstly, we cannot do everything at the same time. Secondly, the objectives of the EEC Treaty can be reached only gradually and step by step. The Commission has to take into account the economic, social and political situation existing at a particular time. Priorities have to be fixed and revised from time to time. Finally, experience shows that the institutions of the Community are not prepared and not willing to approximate the law on public companies at once and by one, two or three Directives. On the other hand we agree that co-ordination should not be done piecemeal. Subjects which belong together should be approximated at the same time and if possible by the same Directive. National Companies Acts should not have to be changed too often. The Commission is trying to meet these demands by proposing not many but few directives, each of which would co-ordinate a substantial and possibly closed part of company law. In addition too frequent changes in company law could be avoided by requiring that effect is to be given to a group of two directives simultaneously.

**Approximation of principles or of laws?**

Another criticism often raised is that detailed approximation may produce unintended and unforeseen distortions when judged by different legal systems and in different national circumstances. Instead of trying to achieve complete alignment, the Community should concentrate on approximating those elements—as yet undefined—which would be generally regarded as essential to a common system of company law.

Directives should initially be confined to stating certain basic principles, and should leave each Member State free to impose more exacting requirements in accordance with its own current standards. If approximation was not to go into some detail but confined to principles only, the danger of distortions became very real. Experience shows that no Member State so far has been ready to accept that approximation should be limited to principles or general rules because they would not be applied with the same result in the different Member States. In addition, every rule has its exception. Without defining such exceptions, the law would become too stringent; and in defining such exceptions, one has to go into some detail. Thus detailed co-ordination does not necessarily mean rigid rules, but rather to build in flexibility by taking care of special situations. In fact, government experts do insist in many cases much more than the Commission's staff on detailed regulation.

**Minimum, maximum and fixed rules**

Another problem frequently discussed is whether a Directive should just contain minimum rules or fixed rules and whether it should offer several equivalent solutions leaving the choice to the national legislator. I think there is no general answer to these questions.

They should be decided case by case in a pragmatic way. Some articles give minimum requirements, some maximum requirements. Some give a choice to the national legislator, others do not. But all the Commission's proposals are based on the belief that something more than an approximation around the average requirement is needed, and every proposal has added at least one more potential requirement to each Member State's array. If approximation of company law is merely successful as a technical exercise it would be a failure. We strive for more. The spirit of the new company law in Europe must reflect the spirit of the new economic order, an order built on the concept of social responsibility.

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# EEC and Fundamental Rights

**By JOHN TEMPLE LANG, M.A., Solicitor**

Under the Third Amendment to the 1937 Constitution of Ireland, which enabled Ireland to join the European Communities, no provision in the Constitution can invalidate any law enacted, act done or measure adopted by the Community institutions, or by the State if the law, act or measure is necessitated by the obligations of membership of the Communities. This amendment to the Constitution enabled the Oireachtas to confer legislative, executive and judicial powers on the Community institutions, and this was done by the European Communities Act, 1972, in accordance with the Treaty of Accession between the nine States which are now members of the Community. The constitutional amendment went further than this,

however. It made it impossible to contest the validity in the Irish Courts of any Community measure on the grounds that it was inconsistent with the fundamental rights provisions of the Constitution. It also made it impossible to contest the validity, on those grounds, of any measure adopted by any Irish governmental institution, once it had been shown that the measure was "necessitated by the obligations of membership of the Communities". This result, which can fairly be described as a revolution in Irish constitutional law, understandably caused concern as a matter of principle, although it is clear that no conflict between Community measures and the Irish fundamental rights provisions is likely.

As the present writer has already pointed out in an analysis of the constitutional amendment ("Legal and Constitutional Implications for Ireland of Adhesion to the EEC Treaty", 9, *Common Market Law Review* (1972), p. 167), the Court of Justice of the Communities has repeatedly declared that **fundamental rights are basic principles of Community law.** It is reassuring for Irish lawyers concerned with civil rights to consider the Court's decision in the case of *Nold v Commission* (No. 4/73) decided on 14 May 1974, in which the Court indicated the sources on which it will draw for Community law on fundamental rights, and how it would interpret that law. The Commission had authorised the major supplier of coal in the Ruhr to make direct supplies of coal only to purchasers who signed firm contracts for 6,000 metric tons per year for two years. Nold claimed that this decision was invalid, on the grounds among others that its fundamental rights were violated by being deprived of direct supplies of coal.

The Court repeated that fundamental rights form an integral part of the general principles of Community law which the Court is obliged to uphold. **The Court will base itself on the constitutional traditions common to the Member States and will not permit measures which are incompatible with the fundamental rights recognised and guaranteed by their Constitutions.** International conventions on human rights to which Member States are parties also provide evidence of what basic rights should be recognised in Community law. In this case, what was involved was the right or freedom to carry on business activities, a right similar to the right of ownership, and recognised by several national constitutions and by the European Convention on Human Rights. These rights, however, are not absolute: they must be considered in the light of the social function of the property and activities which are protected, and they, therefore, are guaranteed only subject to limits resulting from the public interest. In Community law, some of these limits result from the aims pursued in the general interest by the Community, provided that the substance of the fundamental rights is not affected. In particular, fundamental rights of enterprises cannot provide protection of all their interests against commercial risks inherent in economic activity, and this, the Court held, was what was involved in the case before it.

# Extracts from the Third Irish Report on Legislation of the European Communities

**Right to provide services: Lawyers**

6.12. A working group of officials of the Member States is continuing its examination of a draft Directive on the provision of services by lawyers (OJ No. C78. 20 June 1969). At a meeting in October 1973 the group decided to submit an interim report to COREPER setting out the progress made to date and seeking directions on certain basic issues. The interim report has since been prepared and was circulated in February 1974. It seeks policy decisions on such matters as:

—the activities to be covered by the draft directive and the conditions under which they should be exercised taking into account rules of professional conduct;
—the form of the instrument by which liberalisation should be achieved, i.e. whether this should be a Directive under the EEC Treaty or a Convention between the Member States;
—the Courts before which advocacy and related activities might be permitted, e.g., should the right of audience in the highest Courts of Member States be excluded because in some States this is reserved to a certain class of lawyer; and
—the extent and form of the collaboration between the lawyer of the host State and the visiting lawyer.

The working group has also posed a more fundamental question regarding the interpretation of Article 55 of the EEC Treaty which provides that the Treaty provisions on establishment and services shall not apply to activities which are connected, even occasionally, with the exercise of official authority. The question is whether this means that the legal profession as a whole is excluded from the application of those provisions or that only those particular activities which are connected with the exercise of official authority should be regarded as excluded. Ireland favours the latter interpretation. This point has also been raised in the case *Reyners v Belgium* (case 2/74) which has recently been referred to the Court of Justice of the Communities by the Belgian Conseil d'Etat for a preliminary ruling under Article 177 of the EEC Treaty. The legal profession is being kept informed of developments in relation to the draft Directive and is being consulted as necessary.

**Company Law**

10.1. The Council Resolution of 17 December 1973 on Industrial Policy (OJ No. C177, 31 December 1973) established a timetable for the consideration of the draft Second, Third, Fourth and Fifth Directives on Company Law as well as the draft statute establishing a European Company. The provisions of these drafts are described in the First Report, paragraphs 10.2 to 10.7. The Resolution provides that the Council will act

(a) by 1 January 1975 on the draft Second Directive which deals with the formation of public limited liability companies and with the maintenance and operation of their capital;

(b) by 1 July 1975 on the draft Third Directive concerning mergers between public limited liability companies; and

(c) by 1 January 1976 on the draft Fourth Directive which deals with the annual accounts of limited liability companies.

The Resolution also provides that the Council will begin its examination of the draft statute for a European Company as soon as the Commission has submitted its revised proposal which will take into account the opinions of the European Parliament and of the Economic and Social Committee. Examination of the draft Fifth Directive which deals with the structure of public limited companies will also begin as soon as the opinions of the European Parliament and of the Economic and Social Committee are given.

10.2. The Commission has proposed a revision of the text of the draft Fourth Directive to take into consideration the opinions of the European Parliament, of the Economic and Social Committee and of the EEC Accountants' Study Group and also to take into account the legislation of the new Member States. The revised draft Directive has not yet been the subject of discussions between the Member States.

10.3. The Joint Committee of the Houses of the Oireachtas on the Secondary Legislation of the European Communities has examined the European Communities (Companies) Regulations, 1973, and has reported thereon to both Houses (*Second Report of the Joint Committee on the Secondary Legislation of the European Communities,* Prl. 3841). The regulations were made by the Minister for Industry and Commerce under the European Communities Act, 1972. to give effect to the First Directive on Company Law—Directive 68/151 of 9 March 1968 (OJ No. L65, 14 March 1968). The regulations which came into effect on 1 July 1973 are described in paragraph 10.1 of the Second Report.

10.4. In its Report the Joint Committee comments and makes recommendations on the following aspects of the regulations :

(a) the provisions relating to the publication in *Iris Oifigiuil* of certain registered documents and particulars and to the circumstances under which a company may not rely on certain documents and particulars against any other person;

(b) the provisions concerning the notification to the Registrar of Companies of alterations to the Memorandum and Articles of Association;

(c) the *ultra vires* rule which provides that a person dealing with a company in good faith is not prejudiced by the fact that the Board of Directors or other persons authorised to bind the company acted *ultra vires* their powers as imposed by the Memorandum and Articles of Association or otherwise; and

(d) the penalty clause which provides that in the case of failure to comply with certain regulations the company and every officer of the company who is in default shall be liable to a fine not exceeding £100.

The Joint Committee has also recommended the incorporation into the regulation of the text of Directive 68/151.

10.5. The Department of Industry and Commerce is at present examining the Report.

10.6. The Joint Committee is examining the general question of the incorporation of Community acts into those Irish instruments which implement them and hopes to make detailed recommendations to the Houses of the Oireachtas in a future Report.

**Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters**

11.24. The Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters was drawn up by the original Member States in pursuance of the provisions of Article 220 of the EEC Treaty which requires Member States to enter into negotiations with each other with a view to securing for the benefit of their nationals the simplification of formalities governing the reciprocal recognition and enforcement of judgements of Courts or Tribunals. The general object of the Convention is the free circulation of civil and commercial judgements throughout the Community.

11.25. Under the terms of the Accession Treaty the new Member States undertook to accede to the Convention and to the Protocol on its interpretation by the European Court of Justice, subject to any necessary adjustments to be negotiated.

11.26. A working party of representatives of all the Member States is considering the adjustments which may be necessary to the Convention to meet the requirements of the new Member States. During the period under review the working party held two meetings, one in December 1973 and the other in March of this year. The matters dealt with included the formulation of rules of jurisdiction relating to insurance matters, the adaptation of the provisions dealing with recognition and enforcement of judgements and the question of the relationship of the Convention with Conventions governing special matters (Article 57 of the Convention). As regards maritime matters, the approach of the Irish delegation throughout these talks has been to try to preserve the existing admiralty jurisdiction of our Courts. The draft rules of jurisdiction which have been formulated substantially meet our requirements. A subcommittee is being established to study the insurance aspects and to report to the main working party. Draft adaptations to the recognition and enforcement provisions of the Convention and to Article 57 have been agreed in principle. The working party will hold its next meeting in July when it will examine *inter alia* the question of jurisdiction in relation to Trusts and jurisdiction by consent. The legal profession and the other interests concerned continue to be consulted on the Convention.

**Draft Convention on Bankruptcy, Winding-up, Arrangements, Compositions, Similar Proceedings**

11.27. A second draft of this Convention is being considered by the Member States. The purpose of the draft Convention is to provide for one bankruptcy or winding-up in the Community which will be recognised and effective in all the Member States. It deals with the bankruptcy of individuals, the winding-up of companies and the administration of insolvent estates of deceased persons. Proceedings in respect of insurance undertakings and certain other undertakings (such as building societies) to be designated by the Contracting States are to be excluded. A panel of experts from Member States met in Brussels in January, March and

May 1974 to consider the draft. It will be a number of years before the Convention will be in final form.

11.28. Two further meetings of the sub-group which is revising the English text of the draft Convention were held in Brussels. Considerable progress was made and further meetings will be held to complete the work.

**Draft Convention on Private International Law**

11.29. The committee of experts on the harmonising of rules of private international law held plenary meetings in Brussels in November 1973 and in Copenhagen in April/May 1974. These meetings considered a questionnaire received from the Council's Social Questions group concerning a draft Regulation relating to conflist of law rules governing labour relations within the Community and its impact upon similar provisions contained in the draft private international law Convention on the law applicable to contractual and non-contractual obligations.

11.30. A subcommittee on movable property held a meeting on 13-15 February 1974 to consider :

(a) a questionnaire concerning conflict rules relating to contract and tort which had been circulated to member governments of the Hague Permanent Conference on Private International Law; and
(b) The Commission draft Directive on the recognition of securities on movables without dispossession and on the retention of ownership upon the sale of movables.

A report from the subcommittee was before the plenary meeting of the committee of experts in Copenhagen in April/May 1974. The legal profession and a number of interested commercial bodies have been consulted on the draft Directive.

**Draft Directive on Guarantees**

11.31. A committee of experts drawn from the Member States of the Community is examining a draft Directive on the harmonisation of national laws relating to guarantees. The purpose of the draft Directive is to achieve rules in regard to contracts of guarantee which would apply throughout the whole Community in order to facilitate the movement of capital which is envisaged in Article 67 of the EEC Treaty. A meeting of the committee of experts was held from 12 to 14 June 1974.

**Draft Convention on the liability and protection of officials of the European Communities in criminal matters**

11.32. A committee of experts consisting of delegates from the Member States is considering what machinery should be set up to deal with Community officials accused of certain offences in connection with their official duties. A group of experts from the original Member States began work on the matter in 1962. Their discussions were suspended for a long time because of divergences of opinion amongst them but work recommenced in September 1970 and resulted in the preparation of a draft convention in 1972. The draft Convention provides for the extension of the domestic laws of the Member States relating to certain criminal offences to cover such offences committed by Community officials in the course of their duties. The draft is being reconsidered following the accession of Ireland the UK and Denmark and meetings for this purpose of experts from the nine Member States were held in Brussels on 26-27 March 1974 and 4-5 June 1974.

**Patents**

11.33. At the invitation of the German Government a diplomatic conference was held in Munich from 10 September to 5 October 1973 to adopt a European system for granting patents. On 5 October 1973 the nine Member States of the Community and five other countries, viz. Greece, Liechtenstein, Norway, Sweden and Switzerland, signed the International Convention on the European Patent.

11.34. The Convention provides for the obtaining of a European patent, which would have the same validity and effect in designated contracting States as national patents, by means of a single application and one grant procedure. The Convention provides for a European Patent Organisation comprising a European patent will be filed with the European Patent Office will be responsible for operating the European system for the grant of patents. Applications for a European patent will be field with the European Patent Office which will be established in Munich.

11.35. A draft Convention on the European Patent for the Common Market which was prepared early in 1973 was scheduled for consideration and adoption at a final conference to be held in Luxembourg from 6 to 28 May 1974. It was the intention that the draft Convention would be initialled at the end of the conference and be signed for the Council in June 1974. However, a request by the UK Government for the postponement of the conference was granted by COREPER in April 1974. The reason given by the UK Government for this request is that it requires time to undertake a thorough examination of matters relating to the European Patent for the Common Market.

**Harmonisation of Penal Law—Economic Penal Law**

11.36. In June 1961 the Council decided to study the problems posed in relation to the prevention and punishment of breaches of Community Regulations, Directives and Decisions, in particular whether the inequality of penalties imposed in different Member States for breaches of Community provisions would tend to hinder the full implementation of these provisions throughout the Community. A draft Instrument on economic penal law in the Community prepared by a sub-group of experts was considered at a meeting of the plenary working group at Brussels on 6-7 March 1974. After a discussion on the terms and scope of the instrument the draft was referred back to the sub-group for further study. This work is currently in progress.

**Council of Ministers for Justice**

11.37. The first meeting of the Council at which Member States were represented by the Ministers for Justice was held in Luxembourg on 3 June 1971. The Government of the Federal Republic of Germany proposed in February 1974 that a second Council of Ministers for Justice should be held in the second half of 1974 under the French presidency of the Council. An *ad hoc* working group comprising representatives of all the Member States was set up to prepare for the meeting. The working group met in Brussels on 11 March, 8 April and 6 May 1974 and further meetings will be held as necessary to complete the preparations for the Council meeting.

# STATUTORY INSTRUMENTS

## RULES OF THE SUPERIOR COURTS (No. 2) 1974 (S.I. No. 261 of 1974)

We, the Superior Courts Rules Committee, constituted pursuant to the provisions of the Courts of Justice Act, 1936, Section 67, and reconstituted pursuant to the provisions of the Courts of Justice Act, 1953, Section 15, by virtue of the powers conferred upon us by the Courts of Justice Act, 1924, Section 36, and the Courts of Justice Act, 1936, Section 68 (as applied by the Courts (Supplemental Provisions) Act, 1961, Section 48), and the Courts (Supplemental Provisions) Act, 1961, Section 14, and of all other powers enabling us in this behalf, do hereby make the annexed Rules of Court.

Dated this 24th day of May, 1974.

Thomas A. O'Reilly.

William O'B. Fitzgerald — Frank Griffin
Aindrias Ó Caoimh — Weldon R. C. Parke
Brian Walsh — Richard Johnson

I concur in the making of the annexed Rules of Court.

Dated this 29th day of May 1974.

Patrick Cooney (Minister for Justice).

Notice of the making of this Statutory Instrument was published in *Iris Oifigiúil* of 30th August 1974.

**Rules of the Superior Courts (No. 2) 1974**

(1) Rule 3 of Order 109 as amended by R.S.C. (No. 5) 1964 shall be deleted and the following rule substituted therefor, viz.

"3. The party applying for an order under rule 1 or rule 2 shall pay the remuneration of the shorthand writer and said payment shall be borne by said party unless the Judge or the Master (as the case may be) shall after the trial or hearing certify that in his opinion it was expedient that the proceedings or any part thereof should have been so reported. If such certificate is given the remuneration of the shorthand writer for reporting the proceedings or part thereof to which the certificate relates shall be part of the costs in the cause."

(2) Order 99, rule 36 (1) shall be deleted and the following substituted therefor:

(1) The fees to be allowed in respect of shorthand writers and transcripts of evidence in relation to business done after these Rules shall have come into operation shall be of such amount as to the Taxing Master seems reasonable."

(3) In Appendix W, Part II shall be deleted.

(4) These Rules shall be construed together with the Rules of the Superior Courts and may be cited as the Rules of the Superior Courts (No. 2) 1974.

*Explanatory Note*

These Rules prescribe Court procedures in relation to the remuneration of shorthand writers, in amendment of the Rules of the Superior Courts.

Published by the Stationery Office, Dublin. To be purchased from the Government Publications Sale Office, G.P.O. Arcade, Dublin 1. Price 2½p.

## RULES OF THE SUPERIOR COURTS (No. 1) 1974 (S.I. No. 256 of 1974)

We, the Superior Courts Rules Committee, constituted pursuant to the provisions of the Courts of Justice Act, 1936, Section 67, and reconstituted pursuant to the provisions of the Courts of Justice Act, 1953, Section 15, by virtue of the powers conferred upon us by the Courts of Justice Act, 1924, Section 68 (as applied by the Courts (Supplemental Provisions) Act, 1961, Section 48), and the Courts (Supplemental Provisions) Act, 1961, Section 14, and of all other powers enabling us in this behalf, do hereby make the annexed Rules of Court.

Dated this 5th day of April, 1974.

Signed by eight members of the Committee.

The Minister for Justice concurred in the making of the Rules on 27th May 1974.

(1) The following words shall be added to the end of Rule 21 (3) of Order 77 viz.:

"Where a lodgment is made pursuant to Order 22 the request shall state whether it is to be placed on deposit. Where so placed on deposit the defendant shall be entitled to the interest accruing thereon and said interest shall not be treated for the purpose of Order 22 Rule 6 as part of the amount paid into Court."

(2) In Order 77 Rule 33 shall be deleted and the following rule substituted therefor:

"33. Except as provided in the rules of this Order and subject to the provisions therein contained funds in Court shall not be paid delivered or transferred out of Court nor invested sold or carried over unless in pursuance of an Order."

(3) Form No. 9 of Appendix P shall be amended by inserting immediately after the word "receive" where same first occurs therein the following words fiz.: "and place on deposit (delete reference to deposit if not required)" and by adding at the end of the said Form immediately before the word "(signed)" the following words viz.: "and placed on deposit (delete reference to deposit if not applicable)".

(4) These rules shall be construed together with Rules of the Superior Courts and may be cited as the Rules of the Superior Courts (No. 1) 1974.

*Explanatory Note*

These Rules alter the provisions of Rule 21 (3) of Order 77 of the Rules of the Superior Courts (S.I. No. 72 of 1962) by enabling monies lodged with defence to be placed on interest-earning deposit for the benefit of defendants and also alter the provisions of Rule 33 of the same Order by removing the references therein to particular rules which qualified the provisions of the rule in regard to the payment out, transfer or investment of funds in Court.

## PROSECUTION OF OFFENCES ACT, 1974 (COMMENCEMENT) ORDER, 1974 (S.I. No. 272 of 1974)

This Order fixes the 18th September 1974 as the date on which the Prosecution of Offences Act, 1974, other than Sections 3, 5, 7, 9 and 10, comes into operation.

# UNREPORTED IRISH CASES

**In a planning appeal, the Minister, in giving his decision, must act strictly and impartially upon the evidence tendered at the oral hearing before the inspector, and upon no extraneous matters.**

The Minister made a decision on 23 October 1972 under the Planning and Development Act, 1963, whereby the plaintiff, a solicitor, was refused outline planning permission in respect of certain lands, her property. On 3 October 1969 the plaintiff sought under Section 26 of the 1963 Act from Dublin Co. Council outline planning permission for a housing development on her lands at Fosterstown North. The plaintiff's application was refused on 28 November 1969 for the reasons that: (1) Development of housing in the area would result in extensive additional traffic on an overburdened main road; (2) No water supply or sewerage facilities are available; (3) The proposed development is accordingly premature; (4) The proposed development would interfere with the proper development and operation of Dublin Airport; (5) The occupants of any houses erected would suffer severe loss of amenities due to persistent aircraft noise. The plaintiff, in appealing, asked for an oral hearing, which was held before an inspector on 14 January 1972. The Minister's refusal, made by his Parliamentary Secretary, to entertain the appeal was conveyed on 23 October 1972 and in it the Minister relied heavily on grounds (2) and (5).

At the time of the oral hearing, there was in existence a County Dublin Draft Plan, and this had to be considered by the Councillors. In the Draft Plan, the plaintiff's lands were zoned for agricultural purposes only, but in October 1970 a resolution had been passed by the Planning Committee of the Council stating that these lands were to be zoned for residential purposes only. After the oral hearing, on 11 February 1971, the Council passed a resolution zoning these lands for residential purposes; this resolution was taken against the advice of the planning officers, who were indignant.

The inspector made his report on 25 March 1971 and deals with the submissions and evidence tendered at the oral hearing. He then gives an account of his own inspection of the lands in question, and deals with the position of the site in relation to sewerage facilities and road access. The total area is 11¼ acres, of which about half has been zoned for residential purposes. The inspector objects to the inclusion for residential development of part of the site, because of its location on an important flight path of Dublin Airport, and because of the inevitable noise problem. The application should be refused because (1) the site is located on a flight path of Dublin Airport; (2) the residents would suffer loss of amenity due to aircraft noise; (3) there are no proper sewerage facilities. Marginal notes were made by a senior officer of planning in Local Government to the following effect: (1) omit; (2) do not use; (3) add traffic hazard. The inspector's report is part of document 137. In document B. 11 the senior officer of planning sent a long cross-examining memorandum to the inspector; the inspector duly replied in document B. 12. There was also a long report from a Mr. Stringer containing strong condemnation of the County Council resolution of 11 February 1971. In reply to queries by the Parliamentary Secretary, the inspector in document B. 17 submitted a detailed report of his objection in relation to sewerage facilities. Eventually the plaintiff's appeal was refused by the Parliamentary Secretary, who in this case was discharging functions of a judicial nature.

In *Murphy v Dublin Corporation* (1972) I.R. at page 238, Walsh J. said: "By statute, the Minister is the one who has to decide the matter—not the inspector. In doing so the Minister must act judicially and within the bounds of constitutional justice ... The inspector is acting as the recorder of the Minister, and should convey to him a fair and accurate account of what transpires. The Minister should make his decision on this material alone. If the Minister is influenced by the Inspector, his decision will be open to review and may be quashed. It follows that if the Inspector does recommend or advise it must be related strictly to matters arising at the hearing, and, in arriving at a decision, the Minister must be unfettered by any advice given by the inspector." Here the plaintiff's appeal was treated from the very beginning as a departmental matter within Local Government. Instead of the inspector holding an oral hearing, and reporting the result thereof directly to the Minister as the designated person, this report became the subject of a file in the planning officer's section. Furthermore, the chief officer made his own recommendation that permission be refused for reasons stated on an order already drafted. Worse still, it appears that observations were added to the inspector's report which indicated that there was no free and untramelled communication between the inspector and the Minister. Furthermore, details as to the sewerage scheme which were not in the report were also tendered. The inspector in his report not merely contained an account of the evidence, but also an account of his own inspection of the lands, and his personal observations in relation to matters dealt with at the hearing. It follows that the decision of the Parliamentary Secretary acting for the Minister could not have been made on the basis of material and evidence adduced at the oral hearing.

This case illustrates the impracticability of attempting to process through a Department of State the exercise of a judicial function conferred by statute on the head of that Department. Such a function must be discharged by the holder of that office personally, and not with the assistance or upon the advice of persons not contemplated by the statute.

The plaintiff is accordingly entitled to succeed and the declaration will be granted.

[Susan Geraghty v Minister for Local Government (No. 2); O'Higgins J.; unreported; 12 July 1974.]

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**Declaration under Minerals Development Act, 1940, granted to plaintiffs that Minister's Order is invalid, because it does not specify in detail the nature, situation and extent of the acquired minerals.**

The defendant, Patrick Wright, was owner in fee simple of lands at Nevinstown, Navan. By agreement

of 18 March 1971 the said defendant agreed to sell these lands to the first plaintiff, Thomas Roche. By a second agreement of 18 March 1971 the plaintiff, Roche, agreed to form forthwith a limited company with a nominal share capital of £1 million. The consideration was £700,000 of which £200,000 was to be paid by the allotment of 200,000 £1 shares in the Company, and the balance was to be paid on dates mentioned in the agreement. The plaintiff Company, Bula Ltd., was formed in pursuance of said agreement. On 19 March 1971 Patrick Wright executed a conveyance of the lands to the Company. Application was made to the Land Commission for their consent in the vesting of the lands to Bula, under Section 45 of the Land Act, 1965, but such consent had not been forthcoming in April 1973, when judgment was given in the High Court.

At this time a prospecting licence had been granted by the Minister for Industry and Commerce to Tara Exploration and Development Co. Ltd. (hereafter called Tara). Mr. Roche was aware there had been drilling, and that minerals of value had been discovered. There were preliminary discussions between Mr. Roche and Mr. Wright at which it was stated that, to the best of Mr. Wright's knowledge, no order for compulsory purchase of the minerals had been made. Finally, on March 18, in the office of the defendant's solicitors, the agreement to sell was signed, and £50,000 paid over. Later the second agreement providing for the formation of the company was signed and a further £150,000 was paid over. Later on the same day, Mr. Roche and his solicitor saw an official in the Department of Industry and Commerce, who told him that he believed a compulsory acquisition order had been made in respect of the minerals under the lands. Prior to the signing of the agreement, Mr. Roche's solicitor had been told by the Geological Survey that there were no orders affecting these lands. However, on March 15 the Minister made an order under Section 14 of the Minerals and Development Act, 1940, entitled *"The Minerals Acquisition (Nevinstown and other Townlands, Co. Meath) Order 1971"* vesting in himself in fee simple all minerals, but notice was only published in *Iris Oifigiuil* on 23 March 1971. On 1 April 1971 the Minister, acting under Section 13 of the Minerals Development Act, 1940, undertook that under certain conditions, he would grant to Tara, or to its subsidiary, Tara Mines Ltd., a State Mining Lease under Part IV of the Act in respect of Nevinstown.

(I) The plaintiffs, Roche and Bula, claim that this Order of the Minister of March 15 is *ultra vires,* null and void, because :

(1) A Minerals Acquisition Order under Section 14 can relate only to specific minerals, and not to all minerals, as stated in the Order.
(2) The Minister could not know whether *all* the minerals under Nevinstown had been worked.
(3) The Minister has no power to acquire minerals under Section 14 for the purposes of granting a State mining lease, because such a lease will not secure that, in the public interest, the working of such minerals shall be controlled by the State. The purpose of the Order was to enable the Minister to grant a lease, which is *ultra vires* Section 14.

(II) Article 43 of the Constitution prevents the compulsory acquisition of property rights, unless the delimitation of the exercise of those rights is required by the Common Good. But the Common Good cannot require the Minister to take the property of an Irish citizen, and hand it over to a foreign company, otherwise he would be contravening the Constitution.

(III) In making an Order, the Minister is bound to act in accordance with the *principles of Natural Justice.*

(a) He should give notice to the owner that he intends to make such an order.
(b) He should give the owner an opportunity of making representations and of being heard.

(IV) The provisions in relation to compensation are unsatisfactory, as they are based on a nugatory "royalty" rent. If the minerals under any part of Nevinstown are not worked, no compensation will be paid.

(V) As the Minister did not comply with Section 15, by failing to publish the "Notice" "as soon as may be" and as the notice did not indicate precisely the nature and extent of the minerals acquired, such failure by the Minister to comply with the statutory requirements entitles Roche (and Bula Ltd.), as a person affected by the Order, to have it set aside.

Section 7 of the Minerals Development Act 1940, dealing with the entering and prospecting for minerals; Section 8, dealing with prospecting licences; Section 15, dealing with the publication and services in respect of mineral acquisition orders; Section 22, dealing with licences in respect of State acquired minerals; Section 67, dealing with the basis for assessment of compensation in respect of minerals and ancillary rights and Section 68, dealing with the form of compensation for State acquired minerals and for unworked mineral licences are all quoted in full.

The Minister, Mr. Patrick Lawlor, had given evidence on behalf of the defendant. He was satisfied from a discussion with his officials on February 19 that there were minerals under these lands that were not being worked. Prospecting licences had been given to Tara, as it had been established that considerable quantities of lead and zinc were to be found in the area, and he was most anxious to negotiate a lease for the working of the mines in the area. There would be fragmentation if he could not control the mining right in the area. The President thought that the minerals in the area should be owned by the State in order to ensure their orderly working. There was nothing sinister in the dealy in publishing the Order, yet the period of eight days before publication was unduly long. The fact that the Order was not published "as soon as may be" does not invalidate it, but the Minister might be liable in damages to anyone who in the interval had altered his position to his disadvantage.

In this case, the decision of the Minister that minerals should be acquired is an administrative one, and is thus not contrary to natural justice. The arguments under Article 43 are rejected, as in an appropriate case the common good may require that the Minister should acquire all minerals in a given area. The Minister did consider it desirable to acquire all scheduled minerals in the area and his primary purpose in doing so was to secure that they should be worked in an orderly fashion.

However, the Ministerial Order must specify the nature, situation and extent of the minerals to which it relates. This is an all-embracing Order, and the Minister indicated that he intended to acquire *all* scheduled minerals. As regards compensation, no machinery has been devised to compensate an individual for the existence of unknown minerals. The effect of the present order is to acquire *all* minerals, known and unknown, under the plaintiff's land. These minerals may include

unknown minerals of great value which the Minister can acquire without payment of adequate compensation. The Minister has made no attempt to meet this objection. Under Section 14 (2) (a) of the Act of 1940 one cannot specify the nature, situation and extent of the minerals without knowing what such minerals are.

Consequently O'Keeffe P. granted a declaration to the plaintiffs that the Minister's Order is invalid on the ground that it does not specify with reasonable particularity the nature, situation and extent of the minerals being acquired.

[Roche and Bula Ltd. v. The Minister for Industry and Commerce, the Attorney-General and Wright; O'Keeffe P.; unreported; 13 April 1973.]

**Conditional Order of Certiorari quashing Nevinstown Mineral Development Order, 1971, made absolute.**

The applicants had obtained a conditional order of *Certiorari* on 21 March 1972 to quash the *Minerals Development (Nevinstown and other Townlands, Co. Meath) Order, 1971,* and they now seek to have the conditional order made absolute.

Despite the fact that the Minister wished to adduce further evidence, he only filed a Notice to show cause, instead of filing a detailed affidavit. This was pointed out to the Court who made an order on 1 June 1972 giving liberty to file an affidavit before June 12, but no affidavit was filed.

The applicants had made a *prima facie* case by which it was shown that the Minister had no evidence to form an opinion whether there were minerals under the applicant's lands or not, which ought in the public interest to be acquired. The Minister had not tried to rebut this, and the applicant must succeed.

As the Minister's Order was not in accordance with the Statute, as decided in the Roche case, the Order cannot stand. Consequently the conditional order of *Certiorari* will be made absolute .

[The State (Randles) v. The Minister for Industry and Commerce; O'Keeffe P.; unreported; 13 April 1974.]

The Minister appealed against the judgment of the President of the High Court in the two cases, but the two appeals were dismissed unanimously by the full Supreme Court.

Budd J., in delivering the first judgment, read the full text of "The Minerals Acquisition (Nevinstown and other Townlands in Co. Meath) Order, 1971". It indicated that all minerals under the land described in the Schedule to the Order are vested in the Minister in fee simple. The lands were delineated by a red line on a map deposited in the Geological Survey and duly sealed with the seal of the Minister.

In Section 14 (2) (a) of the Mineral Development Act, 1940, it is stated specifically that the Minister's Order must specify the nature, situation and extent of the minerals to which it relates. The nature of the mineral-bearing ore, and the depth and extent of the mineral seam can be discovered by experimental boring. The situation of the minerals can easily be described by reference to the townland. As the nature, situation and extent of the minerals to which this Order relates is not stated, the Minister's Order is consequently invalid.

Henchy J., in delivering the second judgment, stated that Section 14 (1) of the 1940 Act makes it clear that, before a Minerals Acquisition Order can be made by the Minister, three requirements are necessary: (1) It must appear to the Minister that there are minerals on or under the land—this is called into question here; (2) It must appear to the Minister that such minerals are not being worked or not being worked efficiently and (3) That the Minister considers it desirable in the public interest that the working of such minerals should be controlled by the State with a view to their exploitation. These requirements, put together, show that the Minister must make an appraisal of the situation in the light of the particular mineral substances which lie unworked, or are being inefficiently worked, and having considered that it is desirable in the public interest that their working should be controlled by the State. As the Minister's Order is a blanket Order to cover "all minerals" under the land, thereby showing a want of the necessary discrimination and appraisal, it infringes Section 14 (1) of the Act of 1940. The mandatory provisions of Section 14 (2) (a) mentioned by Budd J. were also not complied with.

The scheme of compensation itself seems incompatible with the blanket acquisition of all minerals on or under land. The amount of the royalty rent can be assessed by the Mining Board only after consideration of what a willing grantor and a willing grantee would agree to, having strict regard to "the situation, nature and extent" of the minerals acquired.

The appeals are consequently dismissed.

[Roche and Bula Ltd. v. The Minister for Industry and Commerce and others *and* The State (Randles) v. The Minister for Industry and Commerce and the Attorney-General; Full Supreme Court; unreported; 4 March 1974.]

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**If an unregistered owner of registered land dies before 1959 his executor may sell the estate as if he had been the registered owner, under Part IV of the Local Registration of Title Act, 1891.**

On 26 April 1921 William Sheils was registered as full owner subject to equities of part of the lands of Barnageeragh, Co. Dublin, on Folio 2089, Co. Dubin. Part IV of the Registration of Title Act, 1891, applied. W. Sheils died intestate on 30 March 1931 and on 16 September 1931 letters of administration were granted to his son, Joseph Sheils, the plaintiff in these proceedings, who was not registered as owner on the folio, as there were four next of kin entitled to share in the estate.

On 29 September 1973 these lands were sold by public auction to the defendant. In the conditions of sale, it was stated that the plaintiff was selling the lands as the personal representative of his father. The purchaser objected to the title on the ground that, as the owner had died forty-two years ago, a sale by the plaintiff as personal representative could not be in due course of administration, and required the plaintiff to have himself registered as full owner. The plaintiff contended that his father's estate had not been administered, and that the administration bond had to be renewed each year; as the defendant has refused to accept this explanation, the plaintiff has issued a summons under the Vendor and Purchaser Act, 1874, seeking a declaration that he has shown good title.

It was contended by the defendant that Section 84 (3) of the Registration of Title Act, 1891, no longer applied, as it had been repealed by the Second Schedule of the Administration of Estates Act, 1959. However,

the Act of 1959 only applied to persons dying on or after 1 June 1959 and not to those who had died before then. Under Section 113 (3) of the Registration of Title Act, 1964, it was provided that Part IV of the Act of 1891 was to continue to apply to all land which was subject to that Act before 1964. Under Section 9 (3) of the Succession Act, 1965, it was enacted that its provisions do not apply to any persons dying before 1 January 1967. It follows that Section 84 (3) of the Act of 1891 still applies to this sale; consequently the personal representative has the same power of dealing with the land as if he were the registered owner. The plaintiff is therefore able to show good title to the lands if he can give clear possession. This is reinforced by the strong terms of Section 51 of the Succession Act, 1965, which states specifically that a purchaser from a personal representative shall be entitled to hold that property freed and discharged from all debts and liabilities of the deceased ... and from all claims of the persons entitled to any share in this estate; it is to be noted that this section applies to persons dying before this Act. The summons will consequently be granted.

[Sheils v Flynn; Kenny J.; unreported; 2 May 1974.]

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**Increase of airport landing fees made by Minister in respect of Shannon Airport after 1 April 1969 valid.**

The Minister for Transport and Power claims from the defendant the sum of £19,975, being the balance of landing charges due by them in respect of the use of the services of Shannon Airport for their aircraft between 1 April 1969 and 24 July 1970. Before 1 April 1969 all charges made by the Minister were duly paid on presentation of invoices. On 1 April 1968 the then Minister made a decision that a 20 per cent increase be applied from 1 April 1969 and on 3 July 1968 that was sanctioned by the Minister for Finance. There were subsequent lengthy discussions between the International Air Transport Association (I.A.T.A.) representing the defendants and other airlines. The Association would not agree to the increase, and the Minister consequently put the increase into force. On 1 April 1969 an additional 7½ per cent, which is not disputed, was imposed in substitution for the abolition of fuel through put charges. After 1 April 1969 the defendants received invoices for landing charges showing the increased amounts, but they continued to pay the Minister at the old rate, plus the 7½ per cent not in dispute. This is a test case, as other airlines using Shannon Airport have adopted the same procedure.

In the action before O'Keeffe P. the Minister relied on Section 37 of the Air, Navigation and Transport Act, 1936, as the authority giving him the right to fix charges on landing fees. By S.I. No. 125 of 1959, the functions under this Act originally vested in the Minister for Industry and Commerce were transferred to the plaintiff. The President held that Section 37 of the 1936 Act does not authorise the plaintiff to charge for the services he provides at aerodromes. Although the Minister may have power to fix charges for landing at aerodromes, it was not to be found in Section 37 relied upon. The President accordingly dismissed the Minister's claim.

The claim has now been made on an implied contract, and it was submitted that once the Minister gives notice under the Chicago Convention of April 1947 that the Minister is entitled to make the appropriate charges. The relevant Article in the Chicago Convention is Article 15 which deals with "Airport and Similar Charges". The defendant airline contended that, in fixing the scale of charges applicable at Shannon, the Minister is compelled by Section 9 of the 1946 Act to make a formal Order which would then have the force of law in the State, but it was held that the Minister was not required to make a formal Order, as the Order was not necessary for carrying out the Chicago Convention and for giving effect thereto. Section (1) of the 1946 Act sets out specific matters which may be made by order, and these include prescribing a scale of charges at licensed aerodromes, but Shannon was not licensed. As the scale of charges imposed was no higher for foreign than domestic airlines, it was valid according to Article 15 of the Chicago Convention, provided that this scale had been properly communicated to IATA, which it had. The defendants and other airlines, upon receiving this notice, impliedly contracted to pay such charges on landing. The fact that the plaintiff has relied upon different grounds in the Supreme Court than in the High Court should not prejudice him. As the Rules of the Superior Courts allow pleadings to be amended at any time, the plaintiff's application to amend the pleadings will be granted.

Accordingly the Supreme Court (FitzGerald C.J., Walsh and Griffin JJ.) allowed the appeal and granted the Minister an order for payment of £19,975 by the defendants in respect of landing fees at Shannon Airport.

[The Minister for Transport and Power v Trans World Airlines Inc.; Supreme Court (FitzGerald C.J., Walsh and Griffin JJ.); separate judgments by Walsh J. and Griffin J.; unreported; 6 March 1974.] ]

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**Rights of minority shareholder upheld on ground that directors conducted the company in an oppressive manner.**

Westwinds Ltd. was incorporated under another name in March 1964; its principal object was to take over and carry on the business of builders and public works contractors in Galway in accordance with an agreement, which had apparently not been prepared.

The main shareholder, a developer, had discussions with the petitioner, to arrange for the petitioner to take shares in and become a director of Westwinds, in 1965. On 21 July 1965 the petitioner, who had become secretary, and an auditor met at the petitioner's solicitors's office in Galway. The terms upon which the petitioner was to join the company were settled, as was the distribution of shares in the company—namely 5,000 shares to the developer and 5,000 shares to the petitioner.

In 1968 the company purchased a site of three acres at Knocknacarra. Full planning permission for four houses was obtained, which were duly built and sold. However, the company was unable to obtain planning permission in respect of the remaining two acres, as there were no sewerage services, and the water supply was inadequate. It was falsely contended at the time that these lands belonged to another company of the developer. These lands were duly registered in a Land Registry Folio, and in November 1968 the two acres were sold for £600 to a third company (Company B)

owned by the developer. The developer forged the petitioner's signature to the transfer. The accounts showed that the company made no profit in the transaction. Company B sold the two acres to Company C which also belonged to the developer, and all the developer's shares in Company C were subsequently sold by him to Mr. D, for £15,000, making a net profit of £14,280.

The petitioner was interested to develop houses in Whitestrand Road, Galway, held by Company E in which the developer held most of the shares. The developer wished that the Westwinds Company should guarantee payment to Allied Irish Banks of the overdraft granted to Company E, and fraudulent minutes were furnished to the Bank, stating that the petitioner had been present, although he had not, and that the guarantee had allegedly been signed by him. The resolution also authorised the developer to deposit the title-deeds by way of equitable mortgage to the Bank. The developer certified that a true copy of the minutes had been delivered to the Bank, and, as he wished to conceal the business being transacted from the petitioner, he did not notify him. Apart from that, there were a number of meetings of the company and of the directors, and the petitioner was never notified; the minutes of the meetings held in 1970 and in 1971 were not signed, and from 1972, they were signed by the developer. At a meeting in March 1973, at which the developer and his wife were present, it was resolved that the petitioner be removed from office as secretary and director and the developer was appointed in his place as secretary.

The petitioner presents a petition under Section 205 of the Companies Act, which deals with the powers of a minority shareholder to petition the Court on the ground that directors conduct the company in an oppressive manner. He claims that the agreement of 21 July 1965 is valid, and the Judge accepts his evidence, and that of his solicitor. But on that date only the heads of an agreement were reached which were subsequently to be set out in a detailed contract. This preliminary agreement did not constitute a contract, and was not binding on the parties, and the terms thereof were in any event subsequently rescinded by mutual consent.

The sale of the lands at Knocknacarra by Westwinds for £730 was made at a gross undervalue in 1968, on the basis that the two acres were only agricultural land, but nevertheless planning permission was granted to build upon this land in 1973, which enabled Company C belonging to the developer to sell it for £15,000. The original sale thus benefited the developer alone to the exclusion of the other members of the company. Consequently the sale of the lands at Knockacarra was an exercise by the directors of their powers in a manner which was fraudulent and oppressive to the petitioner, and was in total disregard of his interest as a member of the company.

The mortgage by deposit of title deeds in May 1972 relating to Whitestrand Road to guarantee the amount which Company E owed Allied Irish Banks was not for the benefit of Westwinds or of the petitioner. The forgery of the petitioner's signature to the minutes of the meeting, as well as of his signature to the particulars of the charge indicated that the developer was anxious to conceal the transaction. This is the first case in Ireland under Section 205 of the 1963 Act. As Westwinds has ceased trading and a winding-up by the Court would be expensive, the fairest order would be to direct the developer to purchase the shares of the petitioner at a price fixed by the Court. In this connection, the Knocknacarra lands will be deemed to belong to Westwinds, and, as regards Whitestrand Road, the developer must purchase the lands at full market price. The price will be fixed on the basis that there are no restrictions on the transfer of the petitioner's share in the company, and that the directors would sanction the transfer. Accordingly, the developer is to purchase all the petitioner's share in Westwinds at a price determined at an inquiry held before a Judge.

[Re Westwinds Holding Co. Ltd. and Re Companies Act, 1963; Kenny J.; unreported; 21 May 1974.]

# New President of English Law Society

**Edward Henry Sibbald Singleton, M.A.**

Better known as "Tim", Mr. E. H. S. Singleton, born in 1921, is one of the youngest solicitors to be elected President of The Law Society. He was educated at Shrewsbury and Brasenose College, Oxford. He is a nephew of the late Lord Justice Singleton.

His admission on 1 July 1949 is nearly twenty-five years to the day of his election to the Presidency, which also makes him the first President to be admitted since the war.

After qualifying, he spent five years with Richards Butler & Co. and joined his present firm Macfarlanes in 1954.

In 1961 Mr. Singleton was elected to the Council of The Law Society and he has been a most-active member, serving until 1964 on the Education and Training Committee, from then until 1972 on the Contentious Business Committee and thereafter on the Professional Purposes Committee. He became Chairman of the Legal Aid Committee in 1965, and continued in that position until 1969 when he was appointed Chairman of the Contentious Business Committee. In 1973 he chaired a Working Party of Council Members to consider all the activities and finances of The Society and at about the same time he became a member of the Committee of Management of the Paddington Neighbourhood Advice Bureau and Law Centre.

He represents No. 2 constituency, which is covered by the City of London Solicitors' Company, and he is a Member of their Court. During his Vice-Presidential Year he travelled widely on Law Society business.

"Tim" Singleton's family roots lie in Lancashire, but he was born and brought up in Herefordshire and now lives and practices in London. He is keenly interested in cricket, having played for Oxford University, and for six years has been President of The Law Society's Cricket Club, for which he continues to be a playing member. He and his wife Peggy and their four children spend as much time as possible in East Anglia where they have a small house and a boat.

# New Deal for Self-Employed

By J. H. BARRETT, A.C.I.I.

The enactment of the Finance Act, 1974, has considerably improved the form of retirement provision available to persons in non-pensionable employment. Heretofore, self-employed persons tended to neglect the obligation to make adequate provision for retirement since if their enterprise was a success it was often felt that such provision was unnecessary. In recent years we have witnessed a pattern of rapid inflation to the extent that it must now be accepted that the level of retirement benefit which is likely to be required in future to safeguard your standard of living would place an inhibiting burden on most developing practices. The generous tax concessions now available will emphasise that it makes good business sense regularly to transfer earnings, tax free, to a retirement annuity fund particularly when burdened by a high tax liability!

### What is a retirement annuity?

The retirement annuity is a medium whereby a person in non-pensionable employment may fund for a retirement income by setting aside regular contributions from earnings with the aid of various tax incentives. The retirement annuity in its present form was first introduced to this country following the enactment of the Finance Act, 1958, and its main features at the present time could be summarised as follows:

—Individual earnings may be transferred *tax free* to the fund thereby earning a tax discount equivalent to the rate payable on the top slice of taxable income.

—The earnings of the fund may be accumulated tax free by concession, thereby enhancing the retirement benefit released.

—It is not necessary to retire from practice before opting for benefit.

—Section 63, Finance Act, 1974, allows 25 per cent of the retirement pension to be exchanged for a tax free cash gratuity on retirement.

—Retirement benefits would normally be available at any age between 60 and 70, but for cases of ill-health an earier retirement age is permitted.

—On death prior to retirement all premiums paid will be refunded with or without interest depending on the contract selected.

### Tax relief on pension contributions

Section 63, Finance Act, 1974, reconfirms that premium contributions can be treated as a deductible expense for tax purposes *but doubles the present contribution thresholds.* The maximum contribution which will rank for relief in any tax year will vary according to the date of birth. The following table indicates the maximum contribution now allowable which is in every case the lesser of the two figures shown in columns A and B.

| *Year of Birth* | *A—Maximum % of "Net Relevant Earnings"* | *B—Overriding Maximum Contributions* |
|---|---|---|
| 1909 or earlier | 20% | £2000 |
| 1910 or 1911 | 19% | £1900 |
| 1912 or 1913 | 18% | £1800 |
| 1914 or 1915 | 17% | £1700 |
| 1916 or 1917 | 16% | £1600 |
| 1918 or later | 15% | £1500 |

### Definition of relevant earnings

Relevant earnings are defined as being (in relation to any individual) any income of his, chargeable to tax for the year of assessment in which the contribution is made, being:

(a) income arising in respect of remuneration from an office or employment of profit held by him other than a pensionable office or employment; or

(b) income from any property which is attached to or forms part of the emoluments of any such office or employment of profit held by him; or

(c) income which is immediately derived by him from the carrying on or exercise by him of his profession or vocation either as an individual or, in the case of a partnership, as a partner personally acting therein;

But does not include any remuneration as a proprietary director of an investment company.

The relevant earnings of a married person do not include the income of a spouse notwithstanding that the income chargeable to tax is treated as his income.

### Net relevant earnings

The net relevant earnings could be briefly described as being the total taxable income in any particular year of assessment less the amount of any deductions falling to be made from the relevant earnings in computing the total assessable income for that year.

### Safeguard against fluctuating incomes

Provision is made whereby should a person's net relevant earnings reduce during the currency of his policy so that the contributions paid in any year becomes greater than the amount for which he may claim tax relief, any part of the contribution which does not qualify for relief in any particular year owing to an insufficiency of earnings may be carried forward to qualify for relief as soon as net relevant earnings are high enough to justify relief.

### Method of funding

When this contract was first introduced in 1958 the maximum contribution permitted for persons in the normal age group was £500 per year or 10 per cent of

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net relevant earnings, whichever was the lesser. This restricted limit tended to favour the single premium method of contribution but it is now felt that the present limits would permit most persons to contribute a regular annual premium which could be supplemented where necessary by varying supplementary single premiums. Apart from the older ages the annual premium method will invariably produce the better final pension for any given contribution, particularly when a with-profit contract is utilised. When the retirement annuity was first introduced the non-profit policy was the only contract made available to the Irish market.

Whilst non-profit policies would be considered by most commentators to be no longer an economic or viable proposition for persons in the younger age groups it is surprising to observe that there are but two with profit contracts available in this country at the present time, although it is conceivable that the impetus given to the contract by present legislation will encourage further developments in this area.

### Illustrative example

If we assume that an annual premium contribution of £500 is applied to purchase a retirement annuity at age 65 under a with-profit contract, the following benefits would apply :

| *Age at entry* | 40 | 45 | 50 |
|---|---|---|---|
| Gross premium contribution | £500 | £500 | £500 |
| *Estimated retirement benefits* | | | |
| Option 1: Estimated retirement pension of | £4210 pa | £2610 pa | £1520 pa |
| Option 2: Estimated cash gratuity of | £7440 | £7610 | £2690 |
| plus reduced retirement pension of | £3150 pa | £1950 pa | £1140 pa |
| *No. of years contributing* | 25 | 20 | 15 |
| Total effective outlay allowing for tax relief at | | | |
| 50 per cent | £6250 | £5000 | £3750 |
| 65 per cent | £4375 | £3500 | £2625 |
| 80 per cent | £2500 | £2000 | £1500 |
| Estimated capital value of total retirement benefits as illustrated | £29770 | £18450 | £10750 |

When preparing the above illustration it has been assumed that an average future bonus rate will emerge equal to the underwriters' current scale of distribution.

### Comments on illustrations

The full impact of the tax concessions available can best be illustrated by indicating that for a person aged 40 at entry who is subject to a tax liability of 65 per cent the differential between the effective premium outlay and the total capital value of the benefit provided is such that it would be necessary for him to achieve a gross yield from private investments in the order of 35 per cent per annum or 12.5 per cent per annum after deduction of tax at 65 per cent, to provide similar results.

It is interesting to note that, on retirement, the optional cash gratuity will be at least equal to the total net premium outlay for those taxed at the higher rates.

### Options on retirement

Various forms of pension can be selected on retirement. For the purpose of the above illustration we assumed that the pension would be payable in equal monthly instalments following retirement, ceasing on the death of the annuitant, but with five years payments guaranteed in any event. The guarantee for a minimum number of premium instalments is normally included to safeguard the benefits purchased against the contingency of early death. Whilst it would be normal to include a guaranteed payment period of five or ten years, it is worth noting that a policyholder would have the option of sacrificing a portion of the pension to provide for a reduced income to be payable during the joint survivorship of himself and his wife following retirement. To illustrate this point, it could be stated that one particular underwriter would require the single life pension to be reduced by 21 per cent to include this particular option at age 65 for persons of equal age.

### New innovations introduced by the Finance Act, 1974

*Provision for dependants*—Apart from the improved premium thresholds and commutation option as described above, Section 64, Finance Act, 1974, appears to introduce further benefits similar to those launched in the U.K. in 1970. These are, first, the provision of annuities for dependants, and second, the provision of a lump sum on death prior to retirement for the benefit of one's personal representatives. Heretofore, it was invariably necessary to include some form of temporary life assurance for the protection of dependants to supplement the premium refund on death.

The inclusion of this section in the legislation tends to recognise this factor by providing similar tax incentives to encourage the extension of provision to safeguard one's dependants. The contributions that can be made to this section of the contract is limited to £500 per year or 5 per cent of net relevant earnings. Contributions under this section must be taken into account when applying the premium thresholds on the basic contract, thereby resulting in a reduction in the permissible premium contribution to one's own pension. The pension so purchased for a spouse or dependant may not be commuted for a cash sum.

### Conclusion

The introduction of the commutation option on retirement allows the self-employed person to make provision similar to that available to members of occupational pension schemes. The availability of the cash sum at retirement overcomes the major objection levied at this particular contract in former years, and the new threshold limits now available are such that it would be difficult to disregard this contract in future when planning for retirement The terms for this contract are so varied that professional guidance is to be recommended before reviewing existing contracts or initiating new arrangements to make sure that the policy or policies effected best suit one's particular requirements in the light of the ever-changing conditions.

# Society of Young Solicitors

# Spring Seminar—Galway

There was an attendance of 150 members at the eighteenth seminar of the Society of Young Solicitors which was held in the Great Southern Hotel, Galway, on Saturday, 27th, and Sunday, 28th April 1974.

The first lecture was delivered on Saturday by **Mr. Niall Osborough, LL.M.,** Lecturer in Law, University College, Dublin, on **"Criteria of Criminal Responsibility"**. He stated that the Criminal Law as such, cannot be made to ensure that the actual wrongdoer will in fact be made to answer, either due to (1) the wrongdoing being undetected, or that (2) a prosecution may not follow a detected wrongdoing, or (3) that a Court may enter a finding of "not guilty" against a man who was in fact responsible. The function of the Criminal Law Rules is thus to help delineate the circumstances in which the wrongdoer is in theory to be treated as answerable for his wrongdoing. These rules exert an important influence over the whole process of Criminal Law.

The rules on criminal responsibility necessarily change from time to time. It is proposed to examine the defences of self-defence, insanity and infancy.

**Self-defence**

In this connection, it is proposed to examine the cases of *Bernadette Devlin v Armstrong* (1971) N.I. 13, and *The People* (A.-G.) *v Dwyer* (1972) I.R. 416. Miss Devlin had been charged with riotous behaviour and incitement to riotous behaviour in the Bogside of Derry. Her essential defence was a plea of justification—i.e. that she had acted as she had because she believed honestly and reasonably that the police, on account of previous incursions were about to assault people and damage property in the Bogside. The Court of Appeal dismissed this argument, mainly on the ground that there was no justification in law to incitement to a crime, which is itself considered unjustifiable, as the dangers anticipated should be specific and imminent, whereas Miss Devlin's intentions were too aggressive and too premature. The force used had to be reasonable, and the throwing of petrol bombs was an unwarranted reaction. The argument that there existed a collective right of self-defence arising out of some collective necessity was also rejected.

In *Dwyer's case,* the Supreme Court followed the Australian case of *R. v Howe,* and substituted a verdict of manslaughter for murder. It was held that a person, who has a right to protect himself from unlawful attack does not commit any crime if he uses as much force as is necessary for this purpose. If he uses more force than is necessary, his act is unlawful and, if he kills, the killing is unlawful. If, however, his intention in doing the unlawful thing is primarily to defend himself, he should not be held to have the intention to kill and is thus guilty of manslaughter.

**Insanity**

The most celebrated test of insanity are the *McNaghten Rules* of 1843, by which it had to be clearly established that, at the time of committing the act, the accused was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know what he was doing was wrong. In *Hayes's case* (1967), the first inroad into the McNaghten Rules was laid by Henchy J. who directed the jury to return a verdict of "Guilty—but Insane" if they were satisfied that, at the time of attacking his wife with a hatchet, the accused was so affected by illness that he was unable to restrain himself. Kenny J. followed this direction in the *Coughlan case.* The Supreme Court, per Griffin J., in *Doyle v Wicklow Co. Council* (see *Gazette,* p. 117), has followed this, by stating that the McNaghten Rules do not provide the sole or exclusive test of determining the sanity or insanity of an accused.

**Infancy**

At the age of 7, a boy or girl in the Republic is in theory capable of being deemed fully responsible at law for any crime committed. The former law was very strict, and hanging of children under 16 was only abolished in 1908; here since 1941 it is not lawful to hang anyone under 17. There is, however, a rebuttable presumption that anyone between 7 and 14 is incapable of committing a crime, but it is for the prosecution to rebut the presumption of *doli incapax.*

However, in ordinary cases, from the nineteenth century, it has become clear that the raising of the insanity plea would not lead to an acquittal, but rather to a liability to undergo an indeterminate sentence—detention at pleasure—in special mental hospitals. The Judges now know only too well that a finding of insanity means that administrative arrangements can be made to cope with people who have manifested an intention to act dangerously. In *People* (A.-G.) *v Messitt* (1972) I.R. 204, Kenny J., in delivering the judgment of the Court of Criminal Appeal, said: "While the onus of establishing insanity rests on the accused, it is in our view the duty of the prosecution to give any evidence they have of which the jury might reasonably come to the conclusion that the accused was insane." In this case there was evidence available not given to the jury which established that the accused was an aggressive psychopath who was prone to episodes of uncontrollable violence. There are four appendices to the lecture.

**Mr. Ian Hart, B.A.,** psychologist attached to the Economic and Social Research Institute, delivered the second lecture on **"Modern Views on Penal Institutions"**. An institution is an impersonal social process designed to meet a collective need and imposing obligations as much on those using the service as on those administering it. Insofar as it is impersonal, penal imprisonment is a form of "civilised revenge"—it is difficult to achieve any rehabilitation in an atmosphere where a prisoner becomes less than human.

We need institutional measures providing a wide

range of substitutes for prison, as well as many small residential centres. The fact that most prison sentences do not exceed six months does not detract from the fact that it would be better to impose a fine or probation in the majority of these cases. The emphasis should be not mainly on security, but principally on rehabilitation. Many are recidivists who spend much time in jail, and an intensive vocational and therapeutic effort should be mounted to help them. The views of the Minister, which emphasise the alleged "welfare of the public" in lieu of rehabilitation, should be condemned as out of line with European prison experience. This extreme concern with security is expressed in the fact that a prisoner spends up to fourteen hours per day in his cell. Rehabilitation must extend to the community, who must help a released prisoner to lead a better life. Undoubtedly most of the prison officers are inadequately trained and too closely bound by prison regulations; very little group counselling with prisoners has been established.

It would seem to be necessary to establish four different types of penal institutions: (1) Institutions for recidivists of immature or inadequate personality; (2) Institutions for mentally-handicapped offenders; (3) Residential institutions for alcoholics and drug-addicted offenders; (4) Institutions for all law breakers who constitute definite social risks, such as aggressive types and professional criminals. Young delinquents should be treated in residential institutions but many others could receive community service orders, fines, suspended sentences, or a supervised probation in lieu of prison. The following groups of boys aged fourteen plus on probation are likely to relapse into crime: (1) Boys with a previous history of behaviour disorder; (2) Boys living in disturbed families; (3) Boys who are prone to associa- in disturbed families; (3) Boys who are prone to associate with gangs or bad company; and (4) Boys who commit their offences alone. All of them lack initiative and are unable to stand on their own feet. The social worker, without being paternalistic, should endeavour to befriend the child's family. It would be much cheaper for a probation officer to look after its young people in a residence rather than to have to visit them. Most short-term prisoners should serve their sentence by enforced attendance at weekend probation centres. The idea of a union for ex-prisoners should principally be an instrument for the resocialisation of prisoners. The Simon Community of 700 members and PACE are also doing their best to help prisoners. Lawyers who wish the Children's Act, 1908, to be updated should join CARE.

**Mr. Dermot Gleeson, B.A., LL.B.,** solicitor, delivered the next lecture on **"The Application of the Criminal Code to Children".** Since the *Kennedy Report on Reformatory and Industrial Schools* in 1970, there has been a growing interest in this problem.

Let us first consider the Garda Siochana Juvenile Liaison Scheme, which has been in operation since September 1965. The officers concerned interest themselves in the welfare of potential delinquents. Instead of prosecuting the offender, he is formally cautioned, provided the accused is under 17, admits the offence, has only committed a minor offence, and has not previously come under police notice. Under this scheme, an offender cautioned is kept under informed supervision. Of the 7,000 juveniles dealt with under the scheme between 1965 and 1971 only 13 per cent subsequently became involved in crime. The great majority of children, however, are not cautioned, and must consequently appear in Court.

*The Children's Act, 1908,* has to a large extent replaced the *Summary Jurisdiction over Children Act, 1884.* Juvenile Courts may now generally deal with charges against children up to 17 years of age, and the Courts of Justice Act, 1924, provides for special Juvenile Courts in Dublin, Cork, Limerick and Waterford. The Dublin Metropolitan Children's Court handles over 16,000 cases a year, involving 5,000 children. The jurisdiction of the Juvenile Court in dealing summarily with children under 17 is unlimited, save in cases of murder or manslaughter. Any individual under 15 is deemed a "child" whereas a person between 15 and 17 is a "young person". Juvenile Courts must be held in a private room away from the Courts, but, if there is an appeal to the Circuit Court, no such provision exists in regard to the Circuit Court. The Court can order the attendance of one of the parents of the child, but not both. A child is normally released on bail, but if he is remanded in custody, he has to be sent to the "place of detention", now known as St. Laurence's School, Finglas, Dublin. [Editorial Note: The Children's Court may deal with school attendance problems and, despite the absolute guarantee given exclusively to parents in the Constitution, it has not been unknown for Justices to send away children for schooling to badly-run "residential homes" without proper cause.] As most children plead guilty, the work of the Justice is largely confined to sentencing them.

A survey entitled "The Project on Juvenile Delinquency" was published in *The Irish Jurist,* 1967, and it showed that the average delinquent in St. Patrick's Institution had an intelligence lower than average and committed a crime as a member of a group. There are two possible non-custodial sentences: fining and probation; and four custodial sentences: (1) Children can be sent for one month to a place of detention; (2) Children between 7 and 12 are sent to industrial schools, whereas children between 12 and 16 are sent to reformatories, and children between 16 and 19 are sent to St. Patrick's Institution. Industrial schools are now called "Residential Houses", while reformatories and industrial schools are called "Special Schools". Fines are more effective than probation for first offenders and the Court can order the parents to pay. Probation provides an opportunity for rehabilitation within a social context. While the Court can dismiss the case under the Probation of Offenders Act, 1907, it can also place a child under the supervision of a probation officer. In 1969 there were only six probation officers in the Republic, but now there are eighty. Their main duties are to advise and befriend the offender and report to the Court on his behaviour. In addition the Court may commit the juvenile to the care of a "fit person". Industrial schools are run by the Department of Education, but most of the inmates are not offenders; they are orphans or children whose parents are unable to cope with them as a result of a family breakdown. The present place of detention, replacing Marlborough House, is St. Laurence's School in Finglas. The present male reformatory, replacing Daingean, is at Oberts-town. There are girls' reformatories in St. Joseph's, Limerick, and St. Anne's, Kilmacud. St. Patrick's Institution replaced Clonmel Borstal in 1956 and the majority of male offenders are sent there for detention; there is no corresponding place for girls. In *Sheerin v Kennedy* (1966) I.R. 379, the Supreme Court consid-

ered that offenders should be tried by a jury, and that consequently St. Patrick's was a prison. There are, however, two open institutions which have recently been established—at Shanganagh, Co. Dublin, and at Blacklion, Co. Cavan. All these institutions operate under the completely outdated Rules for the Government of Prisons, 1947. Parole can be given to offenders to work in Dublin during the day, but this has been granted to less than 10 per cent. Offenders may also be released before serving their full sentence. The greater part of the recommendations of the Cussen Report of 1936 and of the Kennedy Report, 1970, have so far remained unimplemented.

The Kennedy Report recommends the raising of criminal responsibility for children from 7 to 12 years. Two suitable lay assessors should assist the Justice as regards sentencing. All sentences should be consistent, which they are not now; sentencing conferences should be held. There is very little research being done which would indicate to Judges whether or not various dispositions of offenders were successful. In practice there is no legal aid in the Children's Court. The State must, however, assume the onus of taking the initial step of securing representation for the child.

It should not be assumed that children can understand a summons or read a statute. A simplified formula should be devised. The best method of eliciting in full the child's own story should be adopted—and the strict Rules of Evidence should be disregarded. The child must primarily understand all the evidence given against him, in order that he may fully challenge and contradict the witnesses against him.

On Sunday morning, April 28, the **Hon. Mr. Justice J. C. Conroy,** President of the Circuit Court, delivered a lecture on **"Criminal Procedure and Evidence".** Article 38 of the Constitution was first cited in full.

If, under Section 19 of the Criminal Procedure Act, 1967, an indictable offence is declared to be a scheduled offence by the Minister, the District Court may try it as a summary offence, if the Court considers it a minor offence, and the accused does not object to be tried summarily. The way in which to distinguish a non-minor offence is to consider the following factors: the statutory punishment, the moral guilt involved, the state of the law in 1937 (when the Constitution was enacted), and public opinion when the statute was enacted. A District Justice has discretion to grant bail in felonies, but must grant it for misdemeanours.

The main objects of the Criminal Procedure Act, 1967, were (1) to replace the preliminary investigation of indictable offences by a more expeditious procedure which normally dispenses with depositions, (2) to extend the powers of prohibiting publication of preliminary proceedings, and (3) to re-enact various enactments relating to bail.

The prosecution serves on the accused the prescribed statutory documents, which he can inspect. The accused is cautioned and if there is a sufficient case, he is sent forward for trial. If the accused pleads "Guilty" of an indictable offence, with the consent of the Attorney-General, he may be tried summarily, and be sent to the Circuit Court to be sentenced; before the 1973 Act there was no appeal.

The District Court cannot grant bail for murder and some offences under the Official Secrets Act, 1963, and the Offences against State Acts; in other felonies and in specified misdemeanours the Justice has discretion. The fact that the accused will commit other offences is not an admissible ground for refusing bail, and the Court must not fix an excessive amount. In most misdemeanours the Justice has to grant bail if the conditions are met. The District Court Clerk must transmit to the County Registrar the prescribed documents within ten days of an accused being sent forward for trial. The indictment must contain a statement of the specific offence charged, and the particulars of the offence should be set out in ordinary language. The Court has wide powers to amend the indictment during the trial. Normally a trial on indictment must be held in public, save in cases of an indecent or obscene nature. An accused must appear in Court personally to be arraigned. If he pleads "Guilty" he is sentenced when the Court has heard pleas of mitigation. If the accused stands mute, a jury is sworn to decide whether he is mute of malice, or mute by the visitation of God. A plea of Autrefois Acquit or Autrefois Convict may be made. If the accused pleads "Not Guilty", the State must prove the case before a jury. The State may ask an unlimited number of jurors to stand by, whereas the accused is only entitled to five challenges without cause shown, but to unlimited challenges with cause shown. When twelve jurors are sworn, the County Registrar reads the indictment to the jury and places the accused in their charge. The verdict of the jury, whether for conviction or acquittal, must be unanimous.

State Counsel opens the case; his duty is to present the facts and to assist the jury in reaching a proper verdict. The State need only produce as witnesses those persons whose attendance they can secure. At the end of the State case, the defence may make a submission that a *prima facie* case is not made out, and if the Judge accedes to it, he directs the jury to acquit the accused. Normally the accused will then present his case to the jury and will call such witnesses as are available. If the accused is not professionally represented the Judge must tell him that he can either give evidence subject to cross-examination, or make an unsworn statement, or say nothing. A free and voluntary statement admitting guilt is only evidence against the accused personally —not against his co-accused. The police must administer the caution in accordance with the nine Judges Rules of 1912 listed. The Judge must rule upon the admissibility of the statement, whereas the jury considers the weight to be given to the contents. When speeches have been made by the prosecution and by the defence, the Judge sums up the case. The summing up is intended to be a direction as to the law and evidence raised as will guide the jury properly as to what the issues are. The Judge determines finally all questions of law, and decides on the admissibility of evidence; he must present this evidence accurately and adequately. The jury alone determines the sufficiency and effect of the evidence, and whether this leads to innocence or guilt.

Generally an accused is presumed to be innocent until he has been found guilty. It is, therefore, for the State to prove his guilt. The jury must be satisfied beyond reasonable doubt of the accused's guilt, and if two constructions of any incident is possible, the one most favourable to the accused should be adopted. If the jury is not unanimous in their verdict, there must be a re-trial. Some evidence is unworthy of belief unless it is corroborated. By statute, no one can be found guilty of treason or perjury or of driving at an excessive speed, if the evidence is only tendered by one witness. In prac-

tice, the Judge must warn the jury that it is dangerous to convict an accused on the uncorroborated evidence of accomplices, or in cases of sexual offences against women or between males, that the jury should not convict on the evidence of the alleged injured party alone. The evidence in a corroboration must be evidence which implicates the accused. Where a case depends on visual identification, the jury must be told that it is dangerous to act on this evidence.

A jury which is unable to agree upon a verdict is discharged. The possible sentences are: death for defined capital murder; penal servitude—maximum life. If not specified in a felony before 1891, the maximum is 7 years. The maximum statutory term of imprisonment is 2 years, but is unlimited in the case of Common Law offences.

An appeal from the Central or Circuit Criminal Court is taken to the Court of Criminal Appeal. Unlike England, only one judgment may be given. If a Certificate for Leave to Appeal is refused by the trial Judge, the appellate Court will normally grant it if a question of law is involved or if the trial was unsatisfactory. The hearing is based on the stenographer's note of the hearing. The Court of Criminal Appeal may refuse the application, or affirm the conviction, or quash the conviction either wholly or by ordering a retrial.

**Mr. Geoffrey Bing, Q.C., C.M.G.,** former Attorney-General of Ghana, delivered a lecture on Sunday afternoon, April 28, on **"Law Reporting in the Irish context".** He emphasised that a lawyer may well know of the existence of some case which is similar to the one with which he is engaged, but he has no means of obtaining the appropriate judgment. Writers of textbooks cannot bring them up to date if they have not access to the most recently-reported cases.

The present indexing system in England was devised in 1951 by Mr. Raoul Colinvaux. The Red Index principle is now well established in England and should be extended to Ireland. From the early nineteenth century, there are excellent sets of Irish Law Reports available, but their real significance in modern conditions has not yet been estimated. In England, it has proved a commercial success to reprint the 178 volumes of old English Reports up to 1865.

Irish Statute Law is unsatisfactory insofar as relatively little consolidation appears to have been done since 1922, and several annual volumes of statutes may have to be examined in order to determine the current law. One must also take into account the Irish Constitution of 1937, which, as the supreme law, has implicitly repealed many old statutes. Sometimes the words of a statute are unintelligible unless one knows the meaning the Courts have placed upon a particular phrase, which can be learnt from law dictionaries. Past cases, however, have to be treated with respect and reserve, as subsequent statutes may have amended the decisions.

The lecturer then compared the history of law reporting in England with that in Ireland. In November 1852, under the inspiration of the Church of Ireland Bishop of Limerick, Dr. Graves, a learned commission was established, charged with superintending and carrying into effect the transcriptions and translation of the ancient laws of Ireland—a work which was published in two volumes by Professor Neilson and the Rev. Thadeus O'Mahony in 1869. In trying to establish the system of English Law Reporting in Ireland, Sir John Davies found out that Ancient Irish Law was based upon generally acceptable and authorised commentaries. His II Reports were written in Norman French in 1615, but the English edition was only published in Dublin in 1767. Finlay's "Digested Index to all Irish Reported Cases in Law and Equity" followed in 1818. Ridgway collaborated with Schoales in the only volume of "Irish Term Reports" from 1793 to 1795. In Ireland, a Council based on the English model began supervising law reporting in 1867. These had been preceded by the series known as "Irish Law Reports" (1838-49) and "Irish Equity Reports" (1838-49) to be followed by the series of "Irish Common Law Reports" (1849-66), and "Irish Chancery Reports" (1849-66)—a total of 60 volumes. Judgments under the Irish Criminal Law Procedure Act" were only published in 1903. After 1867, the Council of Law Reporting appointed editors and reporters. The 32 volumes of "Law Reports (Ireland)" (1878-93) were published indirectly by Ponsonby on behalf of Council but from 1894 the Council took full responsibility with the modern series of "Irish Reports". The Council of Law Reporting for Northern Ireland started publishing the "Northern Ireland Law Reports" from 1925. The time has, therefore, come to consider proposals for the general improvement of Irish law reporting. An English expert has recently stated that the standard of headnotes in the Irish Reports was particularly high. Fortunately the Irish reporter wastes little time on counsel's argument.

The main problem is which Irish cases should be reported and which not. Inevitably some cases which at the time were unimportant may become important later. [Editorial Note: The lecturer suggests that four volumes of unreported cases would be sufficient, but it would seem that, if it were to be complete, at least ten volumes would be required.] Another difficulty is the length of time that arises between the date of the judgment and its publication, which is often due to delay in revision on the Judge's part. As Ireland has had written Constitutions since 1922, many cases dealing with the interpretation of written Constitutions have great persuasive effect outside Ireland; there were some great Judges like Chief Baron Palles. Unfortunately the modern Irish Law Reports lack a comprehensive index: they contain much law and much truth but it is drowned in a sea of words. The new Index should be based on the pattern of the English Red Index, and it should be brought up to date from time to time; all cases in it should be indexed on an all-Ireland basis.

Apart from indexing, it would be essential to have some form of immediate reporting, such as is now available in the London *Times*. The English Law Reporting Committee in 1940 reported that the majority of cases were dictated, but not read by Judges. Prof. Goodhart suggested that official shorthand writers should be attached to all Courts to transcribe all judgments, which would be revised by Judges within a week. The judgments could then be returned to a central office of the Law Courts and should be available at a reasonable fee. The most practical step would be to provide a service by which cases are reported with sufficient authority to permit them to be accepted by Judges. Obviously such a scheme would require side support from the legal profession, as the newspaper would have to go to the expense of appointing a full-time editor and many reporters from the Bar. Apart from that, Irish and English practitioners have always

sought a periodic publication, be it weekly, bi-weekly or monthly, which contains only up-to-date case reports; this used to be fulfilled in England by the *Law Journal* and the *Law Times*. The lecturer then mentions the "Weekly Notes", the "Times Law Reports", and the up-to-date "All England Law Reports" and "Weekly Law Reports".

The present system of law reporting in Ireland is not built on a very systematic basis. There is something to be said for producing criminal statistics, showing which offences are normally dealt with by fine or by imprisonment.

Finally, why should not a report of a case signed by a solicitor as an officer of the Court not have equal value in the Courts to that signed by a barrister? Special pleaders and conveyancers used to be admitted as Court reporters. Case reporting consists in first obtaining expeditiously a copy of the written judgment as delivered at the time. The solicitor can often employ a skilled shorthand writer from amongst his staff to prepare this. The difficulty is in writing the headnote of a case. If law is developed in both parts of Ireland in a progressive and liberal form in order to promote mutual co-operation and understanding, this will be bound to affect the future.

[Editorial Note: Since March, it is unfortunate that a Receiver has been appointed to supervise the affairs of Irish University Press Ltd., who were carrying out such splendid work in republishing many important Irish books that were out of print.]

# Appointments to Law Society

**New Special Examiners**

Mrs. Mary Mathews, U.C.D., B.C.L. (N.U.I.), LL.M. (N.U.I.)—*Special Examiner in Contract and Commercial Law.*

Mr. E. J. Grace, A.C.A., A.C.I.S., Chartered Accountant—*Special Examiner and Lecturer in Book-Keeping.*

Mr. Alvin F. M. Price, U.C.D., B.C.L. (N.U.I.)—*Special Examiner in Real Property.*

Mr. J. F. Quinlan, B.L.—*Special Examiner and Lecturer in Tax Law.*

Mr. P. F. Clyne, B.A., LL.B., Solicitor—*Special Examiner and Lecturer in Statutory Land Law.*

**New Assistant Examiner**

Mr. A. W. Scott, B.L., LL.B. (London)—*Assistant Examiner in Company Law.*

# Admission of Parchments

The next Presentation of Parchments will take place on Thursday, 5 December 1974, at 4 p.m.

Apprentices whose indentures have expired and have passed all the Society's examinations and who wish to receive their parchments should lodge with the Society **on or before November 20** their full name and address in Irish and English together with a Form AE 5 completed by the apprentice and the master.

Please note that no applications will be accepted after **20 November 1974.**

# Kings Inns Library—Gift of Law Books

On 3 September 1974 the President of the American Irish Foundation, Mr. T. Kevin Mallen, presented about 300 volumes on American law and jurisprudence to the King's Inns Library, in Dublin. These include all reports of the American Supreme Court since 1861. The Foundation intends to make a further presentation of books.

Among the attendance was the Taoiseach, Mr. Cosgrave; the Minister for Education, Mr. Burke; the United States Ambassador, Mr. John Moore; the Attorney-General, Mr. Costello, and the President of the Law Society, Mr. Peter Prentice, as well as the Chief Justice, the President of the High Court and other Judges. Mr. John A. Costello, S.C., accepted the presentation on behalf of the Benchers. Mr. Justice Walsh thanked Mr. Mallen for the generous gift of books presented by the American Foundation.

The American Irish Foundation has been quite active in the past two years: it made a presentation to Mr. Seamus Heaney; made a grant available for the cataloguing of the O'Connor archives in Clonalis House, Castlerea, Co. Roscommon; gave a grant to the Ulster Museum to aid the exhibition of artifacts taken from the wreck of the Girona, a ship of the Spanish Armada; and provided financial support for the Killarney Bach Festival.

**PRECEDENT BANK AND ENGROSSMENT SERVICE**

**We wish to inform our members that the above service has been discontinued and is no longer available.**

JAMES J. IVERS (Director-General)

# OBITUARY

**Mr. Robert Frewen** died on 6 May 1974. Mr. Frewen was admitted in Michaelmas Term, 1928, and practised under the title of William Frewen & Son in Tipperary.

**Mr. John C. O'Carroll** died in the Richmond Hospital, Dublin, on 24 August 1974. He was admitted in Trinity Term, 1945, and practised under the title of Wells & O'Carroll in Carrickmacross, Co. Monaghan. Mr. O'Carroll was State Solicitor for Co. Monaghan, and had been for a few years the Ulster Provincial Delegate on the Council.

**Mr. Michael Boland** died at his residence, Mill House, Rineen, Skibbereen, Co. Cork, on 21 August 1974. Mr. Boland was admitted in Michaelmas Term, 1935, and practised as senior partner in the firm of Messrs J. Travers Wolfe and Co., Market Street, Skibbereen, and Bantry, Co. Cork.

**Mr. Reginald J. Nolan** died in Kilkenny on 26 August 1974. Mr. Nolan was admitted in Michaelmas Term, 1924, and practised as senior partner of the firm John Lanigan and Nolan, 81 High Street, Kilkenny.

# NOTICES

**May (otherwise Mary Josephine) Maguire, deceased,** late of 38 Windsor Road, Rathmines, Dublin 6. Would any solicitor having knowledge of a will of the above named deceased kindly contact Arthur Cox & Company, Solicitors, 42-43 St Stephen's Green, Dublin 2.

**John McDonagh** late of the Imperial Hotel, Cork, and Esker, Athenry, Co. Galway. Any person having a will of the above deceased who died on 24 July 1974 as a result of a car accident at Mallow, would you please communicate with the undersigned solicitor for the intended administrator of the deceased. Florence G. MacCarthy, Solicitor, Loughrea, Co. Galway.

**Lady Solicitor** required as assistant for busy provincial office in County Tipperary. Some experience in Probate practice essential. Replies in confidence to Box 110.

**Any Member** requiring a photocopy of the judgment, *Glover v B.L.N. Ltd.;* unreported; Kenny J.; 31 July 1968; 78 foolscap pages; may obtain same from the Library at a reduced price of £3.00 -only one copy available.

# Book-Keeping Examination Results

At the Book-Keeping Examination held on 24 June 1974 the following candidates passed.

*Passed with merit*--(1) Michael G. Brennan; (2) Timothy Boucher-Hayes, B.C.L.; (3) Roderick Buckley, M.A.; (4) James M. Devlin, B.A.; (5) Eugene P. Fanning, B.C.L.; (6) Michael C. Ahern, B.C.L., LL.B., (7) Marie G. Connellan.

*Passed*—Dermot Agnew; Catherine Bergin, B.C.L.; John G. Brady; Cornelius D. Brosnan; Niall B. Browne, B.Sc.; Daragh Buckley, B.C.L.; Nicholas A. Butler; Eamonn B. Byrne, B.A. (Mod.); John J. Carlos; John R. Carroll; Margaret M. Carter; Beatrice M. Carton, B.C.L.; Hugh A. Carty; Niamh F. Casey; Terence Coughlan.

Aidan D. Collins, B.C.L.; Frances Cooke; James P. Courtney, B.C.L.; Donagh J. M. Crowley, B.C.L.; Gerard Cummiskey; Anastasia M. Cunningham, B.C.L.; James Macartan Daly, B.C.L.; Geraldine A. Davy, B.C.L.; Anne M. Delaney, B.C.L.; John G. Dillon-Leetch, B.C.L.; Anthony J. Doherty, B.A., LL.B.; Randal L. Doherty, B.C.L.; Ivan Durcan; Paul Ferris; Hugh M. Fitzpatrick, B.C.L.

Grace M. French, B.C.L.; William J. J. B. Garvan, B.Sc.; Geraldine Gaughan, B.C.L.; John W. Gaynor, B.A. (Mod.); Michael A. Greene; John M. M. Griffin, B.C.L.; Alice B. J. Hanahoe, B.C.L.; Michael Hanrahan; John Hayes; Thomas Hayes, B.C.L.; Henry N. M. Healy; Declan Hegarty; Mary F. Hutchinson, B.C.L.; Caroline Keane, B.C.L. Eimear O'B.-Kelly.

Anne E. Kennedy; Niall D. Kennedy; Simon W. Kennedy; Gillian Kiersey; Thomas King; Joseph F. Langwell; David B. Leon; Maurice J. Linehan, B.C.L., LL.B.; Francis J. Lowney, B.C.L.; Helen Lucey, B.C.L.; Margaret Lucey, B.C.L.; Hugh F. Ludlow; Ronald J. M. Lynam; John R. Lynch; Neasa MacDonagh, B.A.; Daniel T. Maher.

Noel Malone; Patrick J. Minogue; Bryan McAllister; Sarah A. McAuliffe, B.C.L.; Patrick J. McCartan; Michael J. K. McCarthy, B.C.L.; Roderick McCrann, B.C.L.; Rory McEntee; Fiona McGuire, B.C.L.; Anne McKenna; David F. McMahon, B.C.L.; David C. O'Brien; James D. O'Brien, B.A., LL.B.; John J. O'Brien; Isolde A. O'Connell, B.C.L.; Patrick O'Connor, B.C.L.; Hugh O'Donnell.

John V. O'Dwyer; Kathleen O'Leary; Donal Ó hUadhaigh; Michael J. O'Malley, B.C.L.; Anne P. O'Regan, B.C.L.; Brian P. O'Reilly, B.C.L.; John J. O'Shee; Thomas V. O'Sullivan; Geraldine M. Pearse, B.C.L.; Odran J. Rochford; Rosemary A. Ryan, B.C.L.; Linda Scales; Michael J. Sherry, B.C.L.

Bryan C. Sheridan, B.C.L.; Thomas J. Stafford, B.C.L.; Michael Staines, B.C.L.; James D. Sweeney; Joseph R. Sweeney; Terence D. Sweeney, B.C.L.; William Synnott; Dorothy Tynan, B.A.; Rosaleen Tyndall; Catriona Walsh; Michael P. Walsh, B.A.; Roderick St. J .Walshe; Henry J. Ward, B.A.; Brian S. Whitaker, B.C.L.; Michael White, B.C.L.

139 candidates attended; 113 candidates passed.

By order: James J. Ivers, *Director-General.*

# Trinity College, Dublin, Apprentice Elected as Legal Scholar

The Board of Trinity College, Dublin, met to elect to Fellowship and to foundation and non-foundation scholarships. Eleven Fellows and twenty-two scholars were elected. The results of the election were announced by the Provost from the steps of the Public Theatre.

Amongst these was:

**Foundation Scholar—Faculty of Arts, Legal Science:** McGOVERN, Patrick Joseph Conor (Belvedere College, Dublin). Mr. McGovern is apprenticed to Mr. Patrick O'Sullivan, Solicitor, Dame Street, Dublin 2.

# THE REGISTER

D. L. McALLISTER (Registrar of Titles).

**Issue of New Land Certificate**

An application has been received from the registered owner 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 wil lbe issued unless notification is received in the Registry within twenty eight days from the date of publication of this notice that the original certificate is in existence and in the custody of some person other than the registered owner. Any such notification should state the grounds on which the certificate is being held.

Dated this 30th day of September, 1974.

D. L . McALLISTER (Registrar of Titles).

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

**Schedule**

(1) Registered Owner: Evelyn Egan. Folio No. 16213. Lands (1) Rickardstown. Area (1) 13a. 0r. 0p. Folio No. (2) 16231. Lands (2) Rickardstown. Area (2) 7a. 3r. 24p. Folio No. (3) 16231. Lands (3) Barbavilla Demesne. Area (3) ?—?—?—?— County Westmeath.

(2) Registered Owner: Patrick Joseph Farrell. Folio No. 1967. Lands: Carrowstrawley. Area: 28a. 1r. 4p. County Longford.

(3) Registered Owner: Anne Bourke. Folio No. 8874. Lands: Streamstown. Area: 5a. 2r. 8p. County Mayo.

(4) Registered Owner: Mary Murray. Folio No. 1437. Lands: Part of the lands of Tobeen containing Area: 12a. 2r. 3p. Statute Measure. County Dublin.

(5) Registered Owner: Mary Glynn. Folio No. 2021. Lands: Crannagh More. Area: 18a. 1r. 10p. County Roscommon.

(6) Registered Owner: The Very Reverend Mark O'Gorman. Folio No. 5229. Lands: Ballask. Area: 0a. 0r. 16p. County Wexford.

(7) Registered Owner: William St. Jude Huggard. Folio No. 8004L. Lands: Part of the Townland of Butterfield of Rathdown. Area: 0a. 0r. 16p. County Dublin.

(8) Registered Owner: Catherine Sheridan. Folio No. 7433. Lands: Kilnaleck. Area: 3a. 0r. 35p. County Cavan.

(9) Registered Owner: Mary Moran. Folio No. 2431. Lands: Calverstown. Area: 9a. 0r. 0p. County Kildare.

(10) Registered Owner: Brian O. O'Driscoll. Folio No. 11892. Lands: Goldenhill. Area: 1a. 0r. 0p. County Wicklow.

# INCOME TAX

WHEREAS it is provided by the Income Tax Acts that every person who is entrusted with the payment of any dividends which are payable to any person in the State out of any public revenue other than that of the State; or who has entrusted to him any interest, dividend or other annual payments payable out of or in respect of the stocks, funds, shares, or securities of any body of persons not resident in the State for payment to any person in the State shall, within one month, after being so required by notice published in IRIS OIsIGIUIL, deliver to the Revenue Commissions an account in writing, giving his name and residence and a description of the dividends, interests or other annual payments entrusted to him for payment; and whereas by the said Acts, it is further provided that any person or body of persons who neglects or refuses to deliver any such account as aforesaid shall be liable to penalties specified in Sections 500 and 503 of the Income Tax Act, 1967.

NOTICE is hereby given to all persons entrusted with the payment of any such dividends, interest, or other annual payments as aforesaid that the accounts of the said dividends, etc., required by the said Acts are to be delivered in writing to the Revenue Commissioners at their office, Dublin Castle, addressed to their Secretary, within the space of one month from the date hereof.

**Dated this 11th day of September, 1974.**

**J. F. Richardson,**

**Rúnaí.**

**Office of the Revenue Commissioners,**
**The Castle,**
**Dublin 2.**

THE GAZETTE OF
THE INCORPORATED
LAW SOCIETY
OF IRELAND

November 1974
Vol. 68 No. 9

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# Annual Report of the Council 1973-74

THE PRESIDENT REPORTS

1.1 We are attempting a change this year in our method of reporting the proceedings of the Council to the Profession. Hitherto a separate report of the Council has been circulated to members and has been prepared by the Secretariat. This year instead of a separate publication we are using the *Gazette* as our medium of communication.

1.2 The Report now takes the form of a separate report from each of the Committees of the Council. Most of the day to day work of the Council is carried out by its Committees who have their proceedings approved by Council and our new form will, I hope, commend itself to members and give a better appreciation of the work of the Council.

1.3 This year has been one of considerable activity. The most important development has been the signing of the Statutory Order which reforms our educational system. This Order has been the result of very considerable work and negotiation and patient planning over a considerable number of years and it is of great satisfaction to me to see it completed.

1.4 The reports which follow outline our other activities during the year.

1.5 During the year I have visited Vancouver and attended the bi-annual Meeting of the International Bar Association there as the Society's representative. I have been the guest of the European Court in Luxemburg, of the Scottish Law Society at their Annual Conference and have attended by invitation the opening of the Law Term in London in October and regrettably missed the Law Societ'ys weekend meeting at Harogate because of a bout of flu.

1.6 I would like to record my best thanks for all the invitations and hospitality which I received from local solicitors' associations throughout the country during my year of office—too many to detail as I would have liked—and to state how much I have appreciated all the hard work, courtesy and help which I have received from all members of the Society's staff at all times throughout my year of office and the encouragement which I have received from the Council members and from so many of my colleagues from all parts of the country.

Peter D. M. Prentice

President

*The President, Peter D. M. Prentice*

## COUNCIL

Peter D. M. Prentice,
*President*

William A. Osborne
Bruce St. John Blake
*Vice-Presidents*

2.1 The year under review marks a milestone in the history of the Society in that Mr. E. A. Plunkett retired from the office of Secretary after many years of faithful and untiring service. The occasion of his retirement was marked by a presentation at the Annual General Meeting, November 1974.

2.2 In anticipation of Mr. Plunkett's impending retirement Council sought the advice of a Management Consultant as to how best the post of the Society's Chief Executive should be filled. He recommended the filling of the post by way of open competition and that it should be entitled "Director General" in keeping with the developing role of the Society and the new challenges it would face in the years ahead. Mr. James J. Ivers took up duty on 1st October 1973.

2.3 In its ordinary workings the Council delegates the processing of routine work to its Committees. This leaves it free to consider policy recommendations arising from the Committees and matters of urgent public importance.

2.4 Council's major task in 1973/74 was in the educational field. As a result of the work of the Court of Examiners, it was in a position to make progress on the entry level to the profession to the extent that as from 1st October 1975, the normal method of entry will be by way of a university degree. To progress the matter further, on the recommendation of the Court of Examiners, Council has now established a sub-Committee charged with the specific task of preparing in detail the new educational arrangements. This Committee, which is widely drawn, has already commenced its work.

2.5 Because of the provisions contained in the White Paper on Capital Taxation, the Finance Act, 1974 and the efforts of the Revenue Commissioners in relation to Section 176 and 500 of the Finance Act, 1967, much of Council's time was devoted to consideration of reports from the Parliamentary Committee, deputations and legal opinion on these topics.

2.6 With the assistance of the Parliamentary Committee and special interest groups, Council ensured that the Society's viewpoint on pending legislation and Government White Papers was submitted to the appropriate authorities. As and when suitable, these views were also communicated to the public through the medium of the Press and radio/television. Council records its appreciation of the support given by the Communications media throughout the year.

2.7 In an effort to overcome delays and, where possible, simplify procedures Council initiated discussions with the various public service offices with which the profession has contact. While it was not possible to meet the Society's viewpoint in all areas, reasonable progress has been made. The situation will be kept under review. Thanks are expressed to the officers in the various offices including the Department of Justice, Land Registry, Land Commission, Estate Duty Office and Valuation Office.

2.8 Council initiated a major review of conveyancing procedures and established a special committee for the purpose under the Chairmanship of Mr. Anthony Osborne. The Committee hopes to present its report to the Summer Meeting, 1975.

2.9 Because of the increasing impact of E.E.C. developments a special committee under the Chairmanship of Mr. B. O'Connor was set up to review and process all matters relating to Company Law.

2.10 In the international area Council maintained its connection with the I.B.A. and joined the Commission Consultative des Barreaux and the UINL. It was represented at the meetings of all these bodies.

## REGISTRAR'S COMMITTEE

Gerard M. Doyle,
*Chairman*

Walter Beatty
John F. Buckley
Anthony E. Collins
Laurence Cullen
James R. C. Green
Brendan A. McGrath
Patrick F. O'Donnell
David R. Pigot
Mrs. Moya Quinlan

3.1 Under the Bye-Laws of the Council the following are delegated to the Registrar's Committee:

(1) The functions of the Society under Sections 31, 33, 34, 35, 48, 49 and 51 of the Solicitors' Act 1954 and under regulations made pursuant to Section 40 (2) (a), 40 (5) (b) and 66 of the said Act and the functions of the Society under Section 26 of the Solicitors' (Amendment) Act 1960.

(2) The consideration of complaints against Solicitors.

(3) The institution of proceedings against Solicitors on behalf of the Society before the Disciplinary Committee for the time being of any Court.

Consequently the Committee are able to deal with these matters without referring them back to the Council for approval. From the above it is fair to say that in general all matters within the jurisdiction of the Registrar's Committee relate to the fitness, capacity and conduct of Solicitors.

3.2 During the year the Committee held 16 Meetings and dealt with about 300 cases of complaints against Solicitors. These were the cases which could not be resolved by the Secretariat of the Society due to lack of co-operation by the offending Solicitor or because of the circumstance of the case.

Upwards of 20 letters of complaint are received by the Society each week. A random spot check for the month of March 1974 disclosed that 86 letters of complaint went out to various Solicitors. These letters did not include the more obvious complaints which the Society cannot entertain.

3.3 Complaints in writing when received are read by the Secretariat. If an obvious form of reply is not available the Society sends a copy of the letter to the Solicitor named in the letter with a request for the Solicitor's assistance in answering the letter addressed to the Society. A complaint is very often in manuscript and furthermore may disclose a complete lack of knowledge of the legal procedures involved. However, the Society must read a letter of complaint as a query and write to the Solicitor concerned to fill in the particulars which may be absent. The alternative would be to write to the complainant requesting further and better particulars in order to satisfy the Secretariat that a prima facie complaint may lie against the Solicitor.

3.4 The most regular types of complaint are set out hereunder and there is no doubt that in recent times, the number of complaints has increased and the public esteem of the Profession is suffering sadly through the bad conduct of some Solicitors. In the course of its work over the year the Committee has noticed that there are persistent malefactors whose names come up time and time again. The Committee has power and uses it from time to time to summon such Members before it in the hope that they will do something in ease of a long suffering client, or relieve a fellow colleague of further stress by dealing with the particular problem involved.

3.5 If Solicitors are to remain in the forefront as an independent Profession, then the execution of their duties in a conscientious, diligent and reasonably speedy way is paramount as the public (backed up by many vigilant bodies of social reform) will no longer tolerate some of the treatment meted out to them by some of our members against whom justifiable complaints are made, but seek to have their legal affairs dealt with, perhaps by a State legal service bureau.

3.6 *The more frequent complaints are as follows:*

(i) *DELAY:* Very often a person makes a complaint about another party's Solicitor holding up a transaction. In such a case the Society generally writes to the complainant informing him that the Society must decline to intervene in the matter as there is no Solicitor/Client relationship between the complainant and the Solicitor concerned. The Society's consideration of the complainant query should not purport to offer any opinion on the legal aspect of the matter.

*Gerard M. Doyle,*
*Chairman*

(ii) *TITLE DOCUMENTS:* Where a complainant writes to the Society stating that he cannot get documents from his Solicitor, the Society writes two letters; one to the complainant stating that the matter is clearly provided for in Section 11 of the Attorneys' & Solicitors' Act 1849 which allows a person to apply to Court etc. and the other to the Solicitor advising him of the complaint made and also of the advice given to the complainant.

(iii) *LEGAL ADVICE:* Persons writing for Legal advice are informed that they should consult a Solicitor.

(iv) *NEGLIGENCE:* If a complainant alleges that a Solicitor has been negligent, the Society will write to him stating that it may only entertain complaints which allege professional misconduct. The term "Professional Misconduct" is defined for the complainant and he is informed that it does not include negligence by Solicitors. Consequently, the Society must decline to intervene in the matter.

(v) *BILLS OF COSTS:* Sometimes persons write to the Society stating that they have been overcharged by their Solicitors. The standard form of reply is that the Society has no jurisdiction in matters relating to Solicitor's Costs which are controlled as a matter of law. However, the Society may be prepared to express views on the correctness of a Bill of Costs on receiving same from the Client and on hearing from the Solicitor concerned.

(vi) *THEORETICAL COMPLAINTS:* Any complaint which does not state the name and address of the Solicitor concerned is not answered directly. The Society writes to the complainant informing him that in order to properly consider the matter it is necessary to have the name and address of the Solicitor concerned.

3.7 Up to recently every complaint to a Solicitor warranted three reminders to the Solicitor concerned on the part of the Society. Now the Society will send one reminder only where the matter is a serious matter or the Solicitor concerned has shown no inclination in the past to respond to the Society's correspondent.

3.8 *THE INSTITUTION OF DISCIPLINARY PROCEEDINGS AGAINST A SOLICITOR:* The Registrar's Committee are responsible for instituting Disciplinary proceedings against Solicitors. The two most likely areas (apart from a Complaint) where a standard procedure would be desirable is in relation to:
(a) Failure to submit an Accountant's Certificate;
(b) Failure to take out a Practising Certificate.

3.9 The Registrar's Committee feels that its role is one of help to the erring Solicitor even at a time when he has been given every chance to rectify the complaint against him. The work of the Committee is both arduous and time-consuming.

## COMPENSATION FUND COMMITTEE

Gerard M. Doyle,
*Chairman*

Walter Beatty
John F. Buckley
Anthony E. Collins
Laurence Cullen
James R. C. Green
Brendan A. McGrath
Patrick F. O'Donnell
David R. Pigot
Mrs. Moya Quinlan

4.1 The profession are obliged by statute to provide full indemnity to members of the public who may suffer loss as a result of defalcation by any practising solicitor. The contribution for the year under review was fixed at £20.

4.2 Payments from the fund in respect of ascertained losses and other expenses during the year amounted to £15,354.

4.3 The book value of the Fund as at 30th April 1974 was £375,201.

4.4 The report of the Compensation Fund for the year ended 30th April 1974 is considered satisfactory.

## PRIVILEGES COMMITTEE

Michael P. Houlihan,
*Chairman*

William B. Allen
John Carrigan
Joseph L. Dundon
Thomas Jackson
John B. Jermyn
Francis Lanigan
Gerald J. Moloney
George A. Nolan
John C. O'Carroll
Rory O'Connor
Bryan Russell

5.1 Under the Bye-Laws of the Council the function of the Privileges Committee is as follows: "The Privileges Committee shall report to the Council on matters and rights affecting the difficulties and rights of Solicitors and in cases of urgency take such action as may appear necessary without reporting to the Council."

5.2 The Committee met regularly before each Council meeting and considered all matters before them on their Agenda. Among the matters considered by the Committee were the following:

(a) The difficulties between the Medical Profession and the members of our Profession with regard to the payment of witnesses expenses, and efforts to agree the witnesses expenses with the I.M.A. and I.M.U.

(b) Professional Indemnity Insurance with Irish Underwriting Agencies.

(c) Barristers appearing in Court without proper attendance—numerous complaints from Bar Associations.

(d) Complaints from the Profession about the failure of Doctors and Surgeons to furnish medical reports.

(e) The question and problem of Gazumping.

(f) The charges of the Agricultural Credit Corporation.

(g) Complaints by Counsel of the non-payment of fees by Solicitors.

(h) Undertakings required by Banks and Lending Institutions.

(i) The question of opening an office in Paris in conjunction with a French Firm.

(j) The question of acting *en bloc* for purchasers in a Building Estate.

(k) Meetings were held with the Chief State Solicitor, representatives of the P.M.P.A. Insurance Co. and the two Taxing Masters to resolve difficulties that arose.

(l) Numerous complaints were dealt with, with regard to breaches of undertakings, as between members and Lending Institutions and as between members themselves.

(m) Several complaints were received with regard to Company formation and one matter has been referred to the Council's Legal Advisers.

(n) Contentions between members of the Profession were by agreement, submitted for consideration by the Privileges Committee and were resolved.

(o) The Committee considered the difficulties of certain members of the Profession *vis-à-vis* the Courts and certain specific difficulties that arose in certain areas.

(p) The Committee also considered the question of Northern Ireland Solicitors practising without holding a Practising Certificate in the Republic of Ireland.

5.3 The most frequent complaint or difficulty placed before the Committee for consideration related to undertakings. It appears that the demands of the banking and commercial world on the Profession for undertakings on behalf of clients are becoming far too frequent and such undertakings are being given without the necessary authorities of an irrevocable nature from clients and without due consideration by members of the Profession of their ability to fulfil the undertakings.

5.4 Certain members of the Profession have had to pay out of their own pockets very considerable sums of money in compliance with their personal undertakings in the past and this Committee feels it should bring to the attention of the Profession the necessity to reconsider the practice and procedure for giving such undertakings at all.

*Michael P. Houlihan, Chairman*

5.5 It has become obvious that in certain instances clients have been utilising the known procedure for giving undertakings (which after all, are given without charge) to deceive Banks or Lending Institutions to their own gain and members of the Profession are warned to keep a record of all undertakings given and to refuse to give them except where absolutely necessary, and then only when properly protected. A Solicitor should never give an undertaking which is not in his own power to carry out.

5.6 Arising out of certain difficulties that have come to the attention of the Privileges Committee, meetings were arranged between the representatives of the M.U. and I.M.A., the Taxing Master and the Costs Accountants Association. It is proposed to prepare a memorandum as a result of these meetings for circulation to the Profession to assist in the expeditious taxing of costs and to keep the Profession advised on up-to-date developments.

5.7 It would assist the Committee greatly when submitting matters for consideration by the Law Society and the Council, if those members and Institutions who were making the submissions, furnished copies of all their correspondence referred to, and of all the documents supporting same.

5.8 The Privileges Committee meets once a month and it has been found necessary to adjourn matters repeatedly because of the lack of complete information which may have to be requested several times. If the facilities of the Committee are in future sought, the fullest possible information should be submitted with the original request.

## PARLIAMENTARY COMMITTEE

John J. Nash, *Chairman*

William B. Allen
John B. Jermyn
Francis J. Lanigan
Patrick McEntee
Patrick Noonan
Peter E. O'Connell
Robert McD. Taylor

6.1 The purpose of legislation is to attain the common good by regulating the rights and obligations of citizens of the State towards one another and their obligations to the State itself. Legislation is man's fallible attempt to emulate the Divine ideal of justice. In an ideal State legislation would be judged by the extent to which it advances the ideal of Justice.

6.2 Bills which come before Parliament are formulated by legislators who in many cases necessarily are dependent on popular support for re-election. Frequently they must please a majority rather than avoid an injustice to a minority, and are often forced to appear right than to be right. Legislation is influenced by pressure groups who are selfish. It is supported or opposed in public by party politicians, often on an emotional rather than an intellectual basis. It is considered (if at all) by citizens who are disinterested unless and until it affects themselves. Its evaluation is frequently based on prejudice rather than on principle. Until it is submitted to the searching enquiry of a Court its implications frequently are not fully appreciated. Therefore what was intended as the furtherance of the ideal of Justice may create a serious injustice to a minority or may not produce the results which were envisaged.

6.3 The education, discipline and professional work of Solicitors is such that it ought enable them objectively to consider proposed legislation, to have a keen appreciation of possible consequential injustice and to evaluate its probable consequences and its likely effect on the rights and obligations of citizens. As a Profession we owe a social duty to the entire public, all of whom are our clients, that we should study pending legislation in their interests and when necessary make appropriate recommendations thereon.

6.4 At the beginning of each year your Council appoints a Committee, known as the Parliamentary Committee, from among its members to study objectively and impartially Bills coming before the Oireachtas and to report their findings to the Council. This Committee receives from members of our Profession suggestions and recommendations, and has the right to co-opt members of the Profession who have special knowledge and experience relating to matters which form the basis of any Bill. Its reports which are made after careful study and consultation are submitted to the Council who decide whether any and if so what recommendations should be made to the Government relating to proposed legislation. In special circumstances the Council may decide that the public should be informed of the likely consequences which will ensue from legislation which may at the moment appear innocuous or even desirable.

*John J. Nash, Chairman*

6.5 Much of the legislation which came before the Oireachtas during the past year was of a formal nature and did not involve the making of detailed reports. Recommendations were made to the Attorney General relating to sections of the Prosecution of Offences Bill 1974. Suggestions relating to the Town Planning Bill were made to the Minister for Local Government and suggestions were made to the Minister for Labour relating to legal representation in the Labour Court. The items which created most work for the Parliamentary Committee during the current year were the Finance Bill 1974 and the White Paper which envisages a Wealth Tax, Capital Gains Tax, Inheritance Tax and Gift Tax. The problems posed by these in relation to Trusts of all kinds are extremely complex. These problems apply even to simple Trusts created by Will whereby a Testator, for family reasons, may bequeath his property to one member of his family for life with the remainder to another. They present enormous problems for Trustees and Executors, and will involve substantial alterations in the framework of the Common Law system which exists in this country. The consideration of these items absorbed an enormous amount of the time of the Parliamentary Committee. Members of the Profession who had specialised knowledge were co-opted by the Committee to assist them and those, who were co-opted, generously devoted their time and ability to the study. We also availed ourselves of the services of experts from abroad who had previous experience of the operation of such taxes and invited them to some of our meetings. A report was submitted by the Society to the Minister for Finance and your Council were so concerned at the probable consequences that a copy of this report was sent to the Press. In addition to the report on the principles involved there was also submitted to the Minister for Finance a detailed supplementary report setting out pitfalls to be provided against if the new taxes are to take effect and if complete chaos in our legal system is to be avoided. The Committee would like to record their gratitude to our colleagues who accepted co-option during the year and were so helpful in our deliberations and also to all members of the Profession who during the year made suggestions or recommendations to the Committee on pending legislation.

## FINANCE COMMITTEE

Gerald Hickey, *Chairman*

Walter Beatty
Ernest J. Margetson
John J. Nash
George A. Nolan
James W. O'Donovan
Ralph J. Walker

*Gerald Hickey, Chairman*

7.1 The audited income and expenditure accounts and balance sheet of the Society for the year ended 30th April 1974 are not yet available, but as Reports of all the Committees of the Society are now being presented to the members it is felt that the Finance Committee should also furnish a brief Statement.

7.2 The book value of the Society's net assets at the balance sheet date was £300,372 which sum does not include a figure for the premises at the Four Courts or any surplus of current valuation over cost for the valuable property at Blackhall Place.

7.3 The Society is, therefore in a healthy financial position at the present but it must be borne in mind that it will probably face heavy expenditure in the future if it is not merely to maintain the standard of its existing services to members but is to improve and extend the range of such services wherever possible and also to carry out its various statutory and educational obligations.

7.4 We are all only too aware of the rise in costs on every side. Although the Society had a surplus on income and expenditure account for the year the Finance Committee feel that it is essential to maintain the level of members' subscriptions in respect of the other heads under which the Society derives income.

7.5 In the event of our moving either the whole or part of the Society's operations to the King's Hospital substantial expense will be incurred, even taking account of any revenue derived from a sale or letting of the Society's existing premises.

7.6 Lastly, the Compensation Fund was in a very satisfactory state at the 30th April 1974. This fund is, of course, completely separate from the Society's assets and the Society is obliged by statute to maintain it as a separate fund. The fund provides full indemnity to members of the public who suffer loss as a result of defalcation by any practising Solicitor.

7.7 As at the 30th April 1974 the fund stood at £375,201 which is a satisfactory figure by any standards. Payments from the fund in respect of ascertained losses and other expenses during the year amounted to £15,354.

## COURT OFFICES AND COST COMMITTEE

Peter E. O'Connell, *Chairman*
Felicity Foley
Christopher Hogan
Nicholas S. Hughes
Patrick J. McEllin
Patrick McEntee
Dermot G. O'Donovan
John A. O'Meara
Robert McD. Taylor
Ernest J. Margetson

*Peter E. O'Connell, Chairman*

8.1 The Committee during the past year held regular meetings and discussed and reported to the Council on a very wide variety of subjects which came before it. These subjects included matters of difficulty referred by Solicitors for guidance concerning the incidence of costs in sub-sales, sales where partly Land Registry and partly Registry of Deeds was involved. Compulsory Purchase Orders, exchange of properties in Mortgage and Building Contract Sales, Probate and Administration matters, Leasehold interests etc. There were also more general queries concerning costs which were passed on to the relevant rule-making authorities.

8.2 The Committee also considered various matters from Solicitors on the day-to-day working of the Courts, Land Registry, Land Commission, Valuation Office and other Government Departments with which they are in contact. Every effort is being made to alleviate as far as possible the practical difficulties that arise from time to time between Practitioners and the staffs in these Offices.

8.3 Solicitors have experienced difficulties in so far as taxation of costs is concerned. Recently a very satisfactory preliminary meeting was held between the Taxing Masters and representatives of the Committee. It is intended to hold further meetings and also to meet the Costs Accountants to ease difficulties in that area. The Taxing Masters were most helpful and expressed willingness to discuss in more detail matters of mutual interest and concern.

8.4 Revision of the standard Form of Requisitions on Title and Contracts for Sale had attention as a result of suggestions by Practitioners.

8.5 The vexed question of booking deposits on Sales and gazumping was considered in an effort to establish a satisfactory standard code of conduct and the Council's representatives are to meet representatives of the Construction Industry Federation to discuss this. The meeting will also discuss other matters of importance to the Profession arising on sales of property.

8.6 The reports of the Committee on Court Practice and Procedure so far published were considered in detail by the Committee and reported upon to the Council.

8.7 The Committee is always available to consider and report to the Council on Court Procedure and Administration; the working of the Government Departments affecting the Profession and on questions of costs and practice.

## THE COURT OF EXAMINERS

Joseph L. Dundon, *Chairman*
John F. Buckley
James R. C. Green
John Maher
James W. O'Donovan
David R. Pigot

9.1 The year under review has seen substantial progress towards the achievement of a radical reform of legal education which has, for many years, been one of the prime objectives of the Society. It is not proposed to dwell on the details of the changes which have already been given considerable publicity, in particular, in the address given by the President Mr. Peter Prentice at the Society's half-yearly Meeting in Ennis.

9.2 At this stage, the framework of the new system of legal education has been constructed but a very great deal of work still remains to be done before all concerned can say that we have achieved our objectives.

9.3 One of the principal concerns has been to separate the academic and the vocational phases of the education of a Solicitor. It is hoped that this will provide scope in the vocational stage for greater emphasis on those areas of professional practice which in recent years have become more and more complex. It will also provide opportunities for apprentices to acquire some degree of specialist skill in particular branches of the Law on which they hope to concentrate when in practice.

9.4 The Court is conscious of the fact that the social and economic changes which have taken place in our country, the momentum of which has gathered pace over the past decade, has created a demand for a sophistication of legal service which did not exist before. The Society would be failing in its duty to the Profession both present and future if it did not respond to the challenges presented by these changes. The Court is extremely grateful to the Authorities in Dublin University and in the constituent Colleges of the National University of Ireland who have been particularly helpful in arranging a smooth transition to the new system of education.

9.5. Apart from this major task, which has occupied the time of the Court, the routine task of dealing with educational matters has been an onerous one during the past year. The steady increase in the numbers seeking apprenticeship has created a two-fold problem. At the outset, many of those seeking to become apprenticed have experienced difficulties in finding a Master willing to take them. Thereafter the larger numbers give rise to problems of accommodation for lectures and examinations and to a greater volume of incidental work, the supervision of which falls within the scope of the Court.

*Joseph L. Dundon*
*Chairman*

9.6 During the year, the Council (on the recommendation of the Court) to relieve the difficulties experienced by intending apprentices in regard to obtaining a Master gave general notice that it would allow Solicitors who had been sufficiently long in practice to take a second apprentice provided that the first apprentice had been apprenticed for a minimum period of 12 months. It also relaxed the rule with regard to the minimum period during which a Master should have practised, reducing that period from 7 years to 5 years as a general rule. While this expedent has alleviated the situation, it has not eliminated the problem entirely. It is anticipated, however, that the new arrangements which will result in intending apprentices obtaining their university degree before seeking to be apprenticed will, in the long run, eliminate the problem.

9.7 This Report would not be complete without a tribute to the President, Mr. Peter Prentice, my predecessor as Chairman of the Court of Examiners. During his period as Chairman and during his year of office, he has devoted a great deal of his time and energy to the advancement of the Society's present policies. The progress which has been made is due in no small measure to him.

## PUBLIC RELATIONS COMMITTEE

Walter Beatty, *Chairman*

John Carrigan
Joseph L. Dundon
James R. C. Green
Michael P. Houlihan
Brendan A. McGrath
Patrick F. O'Donnell

11.1 Some months ago the Chairman and the Director General attended a seminar in Scotland, which was organised by the equivalent committee of the Scottish Law Society. This Society, which was formed shortly after the last war, takes the question of public relations very seriously, and it is hardly necessary to add that your Committee agrees entirely with them. That Society has been so active in this field that they have established themselves as spokesmen on matters not alone affecting their profession but also in relation to the effects of new legislation on the public. Their methods over the years has been to build up a group of approximately ten Solicitors who have taken courses in television communications and who are available to the communications media when required, which is often at very short notice.

11.2 In Scotland the Law Society has published many pamphlets, which have been circularised to libraries, universities, banks etc. which deal with certain aspects of the law, such as "Buying a House", "The Scottish Law Society", "The Law of the Road", and so forth. These pamphlets are also available to the Profession and Solicitors are encouraged to have them on display in booklet stands in their reception offices.

11.3 At the moment that Society is raising a levy of £10 per member to embark on a programme of institutional advertising over the coming year, in newspapers, magazines and with a view to making known to the man in the street his need to see a Solicitor in certain circumstances and the benefits that can accrue to him.

11.4 The visit to Scotland proved to the Committee that the steps it had taken during the year were right, and that it is planning correctly for the future. The printers presently have three booklets, which will be available shortly, entitled "Buying a House", "Making a Will", "The Incorporated Law Society of Ireland". These booklets will be available to all Solicitors and will be circularised to institutions in Ireland. If the reaction to them is satisfactory provision has been made to issue other publications dealing with other branches of the law of interest to the public.

11.4 Maxwell Sweeney, the Society's public relations consultant, attends all the Committee meetings and has given us valuable advice and constant assistance during the year. After Christmas he embarked upon a programme of press releases to the provincial papers. As a result of his connections, the media now appreciates that the Society will upon request make a spokesman available to comment on matters concerning the profession, or of legal interest. In recent months the President spoke on radio on Section 59 of the Finance Act 1974, under which the Revenue Commissioners have taken power to obtain information from Solicitors in certain circumstances, and a spokesman of the Society was on radio on two other occasions. One of these occasions concerned the demand of an organisation in Cork for the appointment of an ombudsman to deal with the legal profession and their delays. As a result of being asked to speak on that occasion the Committee were able to counteract the mistaken impression of the organisation in Cork, who believed that there was very little that one could do where a genuine complaint existed against a Solicitor. The outcome of the radio programme was a useful discussion with the Chairman of the Cork organisation.

11.5 On the latter note, one factor that worries this Committee is the poor image which the Profession has in some quarters because of the failure of some Solicitors to answer correspondence. This inevitably leads to letters of complaint to the Society, who must give the member concerned every opportunity to explain the situation. When the Society's letters are not answered as well, it means that some action has to be taken against the Solicitor. Unfortunately, meantime, time has passed, and the member of the public has become exasperated and has probably made his complaint elsewhere or in a number of places, and this, of course, leads to the worst possible type of public relations.

11.6 The Committee has tried to keep its policy in perspective because it recognises that public relations should probably be divided into two basic elements—internal and external—and whenever the need arose for communications within the Profession this was given the importance it deserved. Nowadays there are so many pressure groups that not only must an organisation's services be good, but also they must be seen to be good. Press releases were handled by Maxwell Sweeney in relation to "The Kenny Report", "Wealth Tax" and the proposed new Bill to replace the Local Government (Planning & Development) Act 1963.

11.7 For the future it is hoped, by good public relations and by communication on radio and television, to remove the harmful effects of some fixed ideas which the public have about Solicitors. It is also hoped that the public will see Solicitors as people who are prepared to give their time and skills to the community, where the occasion or need arises, on a purely voluntary basis. With this end in view it is hoped to organise seminars on topical subjects which will be open to the public generally and who can apply for tickets on a first-come-first-served basis. At the moment the Committee is considering seminars on "Freedom and the Media" and "The Law and the Farmer". The former topic is of importance because it will bring journalists, radio and television producers, advertising agents, etc., together with members of the Profession, and such communications between all concerned can only be of benefit. Another proposal which has been agreed in principle for the year 1975 is a Law Week. This will be a concentrated programme in schools, at civic level, and hopefully in universities, and elsewhere, which will establish an awareness of law and the citizen. It is hoped that it will take place in the autumn of next year and that a suitable commemorative postage stamp will be issued to coincide with its commencement.

*Walter Beatty, Chairman*

11.8 Because of the progress which the Committee has seen during recent times, the necessity for the Profession's total involvement in public relations cannot be stressed too often.

## BLACKHALL PLACE COMMITTEE

Moya Quinlan, *Chairman*

Thomas Jackson
Ernest J. Margetson
Patrick C. Moore
Patrick Noonan
Rory O'Connor
Patrick F. O'Donnell
Ralph J. Walker

*Mrs. M. Quinlan, Chairman*

12.1 For most of the year, there were no developments apart from questions at Council as to the present position. This situation arose due to the fact that up to July 1974, there were no clear decisions as to road developments in the Four Courts–Smithfield–Blackhall Place area, and this had an effect on all issues involving planning and building in the particular area. Concurrent with the taking of decisions by the Dublin Corporation on the future road development of the area, the Society was clearing its mind as to the demands to be placed on its facilities by the new educational requirements.

12.2 Looking to the future, it is becoming increasingly clear that the present Solicitors' Buildings will not be adequate to meet the Society's needs as to the training of existing and future members of the Profession, and its administration.

12.3 In August 1974, a detailed submission on the topic generally was made to the Department of Justice. It is intended to reach definite conclusions before the year ends.

## DISCIPLINARY COMMITTEE

Thomas A. O'Reilly, *Chairman*

Thomas H. Bacon
John Maher
Patrick C. Moore
Patrick Noonan
Robert McD. Taylor
Ralph J. Walker
Francis J. Lanigan
Thomas Jackson
Roderick J. O'Connor

*Thomas A. O'Reilly, Chairman*

10.1 Since 30th September 1973 the Committee met 16 times. The state of the business of the Committee is as follows:

| | |
|---|---|
| Cases over from previous year ... ... | 35 |
| New Cases commenced after 30/9/1973 ... | 28 |
| | 63 |

OF THE 28 NEW APPLICATIONS

| | |
|---|---|
| (a) Cases where affidavits await consideration | 8 |
| (b) No prima facie case decided ... ... | 6 |
| (c) Prima facie case found ... ... ... | 14 |

OF THE 49 CASES NOW AT HEARING

| | |
|---|---|
| (a) Liberty to withdraw ... ... | 17 |
| (b) Postponed S7 (4) ... ... | 8 |
| (c) Findings of misconduct ... ... | 10 |
| (d) Findings of no misconduct ... | 3 |
| (e) At or awaiting hearing ... ... | 11 |

10.2 Six Reports have been presented to the President of the High Court (4 are outstanding). Of these:

(a) One Solicitor was struck off.
(b) Two cases were disposed of on an order of "costs only".
(c) Three cases are before the Court.

10.3 The Committee were saddened by the loss of former Chairman, Dermot P. Shaw, who died during the year. Mr. Peter O'Connell and Mr. George Nolan both resigned after over a decade of service to the Committee.

## E.E.C. COMMITTEE

John B. Jermyn, *Chairman*

John Buckley
Anthony E. Collins
John G. Fish
Brendan A. McGrath

13.1 The E.E.C. Committee is the newest of the Law Society's standing Committees. It is also probably the most difficult since the members of the Committee are to some extent learning their job as they go along.

13.2 At the outset it was apparent that it would be quite impossible for the Committee to deal as a Committee with the sheer quantity of work that required to be done. At the time of the formation of the E.E.C. Committee, the European Economic Community had already been in existence for 15 years and in that time had produced a considerable quantity of legislation. The Committee had to become familiar with all existing legislation at the same time as it was trying to cope with current developments. It became the practice therefore for the Committee, whilst retaining overall control, to delegate as much work as possible to experts in their own particular fields.

13.3 *E.E.C. Library:* It was hoped to have the Law Society's Library established as an E.E.C. depository library. This would have meant that all E.E.C. publications would have been provided free of charge but it did have the disadvantage that the ordinary members of the public would have to have free access at all reasonable times. In the event the Society's application was rejected by the Authorities and it was necessary to start investigating the possibility of establishing an E.E.C. Central Library. For this purpose a special Library Committee was formed consisting of representatives of the King's Inns, the Department of Foreign Affairs, the National Library, Trinity College Dublin, University College Dublin, University College Cork, University College Galway, Queen's University, in addition to the members of the E.E.C. Committee. Several useful meetings of the Library Committee have already been held and it is presently awaiting a report from its own Sub-Committee before progress can be made.

13.4 *Directives:* The following draft Directives have been studied by the Committee during the year:
(i) Freedom to provide servides;
(ii) Bankruptcy;
(iii) Securities over Moveables;
(iv) Suretyship and Guarantees.

Mr. Collins is presently dealing with the Directive on Bankruptcy and Messrs. Margetson a Moloney with that on Securities over Moveables. The Committee has been glad to adopt the submission made by Mr. Hanley of the Department of Justice in relation to the draft Directive on Suretyship and Guarantees. In this connection, the Committee would like to express its appreciation of the excellent spirit of helpfulness and co-operation which exists in its relationship with the Department of Justice.

13.5 *Liaison with other Organisations:* The Council on the recommendation of the E.E.C. Committee sought and was granted membership of the Commission Consultative des Barreaux des Pays des Communautes Europeennes, and associate membership of the Union Internationale du Notariat Latin. Membership of these bodies has enabled the Society to send representatives to attend their meetings and to make and maintain contact with our professional colleagues within the European Community. With the pace of developments in the legal aspects of the E.E.C., such contact is becoming increasingly important and representatives of the Committee, together with the President, have also been privileged to visit the European Court at Luxemburg as guests of the Court.

*John B. Jermyn, Chairman*

13.6 *Superior Court Rules:* Whilst speaking of the Court, it is to be recorded with regret that no regulations have been formulated by the Superior Court Rules Committee to enable an Appeal to be brought from an Irish Court to the Court at Luxemburg under Article 177 of the Treaty of Rome. This is not due to lack of pressure on the part of the E.E.C. Committee. It is an embarrassing fact that Ireland is the only member country that has not yet made the appropriate amendment to its Rules of Court.

13.7 *Publicity:* In an effort to stimulate interest amongst the Society's members in E.E.C. matters, the Committee organised a Seminar in Wexford in March last. It is proposed to hold a further Seminar in Sligo in the autumn. The Committee also published a short series of articles in the *Gazette* and it is intended to revive this series in the near future. The Committee investigated the possibility of compiling and publishing a short handbook on the E.E.C. for distribution amongst the members of the Profession—however, it was soon realised that the cost of publication would be prohibitive and could not be justified. The College of Law, London, kindly consented to the Society using their handbook and an order was placed for a substantial quantity of these. This handbook is now available from the Society at a cost of £1 per copy.

## COMPANY LAW COMMITTEE

Brian O'Connor,
*Chairman*

Denis J. Bergin
Anthony Collins
Michael G. Dickson
Joseph L. Dundon
Houghton Fry
Patrick C. Kilroy
Peter D. M. Prentice
J. G. Ronan
L. K. Shields

14.1 The Society's Committee on Company Law was set up at a meeting presided over by Mr. Peter D. M. Prentice, President of the Society in January 1974. The Committee has held eight meetings to date and, in addition, there have been a number of meetings of its sub-committees. Initially it has been concerned mainly with the implications of the draft directives and conventions on Company Law of the European Economic Community. Liaison was established with the Department of Industry and Commerce. An Officer of that Department attended one of the earlier meetings of the Committee and outlined the procedures by which draft directives and conventions were processed through the Commission and Council of the Community. At the moment, one Draft Convention (that dealing with International Mergers) and four Draft Directives are going through this process. Individual members of the Committee have had the opportunity of meeting, in Ireland, members of the E.E.C. Commission dealing with company matters. These talks were most useful.

14.2 The Committee decided that the best way to achieve progress was to appoint sub-committees to consider the draft convention and each directive. These would then report back to it. Accordingly, sub-committees were set up to deal with the Second Draft Directive (dealing with maintenance of companies share capital), the Third Draft Directive (dealing with National Mergers) and the draft Convention on International Mergers. The Fourth Draft Directive (which deals with Company Accounts), and The Fifth Draft Directive (dealing with employees participation in management) have been left over for later consideration.

14.3 The Second Draft Directive contains some proposals which are new to Irish Company Law. These include the provision that the minimum initial share capital of a company should be 25,000 units of account (approximately £10,000). The Committee felt that this provision would be too onerous for many private companies in Ireland and was not really necessary for the protection of creditors of such companies. Accordingly, it has recommended that private companies would be excluded from the terms of the Directive. It is understood that this is a view which is also shared by the Law Society, London. The Committee understand that there is every likelihood that private companies will, in fact, be excluded from the Directive if it is finally adopted. Consideration is also being given to the provisions in the Draft Directive which will restrict the distribution of profits by reference to the capital of the company. This was a matter which had been considered by the British Jenkins Committee in their report of June 1962. The Committee took the view that there should not be any legal requirement to make good either realised or unrealised capital losses before distributing revenue profits. On the other hand the Jenkins Committee took the view that previous revenue losses should be made good before current profits are distributed. The sub-committee is still considering implications of these provisions of the Directive, intertwined as they are with the definitions of the word "profit".

14.4 The Third Draft Directive deals with regulations to protect members and others in the case of the merger of two companies. This type of merger is by "fusion" where all the assets and liabilities of one or more companies are transferred to another company in consideration of the issued shares in the "transferee" company to the members of the companies effecting the transfer. The draft Convention on International Mergers deals with mergers of this kind between companies in different countries in the E.E.C. In Ireland and Britain "mergers" are usually effected by way of the takeover of the transferee company of the shares in the transferor company. It is unlikely therefore, that merger by "fusion" will be availed of to any great extent unless this had some advantages where, say, an Irish company were acquiring a company situated in an E.E.C. country other than Britain. It is understood that a Draft Directive dealing with mergers by way of takeover of the shares in a company will shortly come up for consideration by the Commission. The Draft Convention on International Mergers is still being considered by the Commission. The Committee was asked by the Department of Industry and Commerce to send one of its members to attend on the official Irish delegation when the draft Convention was being considered. In response to this invitation, Mr. Michael G. Dickson (a member of the Committee's sub-committee dealing with the draft Convention on the Third Directive) went to Brussels on two occasions and was of great assistance to the officials. Under our Companies Act at the moment a merger by fusion can be effected by going to the High Court under Section 201. The Directive and the Convention propose a different way of achieving this purpose by protecting the interests of shareholders and creditors. It is also intended to insert in the Draft Convention, provisions designed to take into account the interests of employees of the merging companies but no firm proposals have yet been put forward.

*Brian O'Connor,*
*Chairman*

14.5 The Committee were also asked to discuss with the Oireachtas Sub-Committee on European Legislation the operation in Ireland of the First Council Directive on Company Law of 9th March 1968. This is applied here by Statutory Instrument No. 63 of 1973. A sub-committee comprising Messrs. Brian J. O'Connor, M. G. Dickson and H. O. Fry considered the matter. It was suggested that the Registrar of Companies, rather than the company itself should have the duty of publishing notices of the issue of Certificates of Incorporation etc. This simply brings the law into line with the practice. Other drafting amendments were also suggested. Members of the Oireachtas Committee have publicly expressed their thanks to the Society's Committee for their assistance.

14.6 In addition to considering company matters, the Committee have also studied a Draft E.E.C. Directive relating to Commercial Agents. The Chairman and Director General attended a meeting in the Department of Industry and Commerce along with the representatives of other bodies to meet two members of the European Commission. The Draft Directive poses problems of defining a "commercial agent" which have still to be resolved. It would also confer substantial new rights on the agent to compensation on termination of a commercial agency (the "clientele allowance") and during any period thereafter when a covenant in restraint of trade is effective.

## LIBRARY

Colm Gavan Duffy,
*Librarian*

15.1 Within the limitations imposed by the fact that the Library is an all-purpose room, and that it is constantly required for outside activities such as Dinners, Debates and Examinations, continued progress can be reported. Due to a strike in University College, Dublin, members were deprived of a full library service in October, as lectures to apprentices had to be held in the Library.

15.2 The Director-General arranged that for the first time, a qualified graduate library assistant would assist Mr. Gavan Duffy, during the months of July, August and September 1974, and Miss Margaret Byrne, B.A., Dip. in Librarianship, was appointed. Miss Byrne's main task was to classify and catalogue law books, which the Librarian was unable to do owing to pressure of work as Editor of the *Gazette*; this has now been accomplished. Miss Byrne has also sorted out the unreported judgements since 1965; these will be easily made available to members by year in folders. Appreciation has already been expressed by members of the useful service by which these judgments can normally be obtained within days of delivery of the judgment, as it takes a minimum of two years to report them officially. Miss Byrne was appointed Assistant Librarian in October.

15.3 New editions of standard legal textbooks, such as Cheshire & Fifoot on Contracts, and Salmond on Torts, were acquired during the year. These are listed in the June and July–August *Gazettes*. New books on all practical branches of law which it was deemed worth purchasing were acquired. The Finance Committee sanctioned the purchase of the volumes of the Fourth Edition of Halsbury's Laws of England, edited by Lord Hailsham, which are being received. The volumes of the Fourth Edition of the Encyclopaedia of Forms and Precedents were completed.

15.4 The total amount spent in the purchase of books for the year ending 30th April 1974, was £1,665, and in the purchase of periodicals was £202, making a total of £1,867. The total amount spent on binding in the same year was £334. The corresponding amounts last year were in respect of books, £1,190; for periodicals, £130, and binding, £414. Increased amounts for books and periodicals are due to the heavy increase in the price of law books. A paperback standard work which cost £2.50 in 1971 would now cost £4.50.

15.5 In view of the crucial space problem on the shelves in the present Library, in the basement and elsewhere, the Committee sanctioned that the following volumes be transferred to the King's Inns Library as a donation: (1) All bound volumes of "Iris Oifigiuil" from 1923 to 1967. (In practice they are never asked for.) (2) The Journal of the Food and Agricultural Organisation in Rome (never asked for) and (3) Butterworth's Workmen's Compensation Cases. (As these cases have been removed from the Courts since 1966, they are rarely asked for.) (These will replace volumes lost in a fire some years ago.) As a result it was possible to transfer 700 volumes, comprising the English Law Times Reports, the English Law Journal Reports, the English Patent and Trade Marks and Revised Reports to the ground floor in August, in order to make more room for E.E.C. Publications and up-to-date material. As Regulations of the European Community are binding as much on Irish Lawyers as the ordinary Irish legislation, it will be appreciated that the Journal of the European Communities is essential; there is however so much material that it takes 16 volumes a year to bind. This will ultimately present real difficulties.

*Colm Gavan Duffy, Librarian and Editor of the Gazette*

15.6 The Librarian attended the Annual Conferences of the British and Irish Association of Law Librarians held in Edinburgh in September 1973, and in Bristol in September 1974.

15.7 The average number of books borrowed from the Library for the period January–June 1974 was altogether 378, making an average of 16 volumes per week. In addition at least 8 volumes per day, or 40 volumes per week, mostly law reports, were requested for photocopying during term time.

## PUBLICATIONS

16.1 Continuing efforts are being made to improve the *Gazette* under the editorship of Mr. Gavan Duffy, and indeed many members have commented favourably on it. Advertising is a problem, the more so, in the present difficult commercial climate. However, members could assist by interesting client firms in the possibility of the *Gazette* as an advertising medium.

16.2 The Society, through its representatives, Messrs. Prentice, Buckley, Jackson and Ivers is playing an active role in the Incorporated Council for Law Reporting.

16.3 In addition the Society is itself concerned with the publication of suitable legal texts. The relevant Committee, with Mr. W. Beatty as Chairman has before it, proposals to publish texts on:

Cases in Criminal Law
Irish Property Law
The Road Traffic Acts
Planning Law.

Some of the projects are suspended pending amending legislation, but others are well in hand.

## LAW SOCIETY REPRESENTATIVES

Francis X. Burke
Laurence Cullen
Gerard M. Doyle
Joseph L. Dundon
P. McEntee
Enda C. Gearty
Gerald J. Moloney
Robert McD. Taylor
Ralph J. Walker

## LAW CLERKS JOINT LABOUR COMMITTEE

17.1 During the year two meetings of the Law Clerks Joint Labour Committee were held in the offices of the Labour Court, Mespil Road, Dublin.

A Motion was proposed by P. J. O'Brien of the Workers' representatives: "that the present wage rate be reviewed with a view to the appplication thereto of the terms and conditions of the current Employer/Labour Conference National Agreement".

After hearing arguments from both parties the Chairman asked for a vote on the motion. The Employers side did not vote and the motion was carried. A brief discussion took place on the second motion on the Agenda: "that the terms of the national agreement regarding equal pay be implemented".

The Chairman suggested that it might be better for the motion to be withdrawn for the time being, and that at the end of six months the question might be re-opened. Mr. P. J. O'Brien, who had proposed the motion, agreed to withdraw it.

17.2 The Law Clerks Joint Labour Committee meetings were considered unsatisfactory by the Employers' representatives as they felt that since they were not a party to National Wage Agreements they should not be bound by them. The function of the Committee was to deal with Statutory Minimum Rates and not negotiate wage rates. Many of the Society members were left with the distinct impression that the Committee was bound by the National Wage Agreement and that the meetings were held merely to rubber stamp such Wage Agreements.

17.3 Subsequently there was a certain amount of publicity in the national newspapers concerning unnamed Solicitors who failed to pay their staff the minimum remuneration as fixed by the Law Clerks Joint Labour Committee. The Council expressed concern that any Solicitor should fail to pay the Statutory Minimum. However, as no specific names had been forwarded to the Law Society and the Department of Labour was not prepared to disclose names of the firms concerned the Council regretted that no useful action could be taken by them. Council was of the opinion that the individual Bar Associations, with the benefit of superior local knowledge, could help to ensure that Solicitors in their area would not pay less than the Statutory Minimum Wage.

17.4 Council warns members that failure to pay the prescribed minimum rate will leave the particular member open to prosecution. It seems clear that whereas in the past, the Department of Labour satisfied itself that the situation had been rectified, in the future it intends to prosecute without further warning in all cases of non-payment of the prescribed minimum rate.

# DISCUSSION ON THE FINANCE BILL 1974

**Dail Eireann—Second State (12th July 1974)**

**Introductory speech by Minister (Mr. R. Ryan)**

The purpose of Section 54 is to remedy a defect in the existing law whereby a shareholder in a company who accepts additional shares in lieu of a dividend avoids the taxation leviable on the dividend. The section provides that such shares shall be regarded as income up to the value of the dividend which could have been accepted.

Sections 55 to 59 provide for the taxation of income arising from the transfer of assets abroad. I mentioned in my budget statement that tax havens abroad were being used for the avoidance of Irish taxation. The absence of legislation to deal with income arising in these tax havens has been a major deficiency in our tax code for some years and the sections mentioned are designed to ensure that individuals who are ordinarily resident in the State cannot continue to use these tax havens as a means of avoiding their fair share of tax. There is a saver for bona fide commercial transactions and the usual appeals provision is included. Section 57 will enable the Revenue Commissioners, subject to certain safeguards to respect confidential relationships between solicitors and banks and their clients, to obtain necessary information to enable these new measures to be implemented.

The next important part of the Bill is that devoted to anti-avoidance and evasion measures. Nobody will quarrel with this in principle.

**Mr. Haughey**

Those who devote their minds to these matters develop new ways, new systems of either avoiding or evading tax and it is the duty of the Minister and the Revenue Commissioners to keep a watchful eye on these developments and if they expand to any considerable extent take action in the interests of fair play. But it is always a question of judgment. From time to time the question arises as to whether action should be taken in regard to a particular device or system that has developed. A decision must be taken as to whether the evasion or avoidance is on a sufficient scale or whether the practice is growing sufficiently to merit all that is involved in the provision of countervailing measures. In my view the Minister for Finance in the first instance, and this House in the second, have a very important custodial part to play in this regard. The Department of Finance, perhaps, to some extent, but more often the Revenue Commissioners in pursuing their bounden duty seek powers to deal with certain situations which come to their notice and it is here that political judgment must come into play. The Minister is the first line of defence and this House the second line of defence in ensuring that the taxation authorities in wishing to do their job properly and comprehensively do not get excessive powers. It is perfectly legitimate for them to seek these powers, to put forward the case, but it is our job to ensure that the powers they get do not represent an unwarranted intrusion on the rights of the private citizens.

I have seen in my time in this House a number of occasions when this issue has been fought out and when the Revenue Commissioners have been refused powers which they sought because in the opinion of the Minister, or the Government or the House, the powers they were seeking were excessive and could not be justified by the extent or the seriousness of the evasion or avoidance taking place. If the Minister believes that the measures he has put before us in regard to tax havens abroad are necessary, then he has the full support of every Deputy in taking whatever measures are legitimate to deal with that situation. None of us likes to think that somebody else, because he is cleverer or has access to better professional expertise than we have, can, by using foreign tax havens, avoid paying those taxes the rest of us have to pay. We support the Minister in the measures he wishes to take in this regard with the exception of Section 57. It seems to be a clear case where the Minister is affording to the tax-gathering machine powers far in excess of what it is entitled to or really needs. I strongly urge the Minister to drop that provision in regard to solicitors.

**Mr. R. Ryan:** Could I remind Deputy Haughey that he was responsible for Section 176 of the 1967 Income Tax Act which was even more stringent in requiring every person in whatever capacity—not merely a solicitor or a banker—to disclose a great deal of information about money, value, profits gained and so on?

**Mr. Haughey:** That is a codification measure. As the Minister knows, a codification measure is not the work of the Minister for Finance of the day.

The 1967 Income Tax Act was a codification measure which simply brought together in one composite statute the various income tax measures existing up to them. It put them together and codified them in one statute. In fact, you cannot put anything new into a codification measure; you can only include in it something which is already in existing law.

The Minister attributed it to me as a proposal. He said I brought it in and I am quite certain that I did not. I was always anxious as a Minister for Finance to try to keep a careful balance between the needs of the situation as seen by the Revenue Commissioners and the rights of the private citizen and the taxpayer.

**Mr. R. Ryan:** But this provision is on the Statute Book since 1918 and was re-enacted in 1958 and 1963 and again in 1967. It is far more stringent than Section 57.

**Mr. Haughey:** The Minister is now putting Section 57 before us and I wish, to draw his attention to certain aspects of it, to ask him to reconsider it and to consider carefully whether these powers are really necessary to combat the tax evasion about which he is worried. On reflection, the Minister might consider abandoning the bulk, if not all, of Section 57.

The Minister is dealing here with something that is fundamental to our whole system of law and jurisprudence which recognises the privilege that extends to the relationship between a solicitor and his client. For the sake of this one piece of tax evasion it is not worth even tinkering with the confidential relationship between solicitor and client. If the Minister considers this situation from a broader point of view, I think he will agree with me. If we should tamper, even for this limited purpose, with the confidential relationship between solicitor and client we would be starting something that could be very injurious in the long run in other situations.

Subsection (2) of that section reads: "The particulars which a person must furnish under this section, if he is required by such a notice so to do, include particulars ..." I would draw the Minister's attention in particular to the word "include" there. It seems to me that in this regard the Revenue Commissioners can direct the taxpayer involved to give them any sort of information about anything, provided it is related to the sections in question.

**Section 54 (Seanad Eireann; Committee Stage)**

**31 July 1974**

**An Cathaoirleach:** Recommendation No. 22 is consequential on recommendation No. 20. Accordingly, it is suggested that both be debated together.

**Mr. E. Ryan:** I move recommendation No. 20:

In subsection (3), page 30, lines 31 and 32, to delete "in the opinion of the Revenue Commissioners".

My purpose in putting down this recommendation is that on the one hand it is not necessary and, on the other, it will create difficulties both for taxpayers and for the Revenue Commissioners. If dividends are received instead of salary or emoluments, then the taxpayer can be assessed and, if he does not accept the assessment, he can appeal and the matter can be decided then as a matter of fact, as a matter of where evidence would be given, the circumstances will be considered and it will be decided as a matter of fact.

If, in fact, the Revenue Commissioners do press this matter and rely on their opinion then, of course, in the long run—if they have reference to quite a number of cases in recent years decided by the Supreme Court—they will have to exercise their power under the position where they are acting on their opinion. They will have to exercise that power with great circumspection and really in a much more complicated way than if they merely suggested that the person was not really receiving adequate consideration and argue that possibly on appeal. My suggestion is that it is a complication. Any State body, any Minister is being circumscribed more and more by Supreme Court decisions on the circumstances in which an opinion of this kind can be formed. For that reason I suggest that it would be much better to leave out the words in question altogether.

**Mr. Lenihan:** I would support Senator Ryan very strongly on this because I think it is a superfluous insertion in the section. First of all, the subsection stands on its own without the words "in the opinion of the Revenue Commissioners". From the point of view of the Revenue Commissioners themselves, I think they are entering a very dangerous area here because, both in regard to "the opinion of the Revenue Commissioners" as incorporated in subsection (3) and the manner in which they exercise this opinion, as incorporated in subsection (5), the scope here for legal interpretation as to what way or manner the Revenue Commissioners exercise their opinion appears to me to be enormous. I am just as concerned as anybody in this House that revenue be collected in a proper form in the interests of the community as a whole. I do not see why the Revenue Commissioners should be arrogating to themselves, first of all, an opinion in the matter at all and, secondly, why they should be setting out in a section here the various matters to which they must have regard.

**Mr. R. Ryan:** I can find some area of agreement with the Senators when they speak of the phrase "in the opinion of the Revenue Commissioners" being superfluous. From a purely literary point of view I suppose it could be left out but I do not think that its inclusion creates any legal complications because the reality of the operation would be that when the return of income would be made the inspector of taxes would have to make as assessment based on what he considered to be dividends which were issued in lieu of income. That in practice would be the opinion of the Revenue Commissioners. The right of appeal to the Appeal Commissioners exists under subsection (8) with respect to any opinion of the Revenue Commissioners. The final opinion in this will not be that of the Revenue Commissioners in the case of a taxpayer being aggrieved by the original decision. I do not think the amendment strengthens the operation in any way nor do I think it relieves the Revenue Commissioners of the need to form an opinion in the first place. I would be prepared to accept perhaps that the phrase is superfluous but it is the language much admired and used by draftsmen. Down through the decades there have been several cases in which the phrase "in the opinion of the Revenue Commissioners" has been used. I will draw the attention of the draftsmen to the wise remarks of the Senators and of the Minister on this and, perhaps, consideration would be given to whether it is necessary to use such a phrase in the future.

So far as subsection (5) is concerned, it is wise to list the number of considerations which should be borne in mind. There is always the danger that if these tests are not set out, the view may be held elsewhere that these are not relevant. I would suggest that each of these considerations here is a relevant one.

**Mr. E. Ryan:** This Bill is full of flat statements that the Revenue Commissioners are to act in circumstances which are set out and where no reference is made to their opinion. My point is that if they are to rely on an opinion then they are letting themselves in for a lot of trouble. If the taxpayer is not satisfied let him appeal.

**Mr. R. Ryan:** I do not think Sen. Eoin Ryan would dispute that somebody somewhere along the line has to come to an opinion on the facts. What subsection (5) says *inter alia* is that any evidence tendered by or on behalf of the person must be considered. It helps uniformity of interpretation. If the legislators do not set out what they consider to be appropriate considerations, there is a danger of different inspectors of taxes applying their own valuations and their own considerations which might vary quite considerably. On the ground that tax law should be certain, there is a great deal to be said for saying what are the relevant considerations.

**Mr. E. Ryan:** It is moving a little into judicial function and anything of that nature should be queried, to say the least. Recommendation, by leave, withdrawn.

**Mr. E. Ryan:** I move recommendation No. 21.

In page 30, between lines 43 and 44, to add the following proviso:

"Provided that the amount of any dividends which are deemed to be emoluments of any person when added to the other emoluments paid to that person by the company and by any person connected with that company shall not exceed an amount equal to the amount of the remuneration which is deductable for corporation profits tax purposes under the provisions of Section 53 (2) (c) of the Finance Act, 1920 (as amended), as at the date of commencement of this section and as increased on 5th April 1975 and on each subsequent 5th April by the percentage increase in the Consumer Price Index in the period since the date of commencement of this section."

This is merely to deal with the situation where a man is being paid an emolument of, let us say, £1,000 a year and the Revenue Commissioners form the opinion that it is not adequate for the services which he is rendering. I am suggesting that as the Revenue Commissioners have decided that a reasonable emolument for a director for CPT purposes is £4,000, he should certainly opt for another £3,000, that he should be allowed to take that tax free in these circumstances.

**Mr. R. Ryan:** Perhaps Senator Ryan would accept that a figure of £4,000 is not realistic in 1974 for limitation purposes, considering that the remuneration paid to top executives in many companies including export companies is very much higher than £4,000.

**Mr. E. Ryan:** I am merely relying on the figure which, apparently, has been accepted.

**Mr. R. Ryan:** I agree that it has been accepted for corporation profits tax purposes. I do not think it is an appropriate figure today for the purposes Senator Ryan has in mind. If we were to accept it, it would leave open to abuse the very operation that we are trying to stop at present. Four thousand pounds can hardly be a sufficient limitation considering that some remunerations can be in five figures.

Recommendation, by leave, withdrawn.

Mr. E. Ryan: I move recommendation No. 23:

In page 31, between lines 35 and 36, to insert a new subsection as follows:

"(8) Any dividend deemed to be emoluments under the foregoing provision of this section shall be:

(a) allowable as a deduction in computing for the purposes of Schedule D profits or gains or losses of the trade of the person to whom the services have been rendered; and

(b) deemed to be emoluments of the person for all the purposes of Part XII of the Income Tax Act, 1967, and Chapter 2 of Part I of the Finance Act, 1972."

This is merely to ensure that, where the Revenue Commissioners do not accept that the emoluments are sufficient and where they insist on regarding dividends paid as emoluments and taxing them where that is appropriate, the company should be allowed that for Schedule D purposes, in other words, that the Revenue Commissioners do not have it both ways, that if the individual is taxed on the emoluments, then the company should be allowed it free of tax.

**Mr. R. Ryan:** Our object here is to discourage the tax-avoidance device. We want to stop it. I think we will stop it because people will not bother to engage in the complication of issuing dividends in lieu of salary if there is no advantage flowing from the operation of that device. But if people decide to continue to operate that device, they have to carry whatever disadvantages go with it. This will be a further encouragement to them to stop it. It would be quite wrong to legislate in such a way as to give tax concessions which are intended for legitimate operations to what are, in fact, tax-avoidance operations.

Recommendation, by leave, withdrawn.

Section 54 agreed to.

Sections 55 and 56 agreed to.

**Section 57**

**Mr. E. Ryan:** I move recommendation No. 24:

In page 33, line 13, after "individuals" to insert "domiciled and".

This is merely to ask the Minister why "domiciled" is not included for the purpose of preventing the wording "by individuals domiciled and ordinarily resident in the State".

It is conceivable that there might be people ordinarily resident in the State for a long period who would not regard it as their domicile. Executives of multi-national firms who would be stationed in this country for a three-year period could argue that they were "ordinarily resident" but they would not regard it as their "domicile". Further down in this section the word "domicile" is used. It states:

... either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the State, it is hereby enacted as follows:

It is difficult to understand why the word is used in that part of the section but not in the earlier part.

On the surface it would appear necessary to include "domiciled" as well as "ordinarily resident" to make a distinction between people who are living here for a long time but who would not regard it as their domicile.

**Mr. M. J. O'Higgins:** Senator Ryan's recommendation refers to the words "domiciled and". It would seem there might be some greater force in his argument if he had worded the recommendation "ordinarily resident or domiciled" rather than "domiciled and". We all know that a person may be resident abroad for twenty years but is still of Irish domicile.

**Mr. R. Ryan:** Persons who are resident but not domiciled in the State are chargeable to Irish tax in respect of income arising outside Ireland or Britain only on the income which is actually remitted to or received in the Republic of Ireland. It is likely, therefore, that it could be shown that the purpose of avoiding liability to taxation was not one of the purposes for which the transfer of assets giving rise to such income was effected by subsection (3) (a). A person resident but not domiciled in the State might have substantial assets in the State or in Britain from investments in industries and Government loans, thus having an income far in excess of the person's requirements for spending in the State. It would be illogical and unfair to the general body of taxpayers, and in particular to Irish domiciled taxpayers affected by these provisions, if a foreigner were left with an advantage over them in relation to his Irish and British assets.

**Mr. Alexis FitzGerald:** Except we might not have a foreigner here and it might not be desirable to have him.

**Mr. E. Ryan:** There is the type of person I mentioned who would have transferred some of his assets here on coming to live here and might then at a certain stage wish to transfer them back to the country of his origin which would seem a perfectly legitimate thing to do and he could be caught in a way which would not be intended by the Minister in the circumstances set out in this section.

**Mr. R. Ryan:** I will take a look at it. We do not wish to be unfair and if it operates unfairly I would be willing to correct it.

Recommendation No. 24, by leave, withdrawn.

**Mr. Lenihan:** I move recommendation No. 25 :

> In subsection (9), page 35, lines 14 and 15, delete "whether carried out before or after the commencement of this Act" and to substitute "carried out on or after the 4th day of April, 1974."

We know the purpose of this section and this part of the Bill. The part of the Bill deals entirely with tax avoidance. The section is concerned with tax avoidance in the case of transfer of assets abroad by persons ordinarily resident in the State who benefit by way of income increases from assets which are transferred abroad. This is a broad outline of what is contained in Section 57. We all go along with that. In principle this is an undesirable form of transfer of assets, particularly when such a transfer benefits by way of income people resident abroad. In order to benefit such people, those resident in this State are doing harm to the community as a whole.

My recommendation is designed to deal with the very draconian provision which is imported into subsection (9) which, if established as a precedent for other areas of tax dealings with the Revenue Commissioners, could establish a dangerous precedent. For this reason I put down the recommendation.

As subsection (9) now reads, it relates to the provisions of the section in the earlier part and then it states "and shall apply in relation to the transfer of assets . . .". Then we have the draconian words "whether carried out before or after the commencement of this Act". This means that in regard to these particular transfers it applies at any stage or at any time in the past. There is no limitation involved in that phraseology.

This phraseology is highly undesirable having regard to the tenor of tax legislation. In substitution for the words "whether carried out before or after the commencement of this Act" I suggest the substitution for that very draconian phraseology the phrase "carried out on or after the 4th day of April, 1974". That fits in much better with the whole tenor of what tax and finance legislation should be. Indeed, it goes back to the point I was talking about yesterday "retrospection". We may argue about what is retrospective and what is not retrospective. This is blatantly retrospection without any limitation whatever. People who engaged in this particular procedure, which it is now proposed to try to prevent—with which I agree—at any stage before the commencement of the Act can, as the phraseology now stands, be caught. That is retrospection with a vengeance.

I am not making any case whatever for the people concerned in Section 57. I do think in the interest of keeping the tax legislation in a normal manner and, above all else, not letting any element of retrospection be introduced, we should have a specific date in the current year, either budget date or the date of the passing of this Act.

**Mr. Alexis FitzGerald:** I think Senator Lenihan raised this point of retrospection before. I found myself driven to disagree with him because I really do not see that there is anything retrospective about a section which provides that in relation to the year in which it is enacted the particular yardstick is to measure the income to be assessed. If people did things before that date, they did them wisely or unwisely, virtuously or viciously. They formed a view of what was likely to happen. They did not correctly or wisely assess or even know that when a like section was introduced in Britain it too caught, without anyone charging retrospection, income arising from assets that were transferred abroad. I should have thought of all the tax avoidance operations that people have been engaged in and of all the persons least entitled to engage in these tax operations, being for the large part, entirely comfortable gentlemen, this particular type of tax avoidance is the least meritorious.

**Mr. B. Lenihan:** I fully agree. I hold no brief for the type of operation that this section is seeking to cure. As Senator FitzGerald has just said, it is certainly not a meritorious type of operation. It should be sought to be cured as is sought to be done in the section. I am only talking about the danger of importing this type of phraseology into tax avoidance measures.

It is a very dangerous thing to import into any legislation phraseology of this kind, which is unnecessary in this case. There is a danger of it being used again in regard to far less serious and less harmful types of tax avoidance. It is a very dangerous tax power to start giving to the Revenue Commissioners that they can deal with an operation of this kind irrespective of when the operation was carried out by the people concerned at any stage before the commencement of the Act.

That is a very global sort of provision to import into a section of a Finance Act. I agree with Senator FitzGerald that if anybody merits draconian treatment it is the people that the Revenue Commissioners are trying to get to. I am not pressing my recommendation.

Recommenation, by leave, withdrawn.

Question proposed : "That Section 57 stand as part of the Bill."

**Mr. A. FitzGerald:** The section we have—I have not the UK section before me—is modelled on Section 470 of the British Taxes Act, 1970. Subsection (1) of this section is applied to a resident individual who has "power to enjoy" the income of a non-resident person. In a case on this language, Lord Greene MR in *Howard de Walden v IRC* (1942 I KB 39 at p. 395) said that the section does not limit the income of a non-resident in respect of which the taxpayer is charged to the actual benefit which the taxpayer draws from the non-resident.

In another case, *Congreve v IRC* (1947 30 TC 192) Cohen L.J. rejected the view that tax was only chargeable on the income from the assets transferred. This point was left open in the House of Lords. There are, therefore, two possibilities with regard to the meaning of this section. I desire to know what the Minister's view is as to what is the correct possibility. The two possibilities are : *First,* that the resident individual is chargeable on the whole of the non-resident's income, or *secondly,* that tax is chargeable only on the income arising from the assets transferred. If the Minister does not have a view with which he wishes to burden the

future administration of the revenue code by expressing it would be desirable to discharge the obscurity from the section, an obscurity which has survived the attention of the House of Lords.

The second point is that *there is no guidance in the section as to how the income of the non-resident is to be computed.* Is it to be computed in accordance with the rules of Irish tax legislation or in accordance with the rules of the tax legislation of the country of residence of the non-resident person and, if it be the latter of the two, what interesting possibilities remain for the tax avoiders?

**Mr. Ryan:** I can speak in the comfortable knowledge that any opinion I express will not be quotable in court. No doubt it will be learned judges who will ultimately adjudicate on this. It seems to me that the *proper income* to take into account *is the whole income from the assets.* Otherwise the element of avoidance could continue. You could have a situation where a person would decide to build up a considerable asset abroad by leaving income abroad for a large number of years. Ultimately he would himself leave this country and then enjoy the untaxed income accumulation which he has built up outside the State or leave the income there and annually enjoy it by going to the south of France or somewhere else. I think you must take the whole income into account.

On the question of whether it is the tax law of the country in which the asset lies or Irish tax which should apply, *as it is an Irish asset then the appropriate law to apply would be the Irish law.* As it originated as an Irish asset and is only exported for tax avoidance purposes, then Irish tax law would apply.

**Mr. Alexis FitzGerald:** We seem to be taking the safer of the two possibilities.

Question put and agreed to. Section 58 agreed to.

**Section 59**

**An Cathaoirleach:** Recommendation No. 27 is cognate to recommendation No. 26 and it is suggested that they be debated together.

**Mr. Brosnan:** I move recommendation No. 26 :

> In subsection (1), page 35, line 40, to delete "they think" and substitute "facts known to them indicate clearly to be".

Subsection (1)—indeed the whole section—is objectionable to us on this side and, I am sure, to many Senators on the other side. It proposes to give powers to the Revenue Commissioners to pry and to spy into the private affairs and personal lives of citizens and, in doing so, it constitutes a serious threat to the liberty of the individual and to his right to privacy.

The aim of my recommendation is to limit and restrict the powers it is proposed to invest in the Revenue Commissioners. These are extensive powers enabling them to interrogate and to investigate a large number of people, both lay and professional, and this could eventually lead to a massive campaign of interrogation of citizens.

This section could be open to abuse in the wrong hands and citizens could be victimised. Inquiries could be made into their entire background, into details of their personal lives; skeletons in cupboards could be unearthed and other matters, which had nothing at all to do with the officers of the Revenue Commissioners, could be disclosed.

The proposed recommendation would do much to cut down abuses which, we fear, are bound to arise if this section is enacted in its present form. If the recommendation is accepted, it will put a curb on the curiosity of the officers of the Revenue Commissioners. It will compel them to proceed on reasonable facts, pertinent to the purposes of Sections 57, 58 and 60, because they will have to establish on reasonable facts a *prima facie* case before they can embark on their interrogations or investigations.

There was a discussion earlier on a recommendation of Senator Lenihan's about the phraseology used. He objected to the phrase "in the opinion of the Revenue Commissioners". I have never before come across this kind of phraseology in a legal document. Who are the Revenue Commissioners to "think"? The phraseology is most unparliamentary and unlegalistic. The words I suggest are infinitely superior.

The Revenue Commissioners may "think" certain things under subsection (1) and then, under subsection (2), there is a wide range of transactions which they may investigate. Again, the wording in that subsection is :

> The particulars which a person must furnish under this section, if he is required by such a notice so to do, include . . .

and a list of particulars which may be investigated by the Revenue Commissioners is set out. These are included. There is no exclusion of the kind of particulars which, I believe, would inevitably be investigated by officers who might be too conscientious and who might be tempted to deal with matters which had nothing at all to do with the purpose of this section.

The remarks I have made about subsection (1) are equally applicable to the second recommendation in my name. Again, if that is accepted, it will limit their activities to reasonable matters and to facts. It will, at least, compel them to establish some kind of *prima facie* case before they proceed any further.

**Mr. M. J. O'Higgins:** I detest this kind of section. I know Sen. Brosnan feels the same way as I do about it and, in his recommendations, he has approached this in much the same way as what might be called an "unadministration" practising lawyer would approach it. At the same time, we must look at the position as it is. This is a section designed to give the back-up support necessary to the Revenue Commissioners to clamp down on tax avoidance.

Once this is accepted we will have to be very careful about going too far in hamstringing the Revenue Commissioners in their work. The only possible result of acceptance of the recommendations proposed by Senator Brosnan would be that it would leave the operation of the Revenue Commissioners in this field open to challenge in the courts. The aim of the recommendation is to take away discretion from the Revenue Commissioners, to force them to act on the basis of ascertainable facts and then leave them open to challenge as to whether or not they are operating in that way. I am doubtful about the result of such a recommendation.

Subsection (1) as it stands refers to such particulars as they think necessary. It is suggested that "facts known to them indicate clearly to be necessary" be inserted instead. How is that indication to be arrived at? What is the indication to be given? To whom is the indication given? Is it given to the Revenue Commissioners? Effectively the position, as I see it, is that we are depending on what the Revenue Commissioners think of the situa-

tion. What they think of the situation will ultimately determine whether or not they seek the information required in this section. Senator Brosnan suggests they required in this section. What other way can they form an opinion except on facts known to them? I am not sure that it would effectively achieve any difference in actual operation or result.

The same remarks apply to the second recommendation. When tax avoidance machinery is being set up with the intention of making it effective so far as this operation is concerned, the necessary back-up service in the legislation has to be provided. As a practising lawyer—never being in the position as far as litigation is concerned of acting on behalf of the Administration in any sense and possibly regarded as a defendant lawyer rather than an Administration lawyer—my natural reaction is against this kind of section.

**Mr. Lenihan:** I endorse what has been said by Sen. Brosnan. Senator O'Higgins believes in his heart of hearts that this sort of section is all wrong and that these recommendations are designed to cure some of the very serious ills incorporated in this section.

Tax avoidance measures, a general clamp-down on control of the economy attitude-of-mind can be taken too far. This has been clear from what we have seen in recent months. We have had a massive outflow of funds from this country by reason of a lack of confidence on the part of the business community.

I am coming to the section itself. If we write into a subsection of an Act which contains a Gestapo-like marginal note: "power to obtain information"—

**Mr. Alexis FitzGerald:** The "Gestapo" being the British Labour Party.

**Mr. Lenihan:** That is why the British economy is in precisely the same situation as we are. A similar type of operation has been carried on there. It is the height of lunacy for an Irish Government to imitate a British Government, particularly when there is no confidence in the British economy. Section 59 states:

> The Revenue Commissioners, or such officer as the Revenue Commissioners may appoint, may by notice in writing require any person to furnish them within such time as they may direct (not being less than twenty-eight days) wich such particulars as they think necessary for the purposes of Sections 57, 58 and 60.

"As they think necessary"—legislation of that kind could well be found in some of the new African states. We have always had in the Oireachtas an attitude whereby there is a basic legal protection in every section dealing with the public in regard to tax matters.

All that is required is that we put in here a legal directive that the Revenue Commissioners cannot proceed except on the basis of facts that clearly indicate to them that there is avoidance of the nature envisaged to be prevented.

That would appear to me to be an eminently reasonable safeguard. The phraseology which we incorporate there means that the Revenue Commissioners can only proceed on the basis of facts that reasonably indicate to them that the particular tax avoidance they envisage is involved. If we use phraseology such as "they think" and if we give them power to order by notice in writing to furnish such particulars as they think necessary, this must be considered in conjunction with other phraseology to which I referred earlier and indeed to the provision where the privilege which exists between a solicitor and client is sought to be destroyed, so that a solicitor may be directed to reveal particulars to any investigator appointed by the Revenue Commissioners in cases involving clients of his. This is a very dangerous area. It is like the situation in George Orwell's "1984". I would not mind this if there was massive avoidance going on in this country where millions of pounds were involved. All this is eroding confidence on the part of investors in this country and helps to drive money out of here. With that type of legislation we are going to kill any incentive to investment.

I suggest that we maintain the civilised phraseology that has always been part of finance legislation and that we respect the basic rights of citizens in their liability to the State to pay tax.

The Revenue Commissioners have the responsibility of checking tax avoidance and they must investigate. I am not denying this. All I am saying is that they should proceed to investigate on the basis of facts which indicate clearly to them that there is tax avoidance by certain people. We should insert words to show that there is basic legal protection for the citizen, and to indicate that they cannot just proceed on a total widespread draconian basis without any regard to facts.

**Mr. R. Ryan:** The picture of this being a provision invented by a radical Government is ludicrous in the light of historical facts. The first time a section of this kind was written into the laws of these islands was by a cautious, considerate, Conservative British Government under Mr. Neville Cahmberlain, in the 1939 Finance Bill, and it provided exactly what the Republic of Ireland is daring to provide in 1974. That takes care of the highly emotional speech we heard from Senator Lenihan and of much of the criticism that has been voiced elsewhere since this provision was first announced.

Neville Chamberlain was the man who declared war against Nazism. Britainn fought successfully a war against Nazism. In England they hold very strong views about the rights of the individual; these are much stronger than they are here. We have the shame of being the only Parliament in Europe which introduced compulsory, statutory medication, so much did we respect the rights of the individual. At least Britain and other European countries have not done this; I do not think any country in the world has done it. Suddenly there has been a great emotional outburst because we have provided in this legislation the absolute minimum back-up service which must be given to the Revenue Commissioners if they are to take steps to stop tax avoidance.

Senator Brosnan's recommendations would completely defeat the purpose of the section. If the Revenue Commissioners may only put questions when they know the facts there is no need for further investigation. The purpose of giving them the investigatory powers is to establish the facts. If they know the facts, if they know the wrongdoers, they can go after them. Remember we are dealing here not only with tax avoiders but tax evaders as well. Nobody has the right or privilege to avoid answering the lawful questions of the Revenue Commissioners if those questions are for the purpose of ascertaining a person's income. Nobody has the right to refuse that information and if any person does refuse they do so at their peril. That is as it should be.

No profession or banking institution enjoys a privilege in its own right. Any privilege it has is because its clients have a privilege, but privilege does not extend to the

right to avoid and evade tax. We must ensure that we do not bring in a provision here which says that assets which are transferred abroad are to be brought into the tax net and at the same time take no steps to enforce it. Quite clearly people who would be transferring assets abroad would have many occasions to go to their bankers and accountants and legal advisers in order to get advice in order to use their services. It would be ludicrous to allow such people to get professional advice for the purpose of avoiding answering questions.

The references to solicitors and banks here are limitations on the rights of the Revenue Commissioners to seek information. One would assume from the comments that have been made here and elsewhere that solicitors would be obliged to answer everything. That is not so. They are primarily required to declare the name and address of the person on whose behalf they have been acting and to declare the name and address of associated companies and operations. Of course all that is absolutely necessary because one of the easiest ways to operate tax avoidance is to do it by means of associated operations and, when they are identified, then the Revenue Commissioners can pursue the individual or the operation which has been identified through it. The Courts will be there to adjudicate upon the reasonableness of the Revenue Commissioners. If they use this power unreasonably, anybody may challenge the exercise of the power by the Revenue Commissioners and one can be confident that the Courts will not allow the Revenue Commissioners to use this power in an unreasonable way nor may they use it for any purpose other than that of combating tax avoidance, that is what the language of the section says. Necessity is a much stricter word than the wording of the recommendation.

**Mr. Brosnan:** In regard to having recourse to the Courts, there is no provision at all for an appeal.

I want to ask the Minister three or four questions. First of all, is there any time limit at all on how far back the Revenue Commissioners can go in investigating situations like this? Secondly, is there any appeal from the decisions of the Revenue Commissioners, the decision in relation to whether or not they should investigate facts or the decision in a case where a person refuses to give the information? I want to know if there is any appeal against that refusal on the part of an individual? Thirdly, I would like to know how the Minister proposes to enforce this subsection and the other subsections in the case of refusal on the part of an individual or a solicitor or others to furnish the information sought by the Revenue Commissioners?

**Mr. Ryan:** First of all, if a person is of the view that the Revenue Commissioners are acting unreasonably they may challenge the Revenue Commissioners' decision in Court. This is the ordinary right.

**Mr. Brosnan:** On the question of being unconstitutional.

**Mr. R. Ryan:** Unconstitutional or being unreasonable in the exercise of it or being unnecessary for the purposes of the section.

**Mr. Brosnan:** Does the Minister agree that the whole section is certainly bordering on being unconstitutional?

**Mr. R. Ryan:** I can speak as a lawyer as well as a Minister and if this were repugnant on legal grounds I would not be recommending it to the House. I am satisfied that the protections here are the proper protections to have. I am also satisfied that the law, which we must ensure is respected, cannot be enforced unless we have these provisions. Regarding the sanctions. They are the ordinary sanctions for non-compliance and there would be a fine up to £500 and a continuing fine of £10 per day until compliance with the requirement. There again it will be a matter for the Courts to adjudicate if refusal occurs so that the individual's rights are fully protected. There is no question, therefore, of an infringement of the rights of the individual.

The law in Britain has been challenged. The reasonableness of notices has been challenged. One such notice was what one might call a "fishing" notice. In the full sense it was like casting a net on the waters to see what the net would bring in but the courts expressed the view that the Revenue Commissioners were entitled to investigate and that they had to investigate in order to ascertain facts.

Question: "That the words proposed to be deleted stand" put and declared carried.

Recommendation declared lost.

Recommendation No. 27 not moved.

**Mr. Brosnan:** I move recommendation No. 28:

In page 36, to delete subsection (3).

There are two recommendations here. The first is important and has been referred to already. The purpose of the recommendation is to preserve and protect the legal principle which this section seeks to erode and to undermine. The Minister, as a lawyer himself, is well aware that all transactions between a solicitor and his client are absolutely privileged and that the solicitor may not, except on very, very rare occasions, disclose any information received from his client in the course of his professional business without the expressed consent of the client. This also extends to members of a solicitor's staff, to his clerk, to his partner, and I presume, also to typists, secretaries and other members of the staff. It also extends to barristers. This relationship between solicitor and client has been long established and it is time honoured. It has been accepted, respected and practised by members of the Minister's profession over the centuries. It is a secret and sacred relationship and is enshrined in the law of this country. This basic change in the fundamental principle of our law came as a shock and as a surprise to all members of the legal profession and, of course, to the general public who depend so much on solicitors for advice and assistance in their private affairs, including their financial transactions. As the Minister is aware, there is **strong opposition from the Incorporated Law Society.** I have here a copy of a **letter which was written to the Press by the President of the Incorporated Law Society**—I am sure the Minister has a copy—in which it is stated:

> The Incorporated Law Society of Ireland views with great seriousness the effect of Section 57 of the Finance Bill 1974 at present before the Dail if this section is enacted in its present form.
>
> The section is designed to give powers to the Revenue Commissioners to require any person to furnish them with particulars relating to any transaction concerning the transfer of assets abroad and the possible avoidance of taxation thereby and purports to require that solicitors among others shall be compelled to disclose information relating to their clients and their affairs.
>
> The Society does not in any way condone concealment which avoids taxation properly payable and further appreciates that the information proposed to be required of solicitors is less than that which may be required of others.

Nevertheless, the Society feels that the proposals are in direct conflict with the rule of absolute privilege of transactions between a solicitor and his client, a rule which is for the protection of the client to enable him to confide unreservedly in his legal adviser.

This proposed legislation attacks one of the fundamental rights of the citizen and to the extent that the Society feels it must call public attention to it, and is making representation to the Minister for Finance to alter the section and preserve the privilege.

This expresses the fears and objections of the legal profession to this section. I am sure the Minister is also well aware of their determination, as far as possible, to resist this section.

I read an article in the magazine, *Business and Finance* which refers once again to the proposed change. It refers to the solicitor here as the confidential agent. Speaking of the clients, it says:

Without trust, absolute trust, who does he go to? In Sicily they go to the Mafia.

The Minister is aware that in the Dail one of his legal colleagues, stated that he will absolutely refuse to comply with this regulation. I wonder how the Minister or the Revenue Commissioners propose to deal with this. How will the Minister deal with these solicitors, some on his side of the House, if they refuse to comply with this as I am sure many of them will do? They have already challenged the Minister and intimated that they have no doubt at all that they will refuse to do this. I think this subsection will become unenforceable and will lead to confusion. I think that the amount of money which the Minister would hope to collect or the amount of tax avoidance which he would hope to be able to prevent would not be worth the candie, taking into account the cost of the administration of this section.

Because of the nature of the relationship between a client and a barrister, an accountant and a banker, I think that this special privileged relationship should be preserved.

**Mr. R. Ryan:** I do not want to delay the House but acceptance of recommendation 28 would, in fact, leave solicitors completely unprotected. It seems to me that acceptance of recommendation 29 would not give solicitors any greater protection than there is under the section. All they have to do is supply names and addresses.

**Mr. Lenihan:** It is only relevant in the context of having Section 59 in the Bill. The whole thinking in this area is crazy in our circumstances. We are in a period of recession where we are experiencing serious difficulties and we are concerned about chasing halfpennies and destroying basic legal principles in order to chase halfpennies.

There is a sense of unreality surrounding this debate. We are seeking to erode a confidentiality which has existed over centuries between a solicitor and a client, between banks and their clients and between a client and accountant or a barrister. This concerns the private affairs of individuals. "In the case of anything done by the solicitor in connection with the transfer of the asset" is the phraseology used.

**Mr. R. Ryan:** The names and addresses of the people involved—no more than that.

**Mr. Lenihan:** I am referring to (a), (b), and (c) of subsection (3).

**Mr. R. Ryan:** It is the names and addresses that are involved and no more.

**Mr. Lenihan:** And also (a) in the case of anything done by the solicitor in connection with the transfer of any asset and (b) in the case of anything done by the solicitor in connection with the formation or management of any such body corporate and (c) in the case of anything done by the solicitor in connection with the creation or with the execution of the trusts—

**Mr. R. Ryan:** The name and address. That is all that is asked.

**Mr. Lenihan:** There is a lot more than that. With that type of ascertainment of information if you link (a), (b) and (c) together the whole operation in effect which has been discussed between solicitor and client is revealed to the Revenue Commissioners. I agree with Senator Sean Brosnan's view that this is unenforceable. If professional persons in the category mentioned decide not to give the information, that will be the end of that. There is no clause written into this section. If a thing is undesirable but is in the interests of the community, that is acceptable. The amount of information and the amount of revenue this will yield eventually will be negligible. We will just have added a further tarnishing to the good name we spent many years building up.

This type of section brings us close to the Banana Republic type. We have sought for over fifty years to get rid of that—we have never had it in our State. There is a high regard abroad for our institutions and for the way we carry on business and behave ourselves. If we are to have a section such as this written into the principal piece of legislation enacted, which is the Finance Act, there can be no confidentiality in regard to particular transactions between solicitor, client, accountant, barrister, banker and so on.

This sort of damage is punitive when linked to a number of other proposals that the Government have adumbrated, many of which they have withdrawn. It is the total add-up that counts and this is causing the present lack of confidence on the part of financial affairs and business in the development of our community. Basically, the whole financial structure depends on the single element of confidence. If, by reason of sections like this, one further erosion is added to our confidence we are on a dangerous, slippery slope. I appreciate that the Minister is adamant in this matter.

**Mr. R. Ryan:** Senator Brosnan quoted the letter which the President of the Incorporated Law Society sent to the Press. I am not aware that the solicitors' profession or the society were consulted before the letter was issued. Secondly, I am disappointed that the President of my own professional society should have written a letter to the Press which was, to say the least of it, misleading in that it did not fully tell the public the true position under the section.

The letter from the learned President to the Press stated, as Senator Brosnan quoted, that solicitors would be required to give particulars relating to any transaction concerning the transfer of assets abroad and the possible avoidance of taxation thereby and that this section shall require that solicitors among others should be compelled to disclose information relating to their clients and their affairs. I am disappointed that the President did not display the type of caution which I think a solicitor should.

**Mr. Lenihan:** He must have thought it a very serious matter.

**Mr. R. Ryan:** He deliberately conveyed the impression that this was a witch-hunt by the Revenue Commissioners to get a lot of information about advice given, to require the solicitors to disclose what information they received from the clients who consulted them and to state precisely what they did. That is not required. They are required to give the names and addresses of the people who have engaged in the transfer of assets abroad for the purpose of avoiding tax.

It is all very well for the Opposition to state that they share with us a desire to stop people transferring assets abroad for the purpose of avoiding tax and in the same breath stating: "We do not propose to enable the Revenue Commissioners to take the necessary steps to stop the transfer of assets abroad for the purpose of avoiding tax."

I deplore the remarks to which Senator Brosnan has just now referred—the remarks of Deputy O'Malley in the Dail when he asserted that he proposes to disobey the law. It is unforgivable that a man should do it in such a way as might entice people to consult him for the purpose of engaging in the transfer of assets abroad for tax avoidance purposes.

**Mr. Yeats:** This is a typical example of the way in which the Revenue Commissioners over the years literally are allowed to get away with murder. The Minister appears to envisage what is almost a 1984 situation. He says in his simplistic way that if we in the Opposition were really against tax avoidance then we could give him the powers he wants. We all know there are things going on that ought not to go on. People break the law and attempt to evade taxes. It is simply because we know this, and in the interests of the civil rights, that one has to ensure that authorities do not try to take upon themselves powers which are unjustified.

Power is being sought to require every solicitor to give the names to the Garda of all those who they know have been employed in certain named offences. The principle is precisely the same in each case. We are against sin, crime and wrongdoing of all kinds. That does not mean that we are bound to accept a 1984 situation in which the authorities are in a position to cross all the boundaries of confidentiality that have been set against them over the generations.

I will give the Minister credit in assuming that he would not be prepared to accept a situation where solicitors were instructed by the Garda to report to them the names of all clients who have been known to them to have been involved in breaking the law.

Whether one is guilty or not, one must be able to go to a solicitor and seek his advice without feeling he will rush off to the Garda to report that one has been engaged in illegal activities.

As much as we object to and resent the activities of people who are attempting to evade tax, we must have regard to the requirements of confidentiality. The preservation of confidentiality between solicitor and client is more important than the immediate interests of the Revenue Commissioners. This is not just a proposal to say that from now on transactions of this kind may be reported in effect by a solicitor having to give the names and addresses of his clients. The words used are "he must state that he is or was acting on behalf of a client". The Revenue Commissioners can go back fifteen years if they want to. They can go on a fishing expedition back through the generations. There is no limit. They can call upon a solicitor to get the name of a client who was involved in transferring funds in 1952. That is the problem with which we are faced. It is in the interests of the Revenue Commissioners and all taxpayers that as much tax as possible should be collected and that there be as little fraud as possible. Nonetheless, there are other more important interests. We feel in this instance that the Minister is violating them.

**Mr. Brosnan:** It seems extraordinary that the Minister should use this House to make an attack on the President of his own society. It is very significant that not one legal colleague of the Minister, either in this or in the other House, with one exception, got up and spoke in favour of this measure. These are people who studied the section and who knew what it was about. They all refused to come to his assistance. This was noted by many people, including the public. The only person who made a contribution in relation to this section was the Leader of the House and he made an apology.

Incidentally, there is some provision in the Finance Acts whereby solicitors are required to send certain returns to the Revenue Commissioners every year. I do not know how long this provision has been in force. I do know that solicitors have repeatedly refused to make these returns. What has the Minister or anybody else done about it? The same will happen in this case. Could the Minister tell the House whether it is a fact that they have refused to make these returns.

**Mr. R. Ryan:** I do not know.

**Mr. Brosnan:** Does the Minister know about these returns or about the provision?

**Mr. R. Ryan:** I know about the provision.

There is a provision in law that any person who receives money for and on behalf of another may be required to disclose information about such money to the Revenue Commissioners.

**Mr. Brosnan:** Is it a fact that the solicitors' profession have refused repeatedly year after year to make these returns to the Commissioners?

**Mr. J. Fitzgerald:** Even the bank managers had to do it.

**Mr. Brosnan:** They refused to do it.

**Mr. R. Ryan:** This is not an 1984 situation. As I pointed out already it is a 1939 situation.

**Mr. Brosnan:** It is a George Orwell situation.

**Mr. R. Ryan:** It has existed in the UK since 1939.

**Mr. Yeats:** For thirty-five years Ministers for Finance have resisted the impulse to go on the disreputable road followed in England. It has taken thirty-five years for te Minister to come round to it.

**Mr. Brosnan:** Does the provision exist? If it does, is it not ignored by the profession.

**Mr. R. Ryan:** It is in the 1967 Act.

**Mr. Lenihan:** In practice it has been ignored.

**Mr. Brosnan:** A return has never been made.

**Mr. R. Ryan:** I think there is evidence to the contrary.

**Mr. Brosnan:** I have made very positive inquiries and neither the Minister nor his predecessor could do anything about it.

**Mr. Lenihan:** This is why all this is utter nonsense. It is unnecessary, superfluous. It will never be enforced.

Question: "That the words proposed to be deleted stand", put and declared carried.

Recommendation declared lost. Section 59 agreed to.

# UNREPORTED IRISH CASES

**Conviction quashed because identification unsatisfactory.**

On 22 February 1973 a robbery took place in a garage in Rathmines. Two masked men took £73 from the till in the presence of the petrol attendant. The applicant was tried and convicted in Dublin Circuit Court, and sentenced to five years penal servitude. The petrol attendant was driven on February 26 by a Guard to the Circuit Court on the morning of the trial, and identified in the hall of the Court the applicant as the man with the breadknife who had taken part in the robbery four days earlier. No proper identification parade was ever held; the petrol attendant had never seen the accused before the robbery. The petrol attendant had further stated that the Guard told him in advance that the accused would be present. There should have been a full disclosure at the trial by means of examination and cross-examination of the petrol attendant and of the Guard, of all the circumstances of the identification so as to enable the jury to find if it had been established beyond reasonable doubt that the petrol attendant correctly picked out the applicant. Here the full circumstances of the identification relied on were not presented in evidence to the jury.

As the Court considers that a verdict of guilty could not be obtained on the evidence presented at the trial if a retrial were ordered, it will allow the appeal and quash the conviction.

[The People (A.-G.) v Peter Fagan; Court of Criminal Appeal (Henchy, Murnaghan and Gannon JJ. per Henchy J.); unreported; 18 May 1974.]

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**Plaintiff's dismissal from Garda justified.**

Plaintiff was formerly a member of the Garda, and was stationed at Portumna. The Deputy Commissioner had made an order transferring the plaintiff from Portumna to Ballinamore to take effect from 5 January 1971. The plaintiff refused to comply with this order. On 18 February 1971, a directive was issued ordering an inquiry, which duly took place in Loughrea Garda Station on 6 July 1971. Here the plaintiff was charged with having refused to obey a lawful order of transfer and the inquiry duly held that the plaintiff had been guilty of the offence charged.

His complaint is that he was improperly required by the Tribunal to indicate the nature of the evidence to be given by his witnesses. This is obviously a misinterpretation of the Regulations, which does not require an accused to disclose the nature of his defence, but merely requires him to indicate to the Tribunal the purpose for which he requires the Tribunal to issue subpoenas in respect of persons whose attendance he requires in Court.

O'Keeffe P. had found the plaintiff's complaint well-founded, as the plaintiff was not required by the prescribed Regulation to indicate to the persons holding the inquiry the evidence which he considered his witnesses would be able to give. In this respect he held that only material evidence would be received, and therefore only those witnesses who would give material evidence. When the Tribunal requested him to indicate in what way the evidence of these witnesses was material to the issues which the inquiry had to try, the plaintiff objected. Obviously no person can be a witness until his evidence is relevant and admissible. If then the witness is material, he must be summoned if the request is made. But if *prima facie* a witness is not material, the Tribunal must be judicially satisfied of the materiality of the evidence, before it directs a witness summons to issue.

When the Tribunal tried to enforce this Regulation, counsel withdrew from the inquiry, without hearing any of the witnesses whose names were on the list, because no order was issued for the attendance of these witnesses. The President consequently held that the conduct of the Tribunal was in breach of the terms of the Regulation, in that the Tribunal sought to ascertain from the accused the evidence which the proposed witnesses never gave. The Supreme Court held that the Regulation did not violate any constitutional or other fundamental right.

The full Supreme Court consequently allowed the appeal, and ordered that the plaintiff's dismissal was justified.

[Fitzpatrick v Wymes, Flood and the Minister for Justice; full Supreme Court (separate judgments by FitzGerald C.J., Walsh J. and Henchy J.); unreported; 13 February 1974.]

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**Award of Property Arbitrator granting full market value to Claimant from Acquiring Authority upheld.**

Case stated by Mr. Owen MacCarthy, the Arbitrator of the Land Reference Committee, on an arbitration between Dublin Co. Council (hereinafter called the Acquiring Authority) and Deansrath Investments Ltd. (hereinafter called the Claimants) to determine the proper compensation to be paid pursuant to the Dublin Co. Council Compulsory Purchase (Housing Act 1966) No. 1 Order 1968.

The property arbitrator made his award on 25 March 1971. It was there stated that Rules 10 and 13 in the 4th Schedule to the Local Government (Planning and Development) Act 1963 (hereinafter called the 1963 Act) restricted the arbitrator in determining the value of the lands, to value them as agricultural land on the date of the Notice to Treat, 16 April 1970. The arbitrator held that the sum to be paid to the claimants was in principle £450,000, but, if the acquiring authority's submission were upheld, it would be reduced to £150,000. At the hearing, there had been a conflict of evidence between the valuers. The evidence on behalf of the claimants was that the land would realise £3,000 per acre, which would give a total of £698,325. On the other hand, the evidence on behalf of the acquiring authority was that the lands on the same basis were worth £1,750 per acre. If the lands were to be valued solely on the basis of agricultural land, they would only be worth £750 per acre, which is the contention now put forward by counsel for the acquiring authority. Section 2 of the Acquisition of Land (Assessment of Compensation) Act 1919, which deals with the assessment of compensation for lands compulsorily acquired is then quoted in full. Section 69 of the Act of 1963

makes provision for ten new Rules to the Fourth Schedule, numbered 7 to 16. In many considered English decisions, it has already been established that the value must be the value to the owner, from whom the lands are being taken, and not to the purchaser by whom they are being taken. In the absence of Irish authorities, the same English principles must be applied here. As against the local authorities contention, in many parts of the country, houses are built without the benefit of main drainage or water supply; it is not essential for the development of land that a local authority should be involved in supplying such services. The Legislature has failed to state in the Act that the value of the land was to be confined to its value as used on the date of the Notice to Treat. The purpose of Rule 13 was to ensure that a claimant would not attain an enhanced price for the land, because either (1) the Local Authority might propose to expend public money in developing the land in the neighbourhood, or (2) that the Local Authority might include such land in a scheme of development.

Pringle J. accordingly held on 16 July 1971 that the arbitrator had applied the correct principles in assessing the value of the land at £450,000. The Co. Council appealed to the Supreme Court. The judgment of the Supreme Court (Budd, FitzGerald and McLoughlin JJ.) which unanimously dismissed the appeal, was delivered by Budd J. on 17 July 1972. The following facts emerged from the judgment:

(1) On 6 March 1968 the claimants entered into a contract with Michael Downey for the purchase of the lands of Deansrath, Clondalkin, Co. Dublin, containing 280 acres for £200,000.

(2) Proceedings for Specific Performance of the Contract resulted in a negotiated settlement awarding an additional £22,000 to Michael Downey.

(3) As a result of prolonged and desultory negotiations, a Compulsory Purchase Order was made, in respect of 232 acres of these lands, by the acquiring authority on 30 August 1968.

(4) The purchase of the lands of Deansrath was completed on 31 January 1969.

(5) A Notice to Treat was served by the acquiring authority on the claimants on 16 April 1970.

(6) As drainage and water services were not available in respect of these lands, and would not be available for years, the Co. Council would not grant permission for the erection of dwellings thereon.

(7) In April 1970 these lands were zoned for agricultural purposes in the Co. Dublin Draft Development Plan.

The question of law previously referred to is then dealt with, and Section 2 of the 1919 Act, as well as Section 69 of the 1963 Act, are once more quoted in full. In the absence of Irish authorities, English decisions on similar lines should *prima facie* be applied to this case. From these cases, it is clear that the value to the owner before the date of the taking, and not the value to the taker, is to be taken into consideration. The value to the owner is consequently to be the market value or full price of the lands. Rule 13 is a restriction of Basic Rule 2 that, in assessing compensation to be paid in respect of land to be acquired compulsorily, the value shall be taken as the open market value of the land. It was therefore quite open to the arbitrator to take into consideration the potential development value of the lands by any person other than a local authority. Rule 13 is not a method of preventing the claimant from obtaining the market value of his lands, but rather a method of preventing him from getting more than the market value. During the waiting period, before erecting buildings, the owner of the land was entitled to use the land in a profitable fashion. The appeal is accordingly dismissed.

[In re Dublin Co. Council Compulsory Purchase Housing Act 1966 No. 1 Order 1968 and in re Deansrath Investment Co. Ltd.; Supreme Court; unreported; 17 July 1972.]

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**Murder appeal allowed, and new trial ordered, after jury were accidentally given documents after completion of Judge's charge, which might prejudice the trial.**

The accused was on 7 February 1974 convicted of the murder of Joseph Spratt on 13 May 1973; Spratt was found dead in his own room in a derelict house. The statements of a witness purported to establish that the accused was present and took part in the fatal assault on the deceased. At the conclusion of the Judge's charge the jury were accidentally given some of the exhibits referred to at the trial, including two depositions of witnesses, and the statements above referred to. The statements were in the hands of the jury a relatively short time, and the Judge then directed they should be returned to the Registrar. Although it is unlikely that the jury read these statements, nevertheless the possibility must be considered that they had, and in that event that their contents did constitute evidence at the trial. Upon the return of the documents, the Judge directed the jury to disregard the contents of these statements, and further reminded them that the witness had stated in evidence that the contents of the statement had been invented by him. There was abundant evidence from which the jury could arrive at the verdict without reference to the contents of these statements. Nevertheless, the Court will allow this appeal, and order a retrial because it cannot say that the determination of the jury on the assessment of that evidence may not have been affected by the contents of these statements in a manner prejudicial to a fair trial.

[The People (A.-G.) v Nolan; Court of Criminal Appeal (Griffin, Murnaghan and Gannon JJ., per Gannon J.); unreported; 27 June 1974.]

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**Murder appeal allowed and new trial ordered when accused's wife was treated as a hostile witness without the proper procedure being followed.**

The applicant was found guilty of the murder of Harold Dawes on 19 July 1972 before Pringle J. in the Central Criminal Court on 14 December 1972. The incident took place in a laneway in Limerick because the accused had become enamoured of Mrs. Dawes. The question of provocation was raised at the trial. It had to be determined whether the death was a result of a carefully premeditated murder, for which the weapon had previously been bought in Liverpool, or whether the circumstances leading up to the death were largely unforeseen, and that the weapon used was one found at the moment in circumstances amounting to provocation. At first Mrs. Dawes, the mistress of the accused, had stated that the stabbing had been done with a knife, but at the trial she stated it was done with a scissors. On this evidence, the trial Judge allowed her to be treated as a hostile witness. Mrs. Dawes was never asked in cross-examination which of

her statements relating to the weapon was true.

The proper procedure if it is desired to have a witness treated as hostile is to make an application to the Judge and put before him the material upon which it is sought to have the witness declared to be a hostile witness. This should be done in the absence of the jury and if the Judge rules that witness may be treated as hostile the witness may be cross-examined. If the witness denies the statement, it would be necessary that the person who took the statement should testify to that effect. This procedure bears no resemblance and is quite distinct from the rules and procedure which govern the admissibility of written statements in cross-examination. The prosecution, to prove provocation had not established the necessary basis for introducing the written statement made to the Gardai and that being so, the statement should not have been received in evidence.

The conviction was accordingly quashed and a new trial ordered.

[The People (A.-G.) v Derek Taylor; Court of Criminal Appeal (Walsh, Murnaghan and Gannon JJ., per Walsh J.); unreported; 30 July 1973.]

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**Validity of adoption order upheld—no undue influence on the mother by social workers**

In a reserved judgment delivered in the High Court in Dublin on 25 October 1974, Mr. Justice Butler dismissed an action brought by a young couple who had sought an order giving them the custody of a four-year-old boy who was born to them before they were married and given for adoption.

They had brought their action against the Adoption Board and the Attorney-General, challenging the validity of the adoption order, and they sought a declaration that Section 29 of the Adoption Act, 1952, was unconstitutional.

When the action was tried last week, Mr. Justice Butler directed that the names of the plaintiffs should not be published. The baby was born on 15 May 1970 and the couple were married in June 1972. They now live in Ghana.

In a very comprehensive judgment, Mr. Justice Butler dealt at considerable length with a review of the evidence in the case and, having done so, he said that the validity of the adoption order had been attacked by counsel for the plaintiffs on a number of grounds: (1) That there was no valid consent to adoption by the mother; (2) That the Board in making the order did not take any adequate steps to satisfy itself that the mother understood the nature and effect of the consent given and of the adoption order; (3) That the Board did not perform its duties with due regard to constitutional justice; (4) That the subsequent marriage of the parents invalidated the adoption order and that, in so far as the Adoption Act provided that the Legitimacy Act, 1931, should not apply to an illegitimate child in respect of which an adoption order had been made, it was unconstitutional; (5) That the powers and functions of the Board to make an adoption order were unconstitutional because they were judicial powers and functions.

**Alleged consent obtained by undue influence**

The first ground of attack was based on the submission that the consent to adoption was obtained by undue influence first by two social workers (one a nun) in the period up to and immediately following the birth of the baby, the suggestion being that they continually advised the mother that the only choice open to her in the circumstances was to have the baby adopted in the interest of the baby and herself; and secondly by a priest and the same nun in an interview which they had with the mother.

In this it was alleged they obtained her agreement to sign her consent against her will and by insisting that it would be wrong to remove the child from the adoption, and, thirdly, by a letter of 8 June 1971 from the adoption society which was in effect an ultimatum that if she did not sign the consent she would be exposed as the mother of an illegitimate by having the child delivered to her home in a little over 24 hours.

Mr. Justice Butler said that for the purposes of this case he accepted the definition of undue influence submitted by counsel for the plaintiffs, namely, influence which overbore the will of the mother so as to make her act in a manner in which she would not have acted had she been a free agent.

He rejected any suggestion that either of the two social workers told the mother during the pregnancy or after the birth that she had no choice but to have the baby adopted. He was satisfied that they were scrupulous in trying to avoid persuading the mother towards any particular choice and on the contrary at all stages advised her on the several alternatives that were open to her without bias.

He was satisfied that at quite an early stage the mother herself fully understood and considered all the options and, given her unwillingness to adopt any of the others, was driven by the logic of the circumstances to realise that she would have to have the baby adopted.

He thought she had reached this conclusion perhaps without consciously admitting it long before she communicated it to anyone and while she continued to say that she had not yet made any decision in relation to marriage or adoption.

As to the interview of July 7th, he accepted the evidence of the priest and the nun that the mother did not in fact agree to execute the consent. He thought the explanation of that interview was that for the first time the mother was faced with the necessity of deciding either to commit herself in writing to adoption or to be faced with an immediate alternative decision. She remained uncommitted but he thought her attitude continued to be that referred to by her mother, that she was willing to have the baby adopted but not to sign a consent.

**Priest and nun were doing their duty**

He was satisfied that beyond pressing the obvious necessity for her to decide, neither the priest nor the nun forced her to decide in any particular way, and he was further satisfied that the nun again fully explained the other options and was willing to give advice and assistance on any of these options had the mother been inclined to adopt them. Being faced with facts was not being unduly influenced if the facts were truly stated.

One of the facts was the position of the child, and in stressing, as he was sure they did, that he should not be likely taken from the adopters, the priest and nun were doing no more than their duty.

He was satisfied that had the mother expressed a fixed resolve not to have the child adopted as distinct from an unwillingness to sign the consent, both would

have accepted that and tried to assist her in some other choice.

Mr. Justice Butler said that similarly he did not regard the letter of July 8th as an ultimatum calculated to drive the mother to act against her will. She knew from the previous Monday that the adopters intended to give the child back at the end of the week. After receiving the letter and while the consent was still unsigned she met the father. If she were in fact unwilling to have the child adopted surely she would have confided in him instead of leaving him under his mistaken belief that the dye was long since cast and was irrevocable.

The Judge said he accepted that the mother was reluctant to execute the consent but he rejected that she was influenced thereto in the manner suggested or that any undue influence was used. Her action was dictated by her refusal to entertain any alternative and by the imperative necessity to act.

**Law of Contract cannot be imported**

Counsel for the plaintiffs (Mr. H. Barron, S.C.) also threw out but did not develop the submission that as the mother was herself an infant any consent of hers to be valid must be shown to be for her benefit. Mr. Justice Butler said he was not satisfied that the principle of the law of contracts could be imported into the circumstances of this type of case.

Even if it did apply he was not furnished with any evidence or submissions to suggest that at the time and in the circumstances when it was given the consent was unbeneficial.

The plaintiffs' second and third grounds could be taken together and the submission as he understood it was as follows: Section 9 of the Adoption Act empowered the Adoption Board to make an order; Section 31 provided that the Board should not make an adoption order unless satisfied that the applicant was of good moral character, had sufficient means to support the child and was a suitable person to have parental rights and duties in respect of the child; Section 15 (3) provided that the Board should satisfy itself that every person whose consent was necessary and had not been dispensed with had given consent and understands the nature and effect of the consent and the adoption order.

It was submitted, he said, that in the procedure before the Board the care that the Board took with regard to being satisfied as to the matters required by Section 13, examining the application form in detail, considering the report of its investigating officers and social workers, and interviewing the applicants, was to be contrasted with the mere formal requirements that Forms 10 and 4A were on the file, which could in no way satisfy the Board because they did not examine them of the matters required by Section 15.

**Alleged contrasting approach unfair to mother**

This contrasting approach as between the applicants who acquired rights under the Adoption Order and the mother who lost them, it was submitted, was unfair to the mother, contrary to natural justice and contrary to constitutional justice in that she was not treated equally with the applicants and was deprived of her rights without compliance with the statutory provisions.

Mr. Justice Butler said that in his view this argument failed. The matters on which the Board must be satisfied in relation to the adopters were different in quality, nature and degree from those in relation to the mother. In the latter case all they must be satisfied of were two matters of fact, that she had given her consent and that she understood the nature and effect of the consent and of the adoption order. The first was evidenced by her affidavit. If it was correctly dated and sworn and was good on its face it spoke for itself.

The evidence for the second was the acknowledgement by the mother in Form 10 that she had received and retained a statement in the form prescribed by the Board setting out fully and correctly the nature and effect of the adoption order and setting out the necessity for consent. True, the nature and effect of the consent were not completely set out and there might be cases where this would be of such moment as to require further consideration. The registrar of the Board was an experienced officer. The practice of the Board was that no application should be placed before it unless the consent and acknowledgement were in order and on the file and, while one might wish for a somewhat tighter practice, it could not be said that this procedure was a non-compliance or insufficient compliance with Section 15.

**Consent could be revoked until order made**

On the other hand, the nature of the requirements of Section 13 necessitated an examination of the applicants and their background such as undertaken in this case. The omission of the required information that the mother was shown to have had and understood on the face of Form 10 and Form 4A was that the consent could be revoked at any time up to the making of the adoption order (Section 15 (5)). He was not sure that this provision was necessary for an appreciation of the nature and effect of a consent. He reserved the point. He was, however, quite satisfied that had the mother known that she could withdraw her consent she would not have done so before the adoption order was made.

She gave her consent after meeting the father at midday on Friday, July 9th. She was still unwilling to marry him and she did not inform him, not only that the adoption was not irrevocable, but that the arrangement was over and that they could have the child back on the following day.

"I am convinced that her attitude had not changed until well after the order was made," said Mr. Justice Butler.

For these reasons these submissions were not made out and he held that there was sufficient compliance with Section 15, that there was no unfairness in the treatment of the mother as compared with the adopters and that there was no failure to apply the principles of natural justice or constitutional justice.

The next submission was that at the date of the enactment of the Constitution there existed a statutory right in the child conferred in the Legitimacy Act, 1931, to be legitimated by the subsequent marriage of his parents; this was one of the personal rights recognised and protected by the Constitution and was incapable of being taken away by statute. Consequently, the marriage of the parents on 6 June 1972, *ipso facto* rendered the child their legitimate child and rendered the adoption order null and void.

**No statutory right conferred by Legitimacy Act, 1931**

He rejected this submission. He had indicated in the argument that if the proposition were well founded no adoption order such as this could ever be final until the death of one of the parents of an illegitimate child.

However, apart from that he did not consider the right conferred by the Act of 1931 to be such a right as was envisaged by the Constitution, even if its existence in 1937 were capable of enshrining it in the Constitution which he doubted. Furthermore, if it was a right, it was the child's, a right to be legitimated, and as such it existed until an adoption order was made. Thereupon, the contingent right was exchanged for the actual legitimacy conferred by the Act. In the event he held that by virtue of the provisions of Section 29 (1) of the Adoption Act, the Legitimacy Act, 1931, did not apply to the child in the present case and the section was not invalid having regard to the provisions of the Constitution.

It was lastly submitted on behalf of the plaintiffs that the decision whether or not to make an adoption order was the exercise of a judicial power or function and that accordingly Section 9 of the Act, which conferred such power on the Board, was repugnant to the Constitution. The function of the Board was to investigate the circumstances to see whether the necessary conditions existed. If they did, the Board could make an order. In his view, this was an administrative and a judicial function. The Board was not called upon to decide on or arbitrate between opposing interests nor to decide as between competing situations which was in the interests of the child.

Mr. Justice Butler held that the plaintiffs were not entitled to any of the declarations or to the relief and order sought. He said he would make no order as to costs at the moment.

[Re 2 v Adoption Board and Attorney-General; Butler J.; unreported; 25 October 1974.]

# U.C.D. FACULTY OF LAW STAFF CHANGES

**Promotions**

**Dr. J. C. Brady** has been appointed Statutory Lecturer in the Law of Property and Equity.

**Mr. W. N. Osborough** has been appointed Statutory Lecturer in Law.

Dr. Brady will henceforth be in official charge of all matters relating to the courses in Property and Equity, and Mr. Osborough will take charge of matters relating to Tort, Evidence and Penology.

**New Appointment**

**Finbarr Murphy,** B.C.L., LL.B., Dip.Eur.Integr. (Amsterdam).

Mr. Murphy will be in general responsible for courses in European Law. In the coming session he will be responsible for the new Third Year option in this field and in subsequent sessions will take part in a more extended teaching programme.

**On leave from the University of Bristol**

**Clive R. Symmons,** LL.B. (Bristol), Dip.Ed. (Oxon), Barrister.

Mr. Symmons has specialised interests in Tort and Public International Law and has taught both subjects at the University of Bristol. Here he will be responsible for the Third Year option in Public International Law and will share the Second Year course in Tort with Mr. Osborough.

**Member of Staff on leave of Absence**

**Mr. Niflis.**

**Visiting Professors**

It is expected that **Professor J. J. Murphy,** B.A. (Harvard), J.D. (Boston), LL.M. (Illinois), Professor of Law in the University of Cincinnati, Ohio, will be with us for the second and third terms. Professor Murphy has particular interests in Contract and Family Law and has also a special interest in the Watergate and Impeachment issues of 1974. All these interests will be reflected in his teaching with us. Arrangements are under negotiation for a visit in the third term from a professor in the University of Würzburg and it is hoped that an announcement can shortly be made.

**Additional New Appointment**

**Mr. Eugene P. Fanning, B.C.L.**

Mr. Fanning will lecture in Real Property and in Jurisprudence.

PROFESSOR G. J. HAND (Dean of the Faculty)
27th September 1974

# Promotion of Officials in Superior Courts

**Mr. O hUiginn,** former Probate Officer, has been appointed Registrar to the Supreme Court, in succession to Mr. L. F. Branigan, retired.

**Mr. Patrick Waldron** has been appointed Probate Officer.

**Miss Stephanie de Cleir** is now a Registrar in the Central Office, High Court.

**Mr. David Munro** is an Examiner in the Chancery Examiner's Office.

**Mr. Gerard Frewen** has been appointed Assistant Registrar, High Court.

**Mr. Sean O Broin,** of the Taxing Master's Office, has been appointed an Assistant Registrar, High Court.

# Dublin Solicitors Bar Association

The Council and Officers elected at the annual general meeting of the Association held on 28 October 1974 for the year 1974-75 were :

President : Patrick Golden.

Vice-President : David R. Pigot.

Hon. Secretary : Andrew F. Smyth.

Hon. Treasurer : Carroll Moran.

Hon. Auditors : Patrick Glynn and Peter McMahon.

Members : Miss Maeve O'Donoghue, Mrs. Moya Quinlan, John F. Buckley, Joseph G. Finnegan, John P. A. Hooper, Thomas Jackson, Rory O'Donnell, Colm Price and Lawrence K. Shields.

# REPORTED ENGLISH DECISIONS

**If a bank grants an overdraft upon unduly onerous terms, the transaction can be set aside on the ground of undue influence, if the customer were to become penniless as a result of not receiving independent advice. The bank at all times has a fiduciary duty of care towards its customers which it must exercise continuously.**

The principle stated above may appear novel to some legal practitioners, who probably thought that, once a customer signed a guarantee to the bank, he was absolutely bound for all time. But when one party to a contract is so strong in bargaining power, and the other correspondingly weak, then as a matter of common fairness the Courts will intervene. As will be seen subsequently, the relationship of the bank and the father in this case was based on trust. The bank failed in that trust by allowing the father to commit himself to a bargain charging his house, his only asset, without obtaining independent advice. The main judgment of the Court of Appeal (Lord Denning M.R., Cairns L.J. and Sir Eric Sachs) allowing unanimously the plaintiff's appeal, was delivered by the Master of the Rolls, and we cannot do better than quote him verbatim. Lord Denning has in his own memorable words stated the legal principles in this classic case so clearly that there is nothing to add.

On 30 July 1974 the following judgment was read.

**Lord Denning M.R.:** Broadchalke is one of the most pleasing villages in England. Old Herbert Bundy, the defendant, was a farmer there. His home was at Yew Tree Farm. It went back for 300 years. His family had been there for generations. It was his only asset. But he did a very foolish thing. He mortgaged it to the bank. Up to the very hilt. Not to borrow money for himself, but for the sake of his son. Now the bank have come down on him. They have foreclosed. They want to get him out of Yew Tree Farm and to sell it. They have brought this action against him for possession. Going out means ruin for him. He was granted legal aid. His lawyers put in a defence. They said that, when he executed the charge to the bank he did not know what he was doing: or at any rate that the circumstances were such that he ought not to be bound by it. At the trial his plight was plain. The judge was sorry for him. He said he was a "poor old gentleman". He was so obviously incapacitated that the judge admitted his proof in evidence. He had a heart attack in the witness-box. Yet the judge felt he could do nothing for him. There is nothing, he said, "which takes this out of the vast range of commercial transactions". He ordered Herbert Bundy to give up possession of Yew Tree Farm to the bank. Now there is an appeal to this Court. The ground is that the circumstances were so exceptional that Herbert Bundy should not be held bound.

**The events before December 1969**

Herbert Bundy had only one son, Michael Bundy. He had great faith in him. They were both customers of Lloyds Bank Ltd., the plaintiff, at the Salisbury branch. They had been customers for many years. The son formed a company called M.J.B. Plant Hire Ltd. It hired out earth-moving machinery and so forth. The company banked at Lloyds too at the same branch.

In 1961 the son's company was in difficulties. The father on 19 September 1966 guaranteed the company's overdraft for £1,500 and charged Yew Tree Farm to the bank to secure the £1,500. Afterwards the son's company got further into difficulties. The overdraft ran into thousands. In May 1969 the assistant bank manager, Mr. Bennett, told the son the bank must have further security. The son said his father would give it. So Mr. Bennett and the son went together to see the father. Mr. Bennett produced the papers. He suggested that the father should sign a further guarantee for £5,000 and to execute a further charge for £6,000. The father said that he would help his son as far as he possibly could. Mr. Bennett did not ask the father to sign the papers there and then. He left them with the father so that he could consider them overnight and take advice on them. The father showed them to his solicitor, Mr. Trethowan, who lived in the same village. The solicitor told the father that £5,000 was the utmost that he could sink in his son's affairs. The house was worth about £10,000 and this was half his assets. On that advice the father, on 27 May 1969, did execute the further guarantee and the charge, and Mr. Bennett witnessed it. So at the end of May 1969 the father had charged the house to secure £7,500.

**The events of December 1969**

During the next six months the affairs of the son and his company went from bad to worse. The bank had granted the son's company an overdraft up to a limit of £10,000, but this was not enough to meet the outgoings. The son's company drew cheques which the bank returned unpaid. The bank was anxious. By this time Mr. Bennett had left to go to another branch. He was succeeded by a new assistant manager, Mr. Head. In November 1969 Mr. Head saw the son and told him that the account was unsatisfactory and that he considered that the company might have to cease operations. The son suggested that the difficulty was only temporary and that his father would be prepared to provide further money if necessary.

On 17 December 1969 there came the occasion which, in the judge's words, was "important and disastrous" for the father. The son took Mr. Head to see his father. Mr. Head had never met the father before. This was his first visit. He went prepared. He took with him a form of guarantee and a form of charge filled in with the father's name ready for signature. There was a family gathering. The father and mother were there. So were the son and the son's wife. Mr. Head said that the bank had given serious thought as to whether they could continue to support the son's company. But that the bank were prepared to do so in this way: (i) the bank would continue to allow the company to draw money on overdraft up to the existing level of £10,000, but the bank would require the company to pay 10 per cent of its incomings into a separate account. So that 10 per cent would not go to reduce the overdraft. Mr. Head said that this would have the effect "of reducing the level of borrowing". In other words, the bank was cutting down the overdraft; (ii) the bank would require the father to give a guarantee of the company's account in a sum of £11,000 and to give the bank a further charge on the house of £3,500, so as to bring the total

charge to £11,000. The house was only worth about £10,000, so this charge for £11,000 would sweep up all that the father had.

On hearing the proposal, the father said that Michael was his only son and that he was 100 per cent behind him. Mr. Head produced the forms that had already been filled in. The father signed them and Mr. Head witnessed them there and then. On this occasion, Mr. Head, unlike Mr. Bennett, did not leave the forms with the father: nor did the father have any independent advice.

It is important to notice the state of mind of Mr. Head and of the father. Mr. Head said in evidence:

> "Defendant asked me what in my opinion the company was doing wrong and company's position. I told him. I did not explain the company's affairs very fully as I had only just taken over the account. ... Michael said that company had a number of bad debts. I was not entirely satisfied with this. I thought the trouble was more deep seated. ... It did not occur to me that there was any conflict of interest. I thought there was no conflict of interest. I would think the defendant relied on me implicitly to advise him about the transaction as bank manager. ... I knew he had no other assets except Yew Tree Cottage.

The father said in evidence:

> "I always thought Head was genuine. I have always trusted him. ... No discussion how business was doing that I can remember. I simply sat back and did what they said."

The solicitor, Mr. Trethowan, said of the father: "He is straight-forward. Agrees with anyone. ... I doubt if he understood all that Head explained to him."

So the father signed the papers. Mr. Head witnessed them and took them away. The father had charged the whole of his remaining asset, leaving himself with nothing. The son and his company gained a respite. But only for a short time. Five months later, in May 1970, a receiving order was made against the son. Thereupon the bank stopped all overdraft facilities for the company. It ceased to trade. The father's solicitor, Mr. Trethowan, at once went to see Mr. Head. He said he was concerned that the father had signed the guarantee.

In due course the bank insisted on the sale of the house. In December 1971 they agreed to sell it for £9,500 with vacant possession. The family were very disappointed with this figure. It was, they said, worth much more. Estate agents were called to say so. But the judge held it was a valid sale and that the bank could take all the proceeds. The sale has not been completed because Herbert Bundy is still in possession. The bank have brought these proceedings to evict Herbert Bundy.

**The general rule**

Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent moneylenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. There are cases in our books in which the Courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms—when the one is so strong in bargaining power and the other so weak—that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall. Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.

**The categories**

The first category is that of "duress of goods". A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due: and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess: see *Green v Duckett* (1883) 11 Q.B.D. 275. To which may be added the cases of "colore officii", where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker—who is urgently in need—more than is justly due: see *Steele v Williams* (1853) 8 Exch. 625. In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power—the strength of the one versus the urgent need of the other—renders the transaction voidable and the money paid to be recovered back: see *Maskell v Horner* [1915] 3 K.B. 106.

The second category is that of the "unconscionable transaction". A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it—and then being in urgent need—another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him. Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set aside: see *Fry v Lane* (1888) 40 Ch.D. 312, 322, where Kay J. said: "The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, *the vendor having no independent advice,* a Court of equity will set aside the transaction."

This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker: see the cases cited in *Halsbury's Laws of England,* third edition, vol. 17 (1956), p. 682. The third category is that of "undue influence" usually

so called. These are divided into two classes as stated by Cotton L.J. in *Allcard v Skinner* (1887) 36 Ch.D. 145, 171. The first are those where the stronger has been guilty of some fraud or wrongful act—expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself. Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford L.C. in *Tate v Williamson* (1866) 2 Ch.App. 55, 61 :

> "Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

Such a case was *Tufton v Sperni* [1952] 2 T.L.R. 516.

The fourth category is that of "undue pressure". The most apposite of that is *Williams v Bayley* (1866) L.R. 1 H.L. 200 where a son forged his father's name to a promissory note, and by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect : "Take your choice—give us security for your son's debt. If you do take that on yourself, then it will all go smoothly : if you do not, we shall be bound to exercise pressure." Thereupon the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said, at pp. 218-219 :

> "A contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it."

Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit. As where an employer—the stronger party—has employed a builder—the weaker party—to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. Stuart V.-C. said : "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this Court will set it aside": see *D. and C. Builders Ltd. v Rees* [1966[ 2 Q.B. 617, 625.

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court of Admiralty have always recognised that fact. The "fundamental rule" is :

> "if the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust, the Court will disregard it and decree what is fair and just."

See *Akerblom v Price* (1881) 7 Q.B.D. 129, 133, *per* Brett L.J., applied in a striking case *The Port Caledonia and The Anna* [1903] p. 184, when the rescuer refused to help with a rope unless he was paid £1,000.

**The general principles**

Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing. The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or "overcome" by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself. Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal. With these explanations, I hope this principle will be found to reconcile the cases. Applying it to the present case, I would notice these points :

(1) The consideration moving from the bank was grossly inadequate. The son's company was in serious difficulty. The overdraft was at its limit of £10,000. The bank considered that its existing security was insufficient. In order to get further security, it asked the father to charge the house—his sole asset—to the uttermost. It was worth £10,000. The charge was for £11,000. That was for the benefit of the bank. But not at all for the benefit of the father, or indeed for the company. The bank did not promise to continue the overdraft or to increase it. On the contrary, it required the overdraft to be reduced. All that the company gained was a short respite from impending doom.

(2) The relationship between the bank and the father was one of trust and confidence. The bank knew that the father relied on it implicitly to advise him about the transaction. The father trusted the bank. This gave the bank much influence on the father. Yet the bank failed in that trust. It allowed the father to charge the house to his ruin.

(3) The relationship between the father and the son was one where the father's natural affection had much influence on him. He would naturally desire to accede to his son's request. He trusted his son.

(4) There was a conflict of interest between the bank and the father. Yet the bank did not realise it. Nor did it suggest that the father should get independent advice. If the father had gone to his solicitor—or to any man of business—there is no doubt that any one of them would say : "You must not enter into this transaction. You are giving up your house, your sole remaining asset, for no benefit to you. The company is in such a

parlous state that you must not do it."

These considerations seem to me to bring this case within the principles I have stated. But, in case that principle is wrong, I would also say that the case falls within the category of undue influence of the second class stated by Cotton L.J. in *Allcard v Skinner,* 36 Ch.D. 145, 171. I have no doubt that the assistant bank manager acted in the utmost good faith and was straightforward and genuine. Indeed the father said so. But beyond doubt he was acting in the interests of the bank—to get further security for a bad debt. There was such a relationship of trust and confidence between them that the bank ought not to have swept up his sole remaining asset into its hands—for nothing—without his having independent advice. I would therefore allow this appeal.

[Lloyd's Bank Ltd. v Bundy; (1974) 3 W.L.R., 501—C.C.]

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**In an option to purchase a freehold, time is not of the essence of the contract unless stated, and a delay of one month by the plaintiffs in not exercising their option did not amount to a repudiation of the contract.**

By letter dated 30 April 1972 the plaintiffs exercised an option to purchase a freehold property from the defendant and, by condition 1 of the Statutory Form of Conditions of Sale 1925, the date for completion was Monday, June 19. The plaintiffs failed to complete on that date. On Friday, June 23, the defendant's solicitors wrote to the plaintiffs' solicitors and enclosed a notice, purportedly in accordance with condition 9 of the Statutory Form of Conditions of Sale, requiring completion "within 21 days" from June 23. The letter was received by the plaintiffs' solicitors not earlier than June 24, but they were unable to state whether it was delivered at their office by Saturday's or Monday's post. The plaintiffs did not complete and, on July 20, the defendant's solicitors wrote to the plaintiffs' solicitors accepting the plaintiffs' failure to complete as a repudiation of the contract. The plaintiffs brought an action for specific performance of the contract, but at the trial they accepted the defendant's letter of July 20 as a repudiation of the contract and claimed damages.

On the questions whether the notice to complete was valid and whether, if the defendant had wrongfully repudiated the contract, the plaintiffs were entitled to damages:

*Held* by Walton J. giving judgment for the plaintiffs, (1) that even if the defendant had proved that the notice to complete had been received at the office of the plaintiffs' solicitors on Saturday, June 24, the notice was invalid because the defendant had only given the plaintiffs 20 days within which to complete and, in any event, under condition 9 of the Statutory Form and Conditions of Sale, they had to give "at least 21 days' notice", which had to be 21 days excluding the day of service and the date for completion.

*Quaere.* Whether a notice to complete received at a solicitors' office on a Saturday was received within the hours of business.

(2) That time never became of the essence of the contract nor had there been such a delay in completion on the part of the plaintiffs as amounted to a repudiation of the contract and, therefore, in the circumstances, the defendant had wrongfully repudiated the contract by his letter of July 20; that both in equity and common law the plaintiffs were discharged from performing any condition precedent which would otherwise have fallen on them to discharge but for the defendant's repudiation and, accordingly, since they did not have to show that they were ready, willing and able to complete the contract, they were entitled to damages arising from the defendant's fundamental breach of the contract.

[Rightside Properties v Gray (1974) 3 W.L.R. 484—Ch.D.]

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# NEW ZEALAND LAW SOCIETY

The Council of the New Zealand Law Society, Wellington, and the legal profession throughout New Zealand, extend to our members a warm invitation to attend the Triennial Conference of the Society which will be held in Wellington from 3 to 8 April 1975.

Plans are still being formulated and as soon as registration forms and information leaflets are available, a supply will be despatched to the Law Society.

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# MADRID CONGRESS ON REGISTRATION LAW

The Board of Governors of the Second International Congress of Registration Law, held in Madrid from 30 September to 5 October 1974, invited Mr. Desmond L. McAllister, Registrar of Deeds and Titles, as Irish Delegate and to submit papers on the themes to be discussed. Mr. McAllister has now published his book on Registration of Title in Ireland. It is hoped to publish subsequently a summary of some of the papers read at the Congress.

# THE LATE CHIEF JUSTICE FITZGERALD

In the course of paying tributes to the late Chief Justice FitzGerald in the Supreme Court, the President, Mr. Peter M. Prentice, said that solicitors dealing with the late Chief Justice had many happy memories of him. Nothing was too hot or too heavy for him to handle. As a lawyer he would work all day or night to produce the effort which lay behind all that tremendous skill and all that he did in helping solicitors in their profession and in furthering the interests of their clients. "From our point of view we feel we have lost a great friend. He was a tremendous personality."

Mr. Prentice said he remembered especially the late Chief Justice's bubbling sense of humour and the manner in which he could bring relief into what otherwise could be very tense and difficult to understand. He had been of such tremendous help to solicitors as an advocate that it was a great sense of loss to them when he was appointed to the Bench. As President of the Society he had on many occasions consulted the Chief Justice and gained even greater respect for his eminence and for the manner in which he helped. They appreciated his kindly advice and tremendous common sense. "We will miss him greatly. All of us feel this sense of loss and a sense of gratitude for having known him. Through his son, Fr. FitzGerald, we would like to convey to his family our great gratitude."

The Court then observed a brief silence in memory of the late Chief Justice.

**Law Society tribute to Chief Justice**

In a statement on behalf of the Council of the Incorporated Law Society, Mr. W. A. Osborne, senior vice-president, paid tribute to the memory of the late Chief Justice, Mr. William O'Brien FitzGerald, who died recently.

"The Council and members of the Incorporated Law Society have learnt with deep regret of the death of the Chief Justice, The Hon. William O'Brien FitzGerald, and wish to tender their sympathy to Mrs. FitzGerald and his relatives. Since the days when the late Chief Justice was called to the Bar in 1927, and became a senior counsel in 1944, he had won an established reputation as the leading advocate at the Bar; this was achieved by hard strenuous work and brilliant advocacy. Practitioners will always remember how with a few seemingly disarming questions in cross-examination, he could make witnesses co-operate, and he had a masterly way of summing up a complicated case, in clear, succinct and precise sentences. At conferences with solicitors and clients, he could make up his mind very quickly as to what were the essential points of fact and law in the case to concentrate on.

"It was not surprising with these admirable qualities that the late Chief Justice finally consented in October 1966 to become a judge of the Supreme Court, succeeding another great advocate, the late Mr. Justice Lavery. Inevitably the long hours of work at night, and great attention to detail, which was the lot of an outstanding advocate of the bar who was involved in all leading cases, had affected his health, and he was glad to accept a post which entailed a more regular routine. Whether as a Supreme Court judge or as Chief Justice, Mr. Justice FitzGerald will be remembered by practitioners for the terse and concise judgments which he gave, when in a few uncomplicated sentences he came to the succinct kernel of the legal point to be decided; he never wasted any time in jurisprudential discourses.

"The late Chief Justice, principally as counsel, will be generally thought of by solicitors as humane and helpful, who was always willing to give sound advice to those who sought it. May he rest in peace."

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# NEW CHIEF JUSTICE TAKES SEAT

When the new Chief Justice, Mr. Justice T. F. O'Higgins, took his seat in the Supreme Court for the first time, he said that his aim, with God's help, would be to ensure that a free, independent and fearless judiciary would continue to protect the rights and liberties of all citizens and provide at all times for the rule of law in our land.

Less than two hours later, Chief Justice O'Higgins presided at the swearing-in of the new High Court Judge, Mr. Justice Liam Hamilton, who formally subscribed to his oath of office.

Welcoming the Chief Justice, the Father of the Bar, Mr. John A. Costello, S.C., said that he had been a member of the Bar for many years and had vast experience in and out of Court and in other places. Wishing him a long life on the Bench, he said Chief Justice O'Higgins would bring to his high office this vast experience of the law and his service to the general public. He knew he would be a good Chief Justice.

Mr. Peter O'Connell, solicitor, on behalf of the Incorporated Law Society, associated himself with Mr. Costello's remarks.

Returning thanks, the Chief Justice said that sitting for the first time as Chief Justice of Ireland he was particularly conscious of all that was expected from the holder of this office and of the high standards of wisdom, strength and fearless integrity set by each of his predecessors.

"I am humbled by the knowledge of the talent and experience which is shared amongst my colleagues on this Bench. I know that I will be helped by that fact," he added.

# BOOK REVIEWS

**Megarry (Hon. Sir Robert)—A Second Miscellany at Law—being a further diversion for Lawyers and Others.** 23 cm.; xvii plus 420 pp.; index (double columns), pp. 369-420; London : Stevens, 1973; £4.80.

Although the publishers have omitted so far to send a review copy, which it is hoped will be remedied shortly, this fascinating volume is so full of interest that one could not pass it by. The Hon. Mr. Justice Megarry became a recognised favourite with Irish law students when he was one of the principal speakers at a congress on legal education held in Trinity College in 1968. The learned Judge has placed a wealth of learning and erudition at our disposal, as he had previously done in the first volume of *Miscellany at Law,* published in 1955. It is extraordinary that when prominent English counsel refused to defend Casement, they chose to forget Erskine's aphorism in *R. v Payne* (1872) : "If the advocate refuses to defend, from what *he may think* of the charge or defence, he assumes the character of a judge even before the hour of judgment." In view of the relatively small number of practising barristers at the Irish Bar, it would hardly be possible to contemplate a case like *London Financial Association v Kek* (1884) 26 Ch.D. —in which no less than two future Lord Chancellors, one future Lord Chief Justice, four future Law Lords, and three future Lord Justices of Appeal took part as counsel. In the seventeenth century, William Hudson unflatteringly compared solicitors to grasshoppers of Egypt, "who devour our land". An anecdote of Tim Healy is preserved in *The Old Munster Circuit,* in which Healy, on being asked what kind of man the solicitor was, said to the Judge : "The kind of man, my Lord, that when the last trumpet sounds, would wake up and mutter : 'Second Calling'." In another case in 1939, a wealthy Austrian, who wished to put the Bank of England out of reach of the Germans, summoned his English solicitor to Vienna, asked him to take a careful note of the numbers of the bonds, then solemnly burnt them and asked the solicitor to arrange for the Bank to produce duplicate bonds in England. Intricate examples are given in relation to judgments, where the Judges have either died or retired, or where there was an equal division in the Court. Some of the older reports were inaccurate, and Pollock C.B. said that "You may find authority in the so-called 'Modern Reports' for many propositions which are not law." In regard to the doctrine of precedent, the struggle between Lord Denning, M.R., who wished to change the law and the ultra conservative Law Lords is vividly illustrated. In *Smith Hogg and Co. v Black Sea Insurance Co.* (1940) A.C., Lord Wright deprecated the use of Latin phrases, which only distract the mind from the true problem of applying principles of English law to the realities of the age. With regard to the difficulty of interpreting statutes, Lord Goddard, in *Southward Borough Council v Nightingale* (1948), 64 T.L.R., said : "I have spent some hours trying to understand the London County Council (General Powers) Act 1947 and, although I may have some glimmering about it, I am still far from satisfied that I understand it." Although Lord Denning tried wisely to point out that it was the duty of the Court to find out the intention of Parliament, and to fill in the gaps if necessary, this was strangely rejected by the House of Lords in *Magor R.D.C. v Newport Corporation* (1950) 2 All E.R., who pretended it was a "naked usurpation of the legislative function", while the duty of the Court was rigorously limited to interpreting the words the Legislature had used. Brandeis J. in *Olmstead v U.S.* (1928) has rightly said that "the greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding".

These few examples will have shown the mastery which the learned author displayed in writing this erudite volume, full of light touches. There are occasional Irish legal stories though none to emulate the sharpness of Rhadamanthus in describing "Our Judges" in 1890. Mr. Justice Megarry would appreciate if any members sent him some suitable legal stories to add to his vast collection. This volume is memorable, because the learned author bears his vast erudition so lightly.

**Elliott (D. W.) and Wood (J. C.)—A Casebook of Criminal Law.** Third edition; 25 cm.; xxiv plus 558 pp.; index (double columns), pp. 555-558; London : Sweet & Maxwell, 1974; £4.75.

The fact that three editions of this casebook have been published in little more than ten years speaks for itself. Professor Elliott teaches law in Newcastle-on-Tyne, while Professor Wood is on the staff of Sheffield University. Broadly speaking, the more important English legislation and cases on criminal law have been brought up to date since 1969. The Irish case of *A.G. v Whelan* (1934) I.R., where the accused had been forced by threat of death to take stolen property, and was consequently acquitted by the Court of Criminal Appeal, is fully given, followed in England by *R. v Bone* (1968) I W.L.R. There follows *Sweet v Parsley* (1970) A.C., in which the House of Lords allowed a conviction for being concerned in the management of premises used for the purpose of smoking cannabis. In *R. v Lowe* (1973) I Q.B., the accused was charged with, being a person in charge of a child, wilfully neglecting him in a manner likely to cause him unnecessary suffering; his appeal was dismissed. In *R. v Souter* (1971) I W.L.R., the appeal was allowed when the applicant had been convicted of permitting premises to be used for the purpose of smoking cannabis contrary to the Dangerous Drugs Act 1965, as he did not know this was taking place. In *R. v Madan* (1961) 2 Q.B., proceedings brought against an Indian diplomat for allegedly obtaining a railway ticket by false pretences were dismissed as null and void.

In *R. v Smith* (1973) 2 WLR, two accused who were charged with attempting to handle stolen goods, were acquitted on appeal. In this case, the police had stopped a van, which contained stolen goods, on the motorway; they allowed it to proceed and followed it. At a service area, the accused were found waiting to take over the goods.

In *Director of Public Prosecutions v Bhagwan* (1972) A.C., an Indian, who had landed illegally in Britain successfully contended that a charge of conspiracy to evade the control of immigration was one

unknown in the law. In *Director of Public Prosecutions v Doot* (1973) A.C., the accused, who were American citizens, planned to import cannabis into the USA by way of England. One of the vans containing the drug was found in Southampton and another in Liverpool. The defence to the charge of conspiracy to import drugs was that the conspiracy had been effected abroad; this succeeded in the Court of Appeal but failed in the House of Lords. In *Palmer v the Queen* (1971) A.C., the defence of self-defence in a murder affray which succeeded recently in the Dwyer case in Ireland, did not commend itself to the Privy Council.

In *R. v Hyam* (1974) 2 W.L.R., Diana Hyam was an alleged lover of Jones, who heard that Jones intended to go on holidays with another woman. Hyam was furious, went to Jones's house, poured petrol through the letter box and pushed the newspaper in; she then lit the paper and caused a fierce fire. She left without raising the alarm. Two girls who were in the house with their mother were killed; Hyam's defence was that she merely intended to frighten the woman. She had also ascertained that at the time Jones was in his own home and could not come to any harm. Hyam was convicted of murder which the House of Lords sustained by a 3-2 majority; however, the dissenting view of Lord Diplock that the decision in *D.P.P. v Smith* (1961) A.C., upon which the majority relied, was wrong insofar as it rejected the submission that, in order to amount to the crime of murder, the offender, if he did not intend to kill, must have intended or foreseen as a likely consequence of his act that human life would be endangered, must command respect. In *R. v Lamb* (1967), 2 Q.B., the accused pointed in fun a revolver at a friend, but fired a bullet accidentally, killing the friend. The accused, having been convicted of manslaughter appealed and the accused was duly acquitted, on the ground that his case had not been properly put to the jury. In *R. v Duffy* (1967) I Q.B., Lillian Duffy went to the aid of her twin sister, Kathleen, who had been fighting with a Pakistani. Both girls were convicted of unlawful wounding, but on appeal, Lillian was acquitted, as her case had not been properly put to the jury.

This summary will show that the learned authors have dealt most effectively with the most up-to-date cases.

**Zander (Michael)—Cases and Materials on the English Legal System.** 8vo; xxvi plus 484 pp.; index (double column), pp. 477-484; London: Weidenfeld and Nicolson, 1973; Series: "Law in Context"; paperback, £2.95.

Mr. Zander will be well-known to members as the Legal Correspondent of *The Guardian* and as author of *Lawyers and the Public Interest,* but the fact that he is also a Reader in Law in the London School of Economics is perhaps not so evident. This book contains a most useful mine of information on the English legal system. In discussing the role of the Courts and Tribunals, the reorganisation of the Courts carried on as a result of the Beeching Report is fully considered; Lord Gardiner's speech in introducing the Family Division into the High Court in 1970 is given in full, as is an excerpt from Abel-Smith and Stevens on the proper role of the Courts and Tribunals from "In Search of Justice". With regard to pre-trial civil proceedings, Sir Thomas Lund is quoted as stating that it is permissible for the solicitor for either party in civil or criminal proceedings to interview or take a statement from any witness; the views of the English Law Society opposing assessors of claims and contingency fees are fully given, and Master Jacob is fully quoted on "The present importance of pleadings" as expressed in Current Legal Problems, 1960, and Master Diamond on "The Summons for Directions" as expounded in the *Law Quarterly Review,* 1959. JUSTICE in its Report on the Trial of Motor Accident Cases, 1966, emphasises that counsel's brief fee becomes payable upon delivery of briefs, and is still payable subsequently, even though the case is settled.

As regards pre-trial criminal proceedings, Lord Parker stressed in *Rice v Connolly* (1966 ) 3 W.L.R., that there was all the difference in the world between telling a false story—something which a citizen has no right to do—and preserving silence or refusing to answer—something they have every right to do. The Judge's Rules of 1964 are then cited in full. Lord Devlin, in "Too High a Price for Conviction" in the *Sunday Times* of 2 July 1972 has rightly emphasised that the proposals of the English Criminal Law Revision Committee of 1972 are primarily designed to help the police to secure convictions; this is followed by Professor Cross's outstanding article on "The Right to Silence and the Presumption of Innocence" extracted from the 1970 volume of the *Journal of the Society of Public Teachers of Law.* John Lambert in "The Police Can Choose" has indicated that the policeman has at no time been simply a law enforcement officer, but has discretion to prosecute. But JUSTICE in its Report on "The Prosecution Process in England and Wales" (1970), states that "the honest, zealous and conscientious police officer, who has satisfied himself that the suspect is guilty becomes psychologically committed to successful prosecution. The dominance of the police on the English prosecution process undoubtedly exposes them to grievous temptations." Clive Davies emphasises that at any given time a tenth of the prison population is composed of untried or unsentenced prisoners. The English Law Society in its Annual Report 1965-66, on Pre-Trial Discovery, has emphasised the difficulties which are put in the way of defence counsel by the police.

To lawyers, English Co. Courts are the acme of informality, while to the layman, they are surrounded by a bewildering maze of rules and practices; this the Consumer Council in a lengthy report has termed "Justice out of Reach". Judge Jerome Frank considers that trial court fact-finding is the toughest part of the judicial function, not the elaboration of legal principles. On the Continent, emphasis is rightly placed on written evidence; there is no sanctity in oral evidence as in England.

However, as Gerald Coplan points out in "The Judicial Discretion to disallow admissible Evidence", there are many cases when Judges are cussed and have with malice aforethought refused to exercise their discretion to exclude evidence, although it was obtained in circumstances unfair to the accused. For instance in *R. v Maqsud Ali* (1966) 1 Q.B., an English Court had the temerity to allow evidence of a conversation between two men which had been recorded without their knowledge, where neither of the men were charged.

It has been strangely stated that, unless there is a statutory obligation to do so, there is no duty ot state reasons for judicial or administrative decisions; *prima facie* there appears to be an implied duty, particularly in respect of the Superior Courts.

Useful quotations from the Morris Departmental Report on Jury Service (1965), are given, and Lord Denning's historic judgment in *Ward v James* (1966) 1 Q.B., refusing a jury is fully explored. *Boston v Bayshaw* (1966) 1 W.L.R., established the proposition that a jury, having convicted an accused, cannot subsequently acquit him. The Irish Bar has so far successfully resisted the abolition of juries in civil cases, which would expedite trials considerably.

As regards costs, Lord Devlin has pointed out that it would be difficult to reduce them, as long as the English system of proving everything by oral evidence is maintained; it is high time that documentary evidence on the Continental model should be substituted for oral evidence, which tends to encourage advocacy at the expense of a real knowledge of law. As the English Consumer Council has pointed out, the English Legal Aid Scheme is of little help, as most people would still have to pay a contribution to costs. The Evershed Report points out that it is impossible to count the costs of litigation beforehand, particularly the costs of the other side. If the rights of the parties are evenly balanced, they should each bear their own costs. As is pointed out in the "Indemnity Rules in Litigation", contained in the English Law Society Annual Report 1963, this rule in effect means that the loser pays; no change is recommended to the principle that costs follow the event, save within narrow confines.

*McKenzie v McKenzie* (1970) 3 W.L.R., has established that a litigant in person has the right to have someone sit beside him to prompt, give advice and questly assist in the conduct of the law. As regards legal aid, the valuable memorandum of the Law Society on Legal Advice and Assistance, tendered to the Lord Chancellor in February 1968, is fully quoted, as is the pamphlet "Justice for All", published by the Society of Labour Lawyers in December 1968, and the Lord Chancellor's Report of the Advisory Committee on the better provision of Legal Advice and Assistance (1970).

As regards the Enforcement of Judgment Debts, most of the extracts are taken from the Payne Committee (1969).

Legal argument in appellate Courts is restricted in the narrowest confines of statutes, delegated legislation and precedents; fortunately *Bourke v Attorney-General* (1972) I.R., has established that this is no longer the case in Ireland. The excellent American practice of holding conference and exchanging draft opinions is not usually observed in England; this work in chambers is to be commended.

It will be seen that this book contains much material on many legal subjects which it would be hard to find elsewhere. The learned author is to be commended for having collated the material so clearly. Apart from the customary list of statutes and cases, the volume contains also a list of (1) Command Papers and House of Commons Papers; (2) Books, pamphlets, memoranda and articles; and (3) a list of cases referred to, but not excerpted.

**Hill (Hugh)—Outlines of Irish Taxation—1974-75.** 8vo; 22 pp.; published privately; 50p.

We are once more indebted to Mr. Hill for the invaluable *Outlines of Irish Taxation,* which he publishes for the assistance of practitioners of tax law annually. This is not a mere repetition of the previous booklets, as the Finance Act 1974 introduced some startling innovations by abolishing Earned Income Relief and Surtax. All allowances and exemptions from tax are carefully listed, and a summary of Corporation Profits Tax and of Double Taxation Agreements is included. All practitioners in tax law will, as usual, find this booklet essential.

# OBITUARY

**Mr. Brendan P. O'Byrne** died suddenly on 20 September 1974 at his residence, 55 Dartmouth Square, Dublin 6. Mr. O'Byrne was admitted in the Hilary Term 1943, having obtained First Place with Honours in the Final Examination and practised for some years at 25 Essex Quay, Dublin. Mr. O'Byrne was Lecturer in Real Property, Equity and Conveyancing to this Society from 1946 to 1951. Mr. O'Byrne was called to the Irish Bar in 1954, having been specially exempted from all examinations in view of his academic and professional record. Mr. O'Byrne entered the British Colonial Legal Service in 1952 and was appointed successively Chief Crown Prosecutor and Acting Solicitor-General in Northern Rhodesia (Zambia), and subsequently as Attorney-General in Nyasaland (Malawi). He was called as a barrister to Gray's Inn, London, in 1956. He retired from the Colonial Legal Service in 1968, and then became a legal editor to a large firm of legal publishers in Rochester, New York. Mr. O'Byrne was the eldest son of the late Mr. Joseph O'Byrne, Registrar of Titles and of Deeds.

**Mr. Patrick Marron** died at Upton House, Slough, Bucks., on 8 October 1974. Mr. Marron was admitted in Hilary Term 1919, and practised in Carrickmacross, Co. Monaghan, until 1960.

**Mr. Henry B. Linehan** died in the Eye and Ear Hospital, Adelaide Road, Dublin, on 2 October 1974. Mr. Linehan was admitted in Hilary Term 1940, and practised from 1941 until 1956 under the style of Linehan & Ryan at 43 Dame Street, Dublin. From 1956 to 1971 Mr. Linehan was Registrar of Titles in Zambia. From 1971 until his death Mr. Linehan was with the firm of Messrs Bell, Brannigan, O'Donnell & O'Brien at 22 Lower Baggot Street, Dublin 2.

**Mr. Dermot McGillicuddy,** M.A. (T.C.D.), died at his residence, Bishopstown, Naas, Co. Kildare, on 21st October 1974. Mr. McGillicuddy was admitted in Michaelmas Term 1934, and was the sole partner in the firm of Darley & Co., 30 Kildare Street, Dublin 2. Mr. McGillicuddy had also been Law Agent and Keeper of Records in Trinity College since 1948.

**Mr. John J. O'Dwyer** died in Dublin on 24th October 1974. Mr. O'Dwyer was admitted in Hilary Term 1940, and practised at 15 D'Olier Street, Dublin 2, until his retirement.

**Mr. Edward J. Durnin** died in St. Vincent's Hospital, Elm Park, Dublin, on 1st November 1974. Mr. Durnin was admitted in Trinity Term 1942 and practised in the Chief State Solicitor's Office, Dublin Castle.

**Mr. Thomas B. Jellett** died on 19th July 1974, in Dublin. Mr. Jellett was admitted in Trinity Term 1958, and practised as a partner in Messrs Barringtons, 10 Ely Place Dublin 2.

**Mr. John Fitzpatrick** died in the Hospice, Harold's Cross, Dublin, on 3rd November 1974. Jack Fitzpatrick had been on the staff of the Society as Chief Clerk from 1945 to the end of 1973, when he retired on the ground of ill health.

# CORRESPONDENCE

Department of Lands
Dublin

*re Evidence in Land Commission Court*

Dear Mr. Ivers,

I refer to your letter of March 13th last transmitting a member's suggestion advocating prior exchange of data regarding comparable sales proposed to be cited in evidence by witnesses in land price appeals before the Appeal Tribunal. I sent an interim reply on March 25th.

I am pleased to inform you that on examination of what is involved it is proposed, with the approval of the Court, to provide that the Land Commission witness will furnish the owner's valuer with particulars of the properties intended to be cited in evidence, and will require, in return, corresponding particulars from the latter.

I expect that the arrangement will be introduced as a formal practice of the Court in the near future.

Yours sincerely,

T. O'BRIEN (Secretary).

Department of Justice
72-76 St. Stephen's Green
Dublin 2

*re Payment of Criminal Legal Aid Fees*

Dear Mr. Ivers,

With regard to our recent discussion about the fees payable to solicitors under the Criminal Legal Aid Scheme and to the suggestion made by the Law Society deputation that payment of fees should be made on a particular day of the month, arrangements have now been made with the Accountant that in future these payments will be made on the 18th of every month.

Yours sincerely,

M. ROYCE.

Irish Medical Association
Postgraduate Education Scheme
10 Fitzwilliam Place
Dublin 2

*re Seminar—The Doctor and the Media*

Dear Mr. Ivers,

The Irish Medical Association invite you and members of the Incorporated Law Society of Ireland to a seminar "The Doctor and the Media" which will take place at 8.15 p.m. sharp in the Mater Misericordiae Hospital Lecture Theatre, Dublin 7 (North Circular Road Entrance) on Friday, 29th November 1974.

The problem of proper communications between professional bodies and the media is a general one. This occurs mainly because of the ethical codes governing the professions. Due to the ethical codes of the medical profession, by which we must abide, our dealings with the media are of necessity cautious and the all-over impression conveyed to them is one of vagueness which causes a certain amount of frustration. We are fully aware of this problem and we feel an opportunity should be given to representatives from all the professions to air their respective views and have them discussed. We are sure that you and your members would welcome the opportunity to be present at this meeting and participate in the discussion.

The following panel has been selected and each contributor will speak for fifteen minutes :

Mr. Patrick MacAuley, Chairman, Ethical Committee, Irish Medical Association.

Dr. Jack Leahy Taylor, Secretary, Medical Protection Society, England.

Mr. Liam Shine, Chief News Editor, Independent Group.

Mr. John O'Dohoghue from "7 Days", RTE.

The Chairman of the meeting will be Dr. David Nowlan, Medical Correspondent, *The Irish Times.*

After the speakers have given their addresses an open discussion will take place and we hope for some interesting contributions and questions from the general body of the meeting.

The Irish Medical Association wish to acknowledge the generosity of Wellcome Ireland Ltd. who have made this seminar possible.

We look forward to seeing a representation from your Society.

Yours sincerely,

NOEL REILLY (Secretary).

**Incorporated Law Society of Ireland**

*A Public Lecture on*

**"PLANNING CONTROL"**

will be held in

SOLICITORS' BUILDINGS, FOUR COURTS, DUBLIN 7

**at 8.15 p.m. on Wednesday, 20 November 1974**

●

Lecturer: **Gordon V. Hyde, Chairman, Planning Law Committee, Law Society, London.**

Speakers: **E. Walsh, S.C.; J. O'Loughlin-Kennedy, Director, An Taisce.**

Chairman: **M. N. Conlon, County Manager, Cork County Council.**

# STATUTORY INSTRUMENTS

## LAND REGISTRATION FEES ORDER, 1974 (S.I. No. 315 of 1974)

I, Patrick Cooney, Minister for Justice, in exercise of the powers conferred on me by Section 14 (1) of the Registration of Title Act, 1964 (No. 16 of 1964), and with the consent of the Minister for Finance, hereby order as follows :

(1) This Order may be cited as the Land Registration Fees Order, 1974.

(2) This Order shall come into operation on the 1st day of November, 1974.

(3) In this Order "the Principal Order" means the Land Registration Fees (No. 2) Order, 1966 (S.I. No. 276 of 1966).

(4) The Principal Order and this Order shall be construed as one and may be cited together as the Land Registration Fees Orders, 1966 and 1974.

(5) The Principal Order is hereby amended by the substitution for Article 4 of the following :

"4. The fees to be charged and taken in the Land Registry in proceedings under the Act of 1964 shall be in accordance with this Order and the Schedule thereto and all such fees shall be payable in cash, or by means of a banker's draft, money order, postal order or cheque drawn to the order of the Land Registry, or by Land Registry stamps : provided that where a cheque is tendered as payment of a fee, the fee shall not be deemed to have been paid until the cheque has been honoured."

(6) The Principal Order is hereby amended by the substitution for Article 7 of the following :

"7. No registration shall be made and no other transaction shall be done or completed until the appropriate fee has been paid in accordance with Article 4 of this Order."

Given under my Official Seal, this 30th day of October 1974.

PATRICK COONEY (Minister for Justice)

The Minister for Finance consents to the making of the foregoing Order.

Given under the Official Seal of the Minister for Finance, this 30th day of October 1974.

RICHIE RYAN (Minister for Finance)

## UNIT TRUSTS ACT, 1972 (Section 10:3) ORDER, 1974 (S.I. No. 294 of 1974)

The effect of this Order is to ensure that every Unit Trust registered under the Unit Trusts Act, 1972, shall have at least 50 per cent of its assets invested in the State.

## FINANCE ACT, 1974 (Section 85) (COMMENCEMENT) ORDER, 1974 (S.I. No. 312 of 1974)

This Order appoints 23 October 1974 as the date for the coming into operation of Section 85 of the Finance Act, 1974, which provides for amendments of the Provisional Collection of Taxes Act, 1927. These amendments arise out of changes in the Standing Orders of Dail Eireann taking effect on the date mentioned.

# THE REGISTER

**Issue of New Land Certificate**

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

Dated this 30th day of November 1974.

D. L. McALLISTER (Registrar of Titles).

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

**Schedule**

(1) Registered Owner: Egmont O. Hagedorn. Folio No.: 5324 R. Lands: Bellevue Demesne Area: 2a. 0r. 24p. County: Wicklow.

(2) Registered Owner: Ralph Leslie Michaelis. Folio No.: 56830. Lands: Carrigskullihy. Area: 4a. 0r. 38p. County: Cork.

(3) Registered Owner: Daniel Byrne. Folio No. 4992. Lands: (1) Ballynacarrig. Area: (1) 115a. 0r. 13p. Lands: (2) Ballynacarrig. Area: (2) 0a. 2r. 0p. County: Wicklow.

(4) Registered Owner: Thomas F. Walsh. Folio No.: 3227. Lands: Carricksaggart. Area: 100a. 3r. 6p. County½ Waterford.

(5) Registered Owner: Richard Noone. Folio No.: 55930. Lands: Gortaleva. Area: 1a. 1r. 0p. County: Galway.

(6) Registered Owner: Ben Twiss Bowen and Lesley Mary McLaren Bowen. Folio No.: 58681. Lands: Laheratanvally. Area: 0a. 0r. 38p. County: Cork.

(7) Registered Owner: Mary Seymour (full owner as tenant in common of an undivided moiety of the property). Folio No.; 11250. Lands: Mawbeg East. Area: 48a. 1r. 29p. County: Cork.

(8) Registered Owner: Laurence Gavin. Folio No.: 9687. Lands: Castletown. Area: 37a. 1r. 31p. County: Westmeath.

(9) Registered Owner: The Silver Tankard Limited. Folio No.: 26900. Lands: Tankardstown. Area: 5a. 0r. 5p. County: Meath.

(10) Registered Owner: Joseph Kelly. Folio No.: 17260. Lands: Cromwellstown. Area: 16a. 0r. 33p. County: Kildare.

(11) Registered Owner: Julia Ryan. Folio No.: 3950. Lands: Ardcrony. Area: 12a. 0r. 23p. County: Tipperary.

(12) Registered Owner: Daniel Francis Keane. Folio No.: 44726. Lands: Carreigleigh. Area: 0a. 0r. 16½p. County: Cork.

(13) Registered Owner: Patrick Oliver Fagan. Folio No.: 21441. Lands: Seafield. Area: 0a. 2r. 8p. County: Wexford.

(14) Registered Owner: Albert Jeffery. Folio No.: 5094 now the lands No. 1 on Folio 56273. Lands: (1) Ballymartin, (2) Ballymartin, (3) Ballymartin. Area: (1) 33a. 1r. 10p., (2) 30a. 0r. 8p., (3) 7a. 1r. 20p. County: Cork.

(15) Registered Owner: Timothy Healy. Folio No.: 1936L. Lands: Water-Rock. Area: 0a. 2r. 0p. County: Cork.

(16) Registered Owners: John Nally and Ellen Nally. Folio No.: 27835. Lands: (1) Meelick More, (2) Ballykinava.Areas: (1) 6a. 0r. 1p. (2) 28a. 0r. 15p. County: Mayo.

(17) Registered Owner: Sarah Hennigan. Folio No.: 26956. Lands: (1) Rathmore, (2) Grange, (3) Grange. Areas: (1) 12a. 2r. 17p., (2) 21a. 3r. 12p., (3) 0a. 3r. 20p. County: Roscommon.

(18) Registered Owner: William Bracewell. Folio No.: 279L. Lands: The leasehold interest in the property situate on the West side of Loreto Avenue in the Parish of Saint Canice and Borough of Kilkenny. Area: 0a. 0r. 12p. County: Kilkenny.

(19) Registered Owner: John Breen (Jnr.). Folio No.: 29546. Lands: Greenane. Area: 27a. 0r. 20p. County: Cork.

(20) Registered Owner: Evelyn Egan. Folio No.: 16231. Lands: (1) Rickardstown, (2) Rickardstown, (3) Barbavilla Demesne. Area: (1) 13a. 0r. 0p., (2) 7a. 3r. 24p., (3) Barbavilla Demesne. County: Westmeath.

(21) Registered Owner: Sarah A. Cooney. Folio No.: 7637. Lands: Carrownluggan. Area: 0a. 0r. 4p. County: Mayo.

(22) Registered Owner: James Dineen. Folio No.: 29248. Lands: Barna. Area: 60a. 1r. 25p. County: Cork.

(23) Registered Owner: Thomas Murphy. Folio No.: 39120. Lands: Bovinion. Area: 0a. 1r. 11p. County: Galway

(24) Registered Owner: Edmond Shanahan. Folio No.: 25980. Lands: (1) Clonshire More, (2) Clonshire More, (3) Clonshire More, (4) Graigue. Area: (1) 35a. 1r. 18p. (2) 5a. 3r. 38p., (3) 25a. 3r. 8p., (4) 31a. 1r. 37p. County: Limerick.

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LAND REGISTRY SUBDIVISION MAPS

Provided subdivision maps on the 25 inch scale are drawn by suitably-qualified persons, e.g. engineer, architect or surveyor, the Land Commission will accept such maps, provided they are otherwise in order, for subdivision cases.

DESMOND McALLISTER (Registrar)

MASTERS REQUIRED

Will members interested in taking apprentices please communicate with the undersigned.

JAMES J. IVERS (Director General)

# NOTICES

**BARDAS CHORCAI (Cork Corporation)**

**VACANCY FOR SOLICITOR**

**Temporary Vacancy for Assistant Law Agent, Cork Corporation. Salary: £4,082 per annum.**

Appointment will be for a period of six months or until the permanent post is filled, whichever is shorter. The permanent post will be advertised shortly by the Local Appointments Commission. Particulars and form of application from Personnel Officer, Room 220, City Hall, Cork.

**Solicitor**—Excellent prospects and salary for suitable applicant. Applications, in writing, should be addressed to J. K. Boland, 43 South Mall, Cork. Please mark envelope "Solicitor". All applications will be treated with the utmost confidence.

**Honours B.C.L. Graduate** seeks position as Solicitor. Experience in Conveyancing and Court work. Ring 979819.

**1974 B.C.L. Graduate** (U.C.D.) seeks Master in Dublin. If no vacancy, would consider temporary position as Law Clerk. Replies to Brendan McCartan, "Donard View", Newry Road, Banbridge, Co. Down. Tel. Banbridge 8521.

**Any Member** requiring a photocopy of the judgment **Glover v B.L.N. Ltd.**; unreported; Kenny J.; 31 July 1968; 78 foolscap pages; may obtain same from the Library at a reduced price of £3.00—**only one copy available.**

THE GAZETTE OF
THE INCORPORATED
LAW SOCIETY
OF IRELAND

December 1974
Vol. 68 No. 10

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# PRELIMINARY NOTICE

It is regretted that due to the illness of the Editor and the Christmas vacation the December *Gazette* will only be available to members at the beginning of January, 1975.

The next issue of the Gazette will be the January-February issue, 1975, which will be published in the first week of February, 1975. This will be an enlarged issue and will include the Index for 1974. All subsequent monthly issues of the Gazette, from March, 1975, will normally be published on the 15th day of the month. Material for inclusion in the January-February Gazette, 1975, will have to reach the editor before tht 10th January, 1975, and the material for the March, 1975, and subsequent monthly issues will have to be sent before the 15th of the previous month. Special arrangements about the separate publication dates of the July and August issues will be announced subsequently.

# NOTES AND COMMENTS

by ULPIAN

It is a difficult task to pay adequate tribute to all concerned as there have been so many judicial changes in Ireland recently. The unanimous choice of Cearbhal Ó Dálaigh as President of Ireland was easy to forecast, in view of the President's legal and linguistic distinctions, as well as an open manner which will ensure his universal popularity.

The fact that Mr. Justice O'Keeffe succeeded our President as Irish Judge attached to the Court of the European Communities in Luxembourg was less predictable but he will have ample opportunities to master the intricacies of European Law.

The sudden death of Chief Justice FitzGerald left a void which has been well filled by the appointment of Mr. Justice O'Higgins to the highest judicial office: our new Chief Justice has wide legal and administrative experience.

Mr. Justice Finlay was eminent as an advocate and a jurist, and his promotion to the Presidency of the High Court will ensure that that high judicial post will be maintained with learning and dignity.

The legal profession is very pleased with the appointments of Messrs Liam Hamilton, Weldon Parke and Thomas Doyle to the High Court, as each of them in their repective spheres will add lustre to the Bench. *Ad multos annos!*

# THE SOCIETY

# Proceedings of the Council

**19th SEPTEMBER 1974**

The President in the Chair, also present were: W. B. Allen, W. Beatty, Bruce St. J. Blake, John F. Buckley, Anthony E. Collins, L. Cullen, Gerard M. Doyle, Joseph L. Dundon, James R. C. Green, Michael P. Houlihan, John B. Jermyn, Francis J. Lanigan, John Maher, Patrick Moore, P. McEllin, Brendan A. McGrath, John J. Nash, Patrick Noonan, Peter E. O'Connell, Patrick F. O'Donnell, Dermot G. O'Donovan, Rory O'Connor, William A. Osborne, Brian Russell. The Director General was in attendance.

**Costs of a sub-sale**

A member required to know what the proper costs a solicitor should charge where he is involved in a sub-sale, i.e. the purchase of property together with the sale on for an increased consideration.

Where there is a sub-sale and one conveyance to which the vendor, purchaser and sub-purchaser all are parties, the English Law Society's opinion (1265) of 14th July 1950 is that solicitors should charge under Schedule 1 of the Solicitors' Remuneration Act on the sale together with charges under Schedule 2 for the work done in connection with the initial purchase.

However, where the original purchaser does not join in the conveyance the English Law Society expressed the view that all charges should be based on Schedule 2 (Opinion 1266).

The Council, on a report of a Committee, held that the English Law Society's opinion was correct.

**Duty of solicitor to the Court where client on bail leaves jurisdiction**

A member wrote to the Society concerning the duty of a solicitor to the Court where a client on bail leaves jurisdiction. The Council on a report of a Committee felt that the solicitor had no duty to notify the police.

**Solicitor should not accept case in which he will be a witness**

A member wrote to the Society regarding the propriety of accepting a case where he has reason to believe that he may be a witness. In reply the Assistant Secretary quoted from *Conduct and Etiquette at the Bar* as follows:

"A Barrister should not accept a retainer in a case in which he has reason to believe he will be a witness, and if being engaged in a case it becomes apparent that he is a witness on a material question of fact, he ought not to continue to appear as Counsel if he can retire without jeopardising his client's interests. If he continues in the case there is no rule of professional ethics which disbars him from going into the witness box and being cross-examined."

The Council, on a report of a Committee, applied this principle to the solicitors' profession.

**Court offices and costs**

The Council asked that the matter of certain solicitors acting for Dublin County Council in connection with the investigation of title and the preparation of mortgages in connection with Small Dwellings Acquisition loans be referred to the provincial members for their views.

**24th OCTOBER 1974**

The Vice-President, Mr. W. A. Osborne, in the Chair, also present were: W. B. Allen, Walter Beatty, Bruce St. J. Blake, John Buckley, John Carrigan, Anthony E. Collins, Laurence Cullen, Gerard M. Doyle, Joseph L. Dundon, Felicity Foley, James R. C. Green, Christopher Hogan, Thomas Jackson, Francis J. Lanigan, John Maher, Ernest J. Margetson, Gerald J. Moloney, Patrick C. Moore, Brendan A. McGrath, John J. Nash, Peter E. O'Connell, Patrick F. O'Donnell, Rory O'Connor, Thomas V. O'Connor, John A. O'Meara, David R. Pigot, Brian Russell, Robert McD. Taylor, Mrs. M. Quinlan, The Director General was also in attendance.

**Indemnity of Insurance policy**

Members wrote to the Society stating that title documents belonging to a client had been temporarily mislaid and that they were in serious difficulty. The question was whether the loss of title documents is covered in the insurance indemnity policies which covers loss "for breach of professional duty as solicitor by reason of any neglect, omission or error whenever or wherever occurred or alleged to have occurred on the part of the insured or their predecessors in business or any person including any agent at any time employed by the insured or such predecessor". The Council, on a report of a Committee, felt that this matter was not one for the Society and is a matter for the solicitor and his insurance company.

**Representations of the Drogheda Solicitors' Bar Association**

The Drogheda Solicitors' Bar Association wrote to the Attorney General complaining of the delay involved (several months) from the conclusion of an unsuccessful appeal to the Circuit Court before the Gardai obtain a warrant for arrest. It was stated that prisoners themselves do not wish to have the sentence hanging over their heads for an indefinite period of time. The Council, on a report of a Committee, directed the Assistant Secretary to write to the Attorney General giving support to the Drogheda Solicitors' Association's letter to him.

**Service of High Court documents**

Members wrote to the Society pointing out discrepancies in the mode of service of varying High Court documents including a subpoena, statement of claim, etc. The Council directed the Secretary to refer the letter to the High Court Rules Committee.

**Building Societies appointing solicitors to act as local agents**

The Council directed that the following conditions should be observed:

1. (i) There must be a separate office. (ii) There must be a separate entrance. (iii) There must be separate staff paid by the Building Society.
2. Neither the solicitor nor any member of his staff shall act for any borrowers from the agency.

**28th NOVEMBER 1974**

The President in the Chair, also present were: Walter Beatty, Bruce St. J. Blake, John F. Buckley, John Carrigan, Anthony E. Collins, Laurence Cullen, Joseph L. Dundon, Mrs. Felicity Foley, James R. C. Green, Gerald Hickey, Christopher Hogan, Michael P. Houlihan, Thomas Jackson, John B. Jermyn, Francis J. Lanigan, John Maher, Ernest J. Margetson, Patrick C. Moore, Patrick McEllin, Brendan A. McGrath, John J. Nash, Peter E. O'Connell, Patrick F. O'Donnell, James W. O'Donovan, David R. Pigot, Mrs. M. Quinlan, Robert McD. Taylor, Maurice Curran, W. D. McEvoy, Thomas Shaw. The Director General was also in attendance.

**Solicitor's liability to Counsel for brief fee**

A member wrote to the Society to know whether he was liable to pay Counsel his brief fee in a case in which he had informed Counsel he would be briefing him. Counsel agreed to accept the brief. The following day the case was settled before the actual brief had been furnished to Counsel. In fact Counsel did not receive the brief nor did he do any work on the case although he pointed out to the solicitor that he was retained by one side and was thereby precluded from acting for the other side. The Council, on the report of a Committee, directed the Assistant Secretary to write to the solicitor stating that he would not in the circumstances be liable for a brief fee, but he may be liable for a retainer fee (if any).

**Section 90 of the Housing Act, 1966**

A member wrote to the Society complaining that the Transfer Order under Section 90 of the housing Act, 1966, was drawn up by Local Authority officials and not by solicitors. The Council, on a report of a Committee, directed the Assistant Secretary to write to each Housing Authority referring to the Society's previous letter of November 1971 and stating furthermore that the Society would prosecute any offending Town Clerk should evidence be furnished to the Society by members. The Council also directed the Assistant Secretary to write to the member asking him to furnish the necessary evidence to maintain a prosecution.

**Application by a solicitor to practise on a licensed premises**

A member wrote to the Society requesting to know whether the Society had any objection to his office being transferred and being situated in a licensed premises. The solicitor stated he would not be running a bar and the premises would be entirely converted to the needs of his office. He stated that he was aware that to comply with the licensing law he would have to open the bar for at least one day in the year and that he could come to some arrangement about this with the local Garda. The Council, on a report of a Committee, felt the Society should object to the solicitor having his office on a licensed premises. They also felt that the statement of law contained in the solicitor's letter was not correct.

**Irish Banks' Standing Committee**

The Director General reported on a meeting with the Banks' Standing Committee regarding the withdrawal of the service in respect of guaranteed cheques. It was clear from the discussion that while the Banks regretted reducing their service, the risk which they carried in respect of guaranteed cheques was such that they had no option but to withdraw the service. It was clear from the discussion that any suggestion of re-introducing the service for solicitors would not be accepted. The position was noted by the Council.

# RECENT IRISH CASES

**The High Court by virtue of its wide constitutional jurisdiction can grant relief in an action in rem brought by the foreign owner of an unregistered mortgage in an Admiralty action.**

The case refers to the motor vessel, "Fritz Raabe" which was German owned and German registered. In 1969, the first co-plaintiff undertook repairs and supplied materials to the ship which would be deemed "necessaries". The plaintiffs did not retain any lien on the ship, but, as they were unpaid, they instituted proceedings in August, 1969, and in January, 1970, they obtained judgment in default of appearance for £1053 and costs, without prejudice to any subsequent claims; a lien was also granted on the vessel. Later the Waterford Harbour Commissioners obtained judgment against the ship for harbour dues, as the ship had been abandoned in Waterford Harbour. Subsequently the ship, as a result of a High Court Order of February, 1970, was sold, and the proceeds, £10,500, were lodged in Court. As the ship was not an Irish registered ship, the various mortgages could not be entered in the Irish Registry, and would not therefore rank as registered mortgages in Ireland.

In February, 1970, two German Banks, who are co-plaintiffs in this action, issued admiralty proceedings *in rem* against the owners of the vessel, as they had mortgages subsisting against them, which had been registered in Germany in 1957. When the German Banks eventually brought an application for judgment in default of appearance, it was contended by the Irish plaintiff, that, as their mortgages were unregistered, they could not institute such proceedings. But O'Keeffe P., in July, 1971 held that they were entitled to do so and allowed the claims of the German Banks. It was thereupon agreed that the priorities of the parties would be determined by the parties upon the following basis: (1) The costs of the Irish plaintiff; (2) claims for wages; (3) claims of the German Bank mortgagees and (4) claims for necessaries.

The Waterford Harbour Commissioners appealed to set aside so much of the President's judgment as declared the German banks as unregistered mortagees to be entitled to receive payment of their debt in priority to the Commissioner's claim. It was contended that the German banks were not mortagees for the purpose of the distribution of the proceeds of sale. The net question is whether the High Court can grant relief in an action *in rem* brought by the owner of an unregistered mortgage in an admiralty action.

The following matters have to be considered:

(1) The German mortgages created valid charges upon the ship long before the claims of the first plaintiff or of the Commissioners.

(2) The claims of the first plaintiff and of the Commissioners, inasmuch as they constitute a lien, were subsequent in time to the mortgages.

(3) The High Court has jurisdiction to entertain suits in respect of foreign mortgages of moveable property within their jurisdiction and to order the sale of that property.

(4) The Maritime lien did not require possession of the ship, but rested on the basis that the lien travelled with the ship, into whoever's possession it came, and could be realised by proceedings *in rem*.

(5) The Admiralty Court (Ireland) Act 1867 set out in detail the Maritime jurisdiction of the Court.

(6) The High Court established by Art. 34 of the Constitution is vested with original jurisdiction in all matters of fact or law, in addition to any transferred jurisdiction. This original jurisdiction embraces *inter alia* all justiciable controversies relating to shipping. The present High Court is consequently not the old Court of Admiralty amended or extended but a completely new Court.

(7) The fact that particular procedures were or were not available in former Courts is irrelevant. The fact that Section 34 of the 1867 Act excluded from the Courts jurisdiction claims in respect of mortgages of ships registered under the Merchant Shipping Act is inapplicable to the new Court.

(8) Order 64, Rule 1, of the Rules of the Superior Courts, 1962, defined an "admiralty action" as, *inter alia* "a claim in respect of a mortgage or charge on a ship".

Consequently the President was correct in his view that the claims of the German banks should be ordered to be paid out of the proceeds of the sale of the ship. The appeal is consequently dismissed.

Per **Henchy J.** (dissenting): The present jurisdiction of the High Court to hear admiralty actions *in rem* in respect of mortgages of ships is confined to mortgages registered under the Mercantile Marine Act 1955, as Section 3 of the Admiralty Court Act 1840, which conferred a wider jurisdiction, was never extended to Ireland. Since the mortgages in respect of which the banks were sued were not registered under the 1955 Act, the banks had no standing to bring an admiralty action *in rem* in respect of them in an Irish Court, because, if such an action is to be extended, such extension must be made by Statute.

[R. D. Cox Ltd., Staatliche Kreditanstalt Oldenburg-Bremen and Deutsche Schiff-fahts-Bank Aktien-Gesellschaft v. Owners of M.V. "Fritz Raabe"—Supreme Court. (Walsh, Henchy and Griffin JJ.—majority judgment by Walsh J., separate dissenting judgment by Henchy J.)—unreported—1st August 1974.]

**A person who has no legal estate or interest is not entitled to apply for permission to develop the property.**

The plaintiffs are the owners in fee simple of Frescati, Blackrock, Co. Dublin. As they were refused permission to develop it, they claimed compensation of £1,309,000. Subsequently in October, 1973, the plaintiffs were to be granted development permission subject to certain conditions. At this stage the defendant, who had no legal estate or interest in the property, applied for outline planning permission to develop the property in a manner quite inconsistent with that of the plaintiffs. On 28 November 1973 the planning authority notified the defendant that she had obtained the outline planning permission sought, notwithstanding the fact that

she had no intention of developing it. Kenny J. on 3 December 1973 refused to grant an injunction to restrain the defendant's application as well as a mandatory injunction ordering her to withdraw it. (See January-February Gazette, 1974, p. 22). The defendant based her claim on the fact that in applications for development permission under Sections 25 and 26 of the Planning Act, 1963, reference was made to "the applicant" and not to the owner or occupier; the Court accepted this. The Defendant however went further and contended that, because no limiting qualifications are laid down by the relevant sections for an applicant, *anyone* can be an applicant for development permission. It was said that there was nothing to debar a pauper from making an application for permission for a multi-million pound development of a property which he has only read about in the newspaper. This proposition could lead to strange incongruities. It is clear that the powers given by the Act must be read as being exercizable in the interests of the Common good, as set out in the long title to the Act. Accordingly the Courts should lean against a construction which would make the exercise of those powers available to an individual for advancing a purely personal motive. The inequities and anomalies that would follow if there is to be an unrestricted right to apply for permission to develop another person's property is shown by the terms of many provissons in the Act.

When these proceedings were taken on 12th November 1973, the decisions of the planning authority were still being considered, and were only made on 27th November, 1973. On 30th November, 1973, the plaintiffs appealed, but the appeal had not yet been heard by the Minister and is still outstanding. Since the defendant ranks as respondent in the appeal, she is no longer a moving party so she cannot be restrained in the pending proceedings by means of either the negative or mandatory injunction sought. In the present case, the defendant's application was invalid and should not have been entertained. If the Minister allows the appeal, it would negative the planning authority's decision on the ground of the defendant's lack of standing.

The Court would have decided the substantive point in favour of the plaintiffs, but, for the procedural reasons given, dismisses the appeal.

[Frescati Estates Ltd. v. Walker; Full Supreme Court per Henchy J.; unreported; 30 July 1974.]

**Custody of two infants granted to father, in view of mother's association.**

The parents were married in October 1967. Two children were born of the marriage, a son (Stephen), now 5½ years and a daughter (Amanda), now 3½ years. They lived in Cashel until 1969, and then bought a farm at Summerhill, Co. Meath. Relations between the husband and wife became unhappy in 1970, and the wife left the home three times, but returned. She blames the irretrievable breakdown of the marriage on the husband's concentration on training horses; he blames it on her instability and emotional immaturity. The wife finally left the home in July, 1973, took the children with her and went to live with her parents in Donnybrook. When proceedings were taken by the wife for the custody of the children, a consent was signed in September, 1973, by the parties by which they agreed that they were to have joint custody, but the care of the children was to be given to the wife, subject to access by the husband, who was to pay £1,040 per annum for their maintenance. The wife has since bought a bungalow and land of 11 acres near Naas. The husband and wife have sold the farm at Summerhill, and he has bought another one at Enfield, which is not yet ready for occupation; meanwhile he lives in a flat in Dublin. Both the husband and wife are children of wealthy parents, accustomed to high standards of living. The wife had in 1972 committed adultery with an employee, which the husband had detected, yet had returned to the matrimonial home from April to July, 1973 to resume residence only. The case was first listed before O'Keeffe P. in December, 1973, and the parties consented to the joint custody of the children, who were to be given in the care of the mother, subject to the father's access and other condition, and to the payment of the aforementioned sum of £1,040, payable monthly in respect of the children's maintenance.

On 20 December 1973 the husband, through his solicitor, complained about the wife's failure to honour the arrangements; he also complained of the wife's association with Mr. X, and specifically that Mr. X was allowed to associate with the children. The letter required that such association should cease immediately. The association of Mr. X with the children was rejected by the wife's solicitor on the 15th January, 1974. When the matter was listed before Kenny J. on 24 May 1974, the wife gave the following personal undertakings: (1) that Mr. X would not be allowed to take the children on outings, (2) that, if the children were in the house, Mr. X would only visit the wife between 8.30 p.m. and midnight, and would not engage in improper conduct. The evidence showed that there was a permanent adulterous relationship between the wife and Mr. X. In order to support this, the wife alleged that she had been seeking an annulment in the Ecclesiastical Courts, but had given no thought to the legal position. Thereupon Kenny J. gave custody of the children to the wife. The appeal was allowed, because the first and paramount consideration was the religious, moral, intellectual and social welfare of the children, which should be considered globally. The facts here warrant the order that the children be placed in the custody of their father, as the mother here has been so greatly wanting in her duty towards them. The marriage in this case has undoubtedly irretrievably broken down. Apart from the welfare of the children, there is no question of doing justice as between husband and wife. The difference lies in the social, moral and religious aspects of the children's welfare. The unstable life of the mother is a manifest repudiation of the social and religious values with which the children should be inculcated. On the facts the permanent home of the children would be the husband's home. The rights of access should continue and the wife should have ample opportunity of seeing and caring for the children. In this case it is the wife who has broken up the family home. The appeal is accordingly allowed.

[K. v. K.; Full Supreme Court; Separate judgments by FitzGerald C.J.; Walsh and Henchy JJ.; unreported; 31 July 1974.]

**Redemption price fixed by County Council in respect of purchase of cottage unenforceable, as wrong principles applied.**

The plaintiff is the registered owner of a cottage on Folio 50107, Co. Cork. The cottage was built subject

to the Labourers Act 1903. From 25 September 1964 the plaintiff had vested in her the cottage in fee simple subject to statutory conditions. Amongst these conditions was one prohibiting alienation, save by operation of law or by sale with the consent of the Board of Health; this condition was according to the Supreme Court Decision in *McGeough v. Louth C.C.,* 107 ILTR 13, subject to the consent not being unreasonably withheld. There was also a prohibition against sub-division.

Section 98 of the Housing Act 1966 enacted that such a cottage, could be, and was always capable of being sub-divided, but consent to alienation could be refused if the acquiror was a person not in need of housing, or if such alienation would cause the acquiror to be a person without adequate means.

By an agreement of April, 1969, the plaintiff agreed to sell to a third party, acquiring for £590 a portion of the land pertaining to the cottage with no building attached; the assignment to the purchaser had to be sanctioned by the County Council, which would only grant permission in respect of a quarter of an acre. The purchaser's purpose in acquiring this property was to build a house for himself, but the County Council insisted upon receiving the £590 themselves before granting permission. Mandamus proceedings were brought, and O'Keeffe P., having deemed that the Co. Council had taken into consideration irrelevant matters, granted the application, on the ground that the Council had followed a ministerial circular letter in disregard of Section 99 of the Act; there was no appeal. The Council were then ordered to consider the matter anew.

In July 1971 plaintiff's solicitor wrote to the Co. Council asking for a revised redemption figure of the apportioned annuity in respect of the premises; the Co. Council fixed the redemption price at £443.33; this was the redemption price for an annuity of £1 with 3 years to run. The plaintiff refused to accept this and brought the present proceedings; it was contended that this sum of £443.33 was in the nature of a penalty, and unenforceable; it was also contended that the consent of the Council was being unreasonably withheld. In the High Court, Murnaghan J. dismissed the plaintiff's application.

It was contended in the High Court that S. 98 (5) of the Housing Act 1966 enabled the Council to lawfully charge a premium for their consent because a privilege was granted by allowing the plot to be subdivided, but Murnaghan J. refused to follow O'Keeffe P. S. 98 (5) and 99 of the Housing Act 1966 are then quoted in full. The net question is whether S. 98 enables a demand for payment in respect of a sum of money where there is no annuity to be redeemed. The Court answered this in the negative. The whole tenor and structure of Sections 98, 99, and 100 indicates that the State is specifically dealing with the redemption of annuity; consequently no payment can be required where there is no question of redemption. In this case the County Council misconstrued S. 98. The Council should not take irrelevant matters into consideration, but is only entitled to claim such amount as could be reasonably regarded, having regard to the present value of money, as an appropriate amount for the redemption outstanding. Consequently a declaration will be granted that the amount demanded is unenforceable at law. There will also b a declaration that the plaintiff is entitled to receive the consent of the Council to the proposed sale, upon tendering to them the capitalised value of the annuity outstanding applicable to the portion of the plot to be alienated. The appeal was accordingly allowed by Walsh J. (FitzGerald C.J. and Budd J., agreeing).

Henchy J. in a concurring judgment said: "If the £443.33 had been approved solely for the purpose of S. 98 (5) I would agree with Murnaghan J. in supporting it. If it had purported merely to be a redemption of the apportioned annuity under S. 99, I would agree with O'Keeffe P. in condemning it. But the Minister' order is neither one thing or another. It purports to approve the payment of £443.33 pursuant to S. 98 (5), and then, in the same sentence, to say it is to be in redemption of the annuity, under S. 100. There is thus an error of law apparent on the face of the order, in that the Minister approved one sum instead of two separate ones. He was given no power to do so. It was mandatory on him to approve one sum under S. 98 (5) and another under S. 99". Appeal allowed and Murnaghan J. reversed.

[Meade v. Cork Co. Council; Full Supreme Court; Separate judgments by Walsh, Henchy and Griffin JJ.; unreported; 31 July 1974.]

**Perpetual injunction granted to plaintiff squatter, as the defendants, by taking a transfer of the freehold, cannot give to themselves any better right to possession than they had before that.**

The following is the title to the premises:

(1) The plaintiff was the purchaser of a plot of ground at Kennelsfort Road, Palmerstown, Dublin, held under a Lease by Clontarf Estates Ltd. and the plaintiff holds under a Sub-Lease.

(2) Three members of the Bruton family (hereinafter called Brutons) were registered as owners in fee simple of the lands comprised in Folio 539, Co. Dublin.

(3) By lease of November, 1947, the Brutons leased the lands now in dispute to Clontarf Estates Ltd. for a term of 999 years from 27 September 1947, at the yearly rent of £236, and subject to covenants and conditions therein contained.

(4) Clontarf Estates erected certain buildings on the lands and ultimately by Assignment of July 1950, they assigned the lands to the Irish Life Assurance Co. (hereinafter called Irish Life).

(5) By Assignments of July, 1961 and May 1963, part of these lands were assigned by Irish Life to Schuster who built some houses upon them.

(6) When the plaintiff's house was built, there was a roadway at the rear giving access to the garage. Beside this roadway was a plot of ground which was not built on. Ultimately from December, 1955 the plaintiff has used what he regarded as his part of this plot without paying any rent, and has thus acquired a statutory title against Irish Life.

(7) In October, 1970, Irish Life assigned to the defendants, Woodfarm Homes, this vacant plot of ground, subject primarily to a rent of £48 per annum.

(8) By transfer of November, 1970, Brutons transferred to the defendants in fee simple the plot of ground previously assigned in October 1970. This transfer was duly registered on 17 December 1970.

(9) As a result of correspondence between the respective solicitors, it was established that the defendants proposed to enter this plot held by the plaintiff on 7 December 1970, although they had no title to the lands then. They were the successors in title of Irish

Life whose leasehold interest was statute barred in favour of the plaintiff, but whose title to the freehold was not completed until its registration on 17 December.

By virtue of having been a squatter with twelve years adverse possession as against the Irish Life Assurance Co., the plaintiff acquired a statutory title to the land of which he had been in possession. An interim injunction had been granted against the defendants, because on 14 December 1970, the defendants were not registered as full owners of the land in Folio 18621, Co. Dublin. The point at issue is whether the plaintiff can permanently restrain the defendants from entering the aforementioned land, or whether the Irish Life Co. as tenants under a long lease, whose own title has been extinguished by twelve years adverse possession by the plaintiff, can validly assign to the tenants. Furthermore the question is whether the defendants, as assignees of the tenant's interest can, by acquiring the fee simple in the land, enable the lease to be determined by merger, and the plaintiff to be dispossessed as a squatter.

The matter is regulated historically by Section 34 of the Real Property Limitation Act, 1833, which provided that after 20 years from the time a person could bring an action, if he did not exercise it, the right and title to such land would be extinguished. This period of 20 years was reduced to 12 years by Section 1 of the Real Property Limitation Act, 1874. This has now been repeated in Section 13 (2) (a) of the Statute of Limitations 1957.

The defendants contend that the freehold interest, to which they became entitled on registration, was an estate or interest in remainder, or alternatively a future interest. Section 15 (1) of the 1957 Act states that, where a claim is made under a reversion, a remainder or future interest, and no person has taken possession of the land by virtue of the interest claimed, such estate or interest shall be deemed to have accrued on the date on which they fell into possession, by reason of the determination of the preceding estate. Therefore the defendants contend that their right of action only accrued upon the determination of the preceding estate, which in this case was a lease. As the defendants acquired by assignment a leasehold interest on 5 October, 1970, when the defendant was registered as full owner of the land, they contend that a merger took place, and consequently that the immediate reversion was vested in them.

The plaintiff's contentions are as follows:

(1) The object of all Statutes of Limitation is to prevent claims which, though originally valid, must be considered as extinguished where ancient possession is to be clothed with the right.

(2) The effect of Section 13 (2) and 24 of the Statute of Limitations is to destroy the title of the leaseholder. Section 24 provides that subject to the squatter provisions of the Registration of Title Act 1964, at the expiration of the 12 year period within which an action for recovery of land may be brought, the title of that person to the land shall be extinguished.

Before 1892, it was widely accepted that the effect of Section 34 of the 1833 Act was to convey the estate of the ousted person to the squatter. In *Tichborne v Weir* (1892), 67 L.T. 735, the English Court of Appeal held that the person who had been in possession adverse to the tenant for a number of years was not liable on the covenants in the lease after the expiration of the term, and after he had gone out of possession; the Court also refused to accept the notion of a parliamentary conveyance as good law. Tichborne's case has since been accepted as a leading precedent in English Law. In Ireland, Holmes, L. J.'s statement in *O'Connor* v. *Foley* (1906) 1 I.R. 20 that the title gained by a wrongdoer by adverse possession is limited by rights yet remaining unextingished, is also commensurate with the interest which the rightful owners lost by the operation of the statute, and has the same legal character", is generally accepted.

The majority decision, given by Lords Radcliffe, Denning and Guest, in *Fairweather* v. *St. Marylebone Property Co. Ltd.* (1963) A.C. 510 where the ousted tenant purported to surrender to the freeholder, was:

(1) That an owner in fee simple, subject to a term of years, had an estate or interest in reversion or remainder.

(2) Accordingly his right of action against a squatter was deemed to have accrued at the date when the preceding estate determined, so that his estate or interest fell into possession.

(3) That the effect of the extinguishment sections of the Statute of Limitations was that, when a squatter dispossessed a tenant for the statutory period, it was the *tenant's title as against the squatter that was finally destroyed, and not the tenant's right or title against the freeholder.*

(4) Accordingly the tenant was in a position to surrender to the landlord.

(5) That, as a result of the ousted tenant surrendering the lease, the lease was determined.

(6) Thereupon the freeholder became entitled to possession of the property.

The effect of this decision is that the successors in title of a squatter on leasehold land can, by collusion between the tenant and the freeholder, be ejected, however long the landlord has been out of possession, be it 12 years, 120 years or 900 years. It seems that such a result would entirely defeat the object of the Statute of Limitations. In this case, the squatter (the plaintiff) has gained the right to possession of the premises in dispute as against the fee simple owner (the defendants), subject to the risk and possibility of forfeiture, as a result of a breach of covenant. Once the squatter has been in possession for 12 years, the title of the tenant is extinguished, and the tenant, who has lost the right to possession, can no longer eject him.

The next question is whether the tenant and the freeholder can by a merger or surrender give to the freeholder the right to possession so as to defeat the squatter. This was the view of Lord Denning in *Fairweather's case* when he said that he saw no difference between a surrender or a merger or forfeiture, and that, on each of these events, the lease is determined, and the freeholder is entitled to evict the squatter, even though the squatter has been on the land for more than 12 years. But, in the same case, Lord Morris, dissenting, said: "If a tenant wishes during the term to place the landlord in the position of having a right to possession as against everyone, he does not do this by abandoning such right to possession, because he must be in a position to cede to the landlord right to possession as against everyone else". It is undisputed that if a tenant made a sub-lease, and subsequently surrendered his own lease to the freeholder, the freeholder could not eject the sub-tenant during the term of the sub-lease.

Irish Life, by losing the right to possession, cannot by assigning to the defendants, give them a right of possession. The defendants, by taking a transfer of the freehold, cannot give themselves any better right to possession than they themselves had, before the transfer was effected. The decision of O'Keeffe P. granting a perpetual injunction to the plaintiff restraining the defendants from taking possession of the specified plot was accordingly affirmed, and the appeal was dismissed.

Henchy J., dissenting, would have allowed the appeal and would have held :

(1) By never paying rent, the plaintiff is not entitled to the leasehold interest.
(2) The plaintiff is not now entitled to the fee simple in the plot; by making the lease of November 1947 for 999 years, the owners of the fee simple put the plot out of their reach for the duration of the lease, and consequently the earliest date at which the Statute of Limitations would have begun to run against them would be the 5th November, 1970.
(3) The defendants are ultimately entitled to the fee simple in the plot subject to the right of a plaintiff, who is not a squatter, to retain possession of it until the expiration of the lease, i.e. 999 years from 1947. The principle that a tenant cannot derogate from his grant does not apply to a squatter.
(4) The defendants have become entitled, since the merger of the lease in the freehold in 1970 to a right to recover possession of the plot.

[Perry v. Woodfarm Homes Ltd.; Supreme Court (Walsh and Griffin JJ., Henchy J. dissenting); Separate judgments by each Judge; unreported; 1 August 1974.]

**A conviction for driving a motor car while under the influence of intoxicating liquor or of a drug constitutes a single offence.**

In February, 1973, the accused was charged under S. 49 of the Road Traffic Act, 1961, with driving a motor car while under the influence of intoxicating liquor or of a drug to such an extent as to be incapable of having proper control of the vehicle. The District Justice convicted the defendant, and fined him £10 or one months imprisonment. In July 1973, Finlay J. granted a conditional order of certiorari to quash the conviction, on the ground that the order for conviction was bad for duplicity. On 1 October 1973 Gannon J. made absolute the conditional order and disallowed the cause shown, on the same ground. The Attorney-General appealed on the ground that the complaint against the accused charged one offence only and consequently there was a valid order of conviction. The net question is whether to drive under the effect of intoxicating liquor is one offence, and whether to drive under the influence of drink is a separate offence.

In *Thomson* v. *Knights* (1947) K.B. 336, a Queen's Bench Divisional Court held that a charge under a similarly worded section in the English Road Traffic Act consisted only of one offence. The accused contends that, in order to secure a prosecution for an offence under the Irish Section, the prosecution would have to prove that the incapacity resulted either from intoxicating liquor or from a drug. It is to be noted that tests like blood tests were not envisaged in 1961 and consequently prosecution under the section were foredoomed to failure if the incapacity resulted from *either* intoxicating drink or a drug. As S. 50 of the 1961 Act contemplates only one offence—unfit to drive—it would be unreasonable to hold that two separate offences are created by S. 49. Those sections effectively show that the words "intoxicating liquor or a drug" was to indicate the range of causation for the incriminating capacity, not to effect a subdivision into two distinct offences. The lack of particularity in referring vaguely to "intoxicating liquor or a drug" is in accordance with the legislative intent. Although it would be desirable for a Justice in cases under Sections 49, 50 and 51, to identify whether an accused was convicted or acquitted for driving as a result of intoxicating liquor *or* a drug, it is not essential, owing to the statutory definition, to do so. The majority of the Court (**Henchy and Griffin JJ.**) accordingly held that the conviction in this case was for a single offence, not invalid for uncertainty or duplicity. Accordingly they allowed the appeal and the cause shown, and discharged the conditional order of Certiorari.

**Walsh J.,** dissenting but affirming Finlay and Gannon JJ., would have dismissed the appeal. It is clear that the definition of "unfit to drive" is a mere term of art limited to unfitness due to either the influtnce of intoxicating liquor or of a drug. It is to be noted that in Section 49 the Oireachtas did not provide that a person shall not drive, or attempt to drive, a mechanically propelled vehicle while he is unfit to drive, and then define "unfit to drive". One should note that the Section 15 (1) of the English Road Traffic Act 1930, unlike the Irish Act of 1935, did not use the words "intoxicated" or "intoxicating". In the *People* v. *Blogh* (1958) I.R. 91, the Court, as did the English Courts, held that a person who drives a vehicle in a public place "at a speed or in a manner" which was dangerous to the public, created two offences, distinguishing between "the dangerous manner" and "the dangerous speed"; the wording was not changed in the 1961 Act, but the single offence of dangerous driving was specifically created by Section 51 of the 1968 Act. The words "under the influence of intoxicating liquor or a drug" are not merely adjectival. A person cannot be incapable by reason of the fact that the consumption of intoxicating liquor was self-induced. But drugs are of two types—(a) those that are medical, and (b) the result of taking drugs would be the result of addiction to drugs. In the case of medicinal drugs, the taking of drugs is not necessarily self-induced. It is an exceptionally serious thing for a person to have been convicted in terms which leave it uncertain as to whether this incapacity was due to drink or drugs. It is the duty of the Justice to apply his mind not merely to the incapacity, but basically to the cause of the incapacity. If the Justice is not sure under which capacity resulting from the combined effects of taking drink and drugs he is to convict, or he can convict in respect of the one of them as he would regard as being the immediate cause. If, as in this case, the conviction is bad on the face of it because of duplicity, the proper course is to send the case back to the District Court to have a correct order made. Accordingly, the conviction should be quashed, but the case should be returned to the Justice to make a proper order.

[The State (*McGroddy*) v. *District Justice Carr*; Supreme Court (Walsh, Henchy, and Griffin JJ.); Separate Judgments by each Judge; unreported; 1 August, 1974.]

# The Effects of Community Law from the point of view of the National Judge

by LORD MACKENZIE STUART, Judge of the Court of Justice of the European Communities.
Delivered in Luxembourg, May 1974.

PART II

(b) **Regulations**

The effect of Regulations is, of course, specifically dealt with by Article 189, "A Regulation shall have general application. It shall be binding in its entirity and directly applicable in all member states." Nevertheless it is still necessary to construe the Regulations in order to understand its effect.

Where a Regulation imposes a clear prohibition or requires a member state to do something positive, these obligations can normally be invoked by an individual in an appropriate case. Frequently, however, a regulation of the Council requires implementation by a regulation of the Commission in order to produce direct effect. In the Agricultural markets there are abundant instances of a multi-tier structure of regulations. For example in the cereals sector of the Common Agricultural Market there is a basic Council regulation creating a system of prices, levies and refunds. There is a second regulation of the Council laying down the general criteria to be adopted by the Commission in fixing, inter alia, the amount of the refund and, finally, there is the Commission regulation which actually fixes the refund applicable for a stated period. It is only at this point that the right to a refund *vests* in the exporter. If however the right has vested, it does so whether or not the internal procedure in a Member State for obtaining the necessary funds for granting a refund have been completed or, indeed, even begun.

This can be illustrated by a decision of the European Court—*Leonesio v. Italian Minister of Agriculture* (1973) CMLR 343. In 1969 the Council adopted a regulation providing a premium for the slaughter of milk cows in pursuance of its policy to reduce the excess quantity of milk in the Community. At this point no rights to this premium became vested. The same year the Commission adopted a regulation fixing the conditions for the grant of the premium and the amount thereof, from which point the right to a premium vested in the person who fulfilled the conditions laid down in these two regulations. When the plaintiff, who by then had slaughtered her cows, applied for the premium, she was informed that the budgetary funds had not yet been voted by Parliament. In the regulations which applied in the Leonesio case there was no mention of budgetary action by the Member State, so that it was possible for the Court to say that :

"To enable them to have the same efficacy vis-á-vis the citizens of all the Member States, the Community Regulations become part of the national legal system which must make possible the direct efficacy mentioned in Article 189, so that individuals may invoke them without being met with provisions or practices of a national nature."

"Therefore the budgetary rules of a member state cannot impede the immediate efficacy of a Community provision o r,consequently, the immediate exercise of the subjective rights that that provision attributes to individuals."

**Obligation to achieve ill-defined results**

An allied problem which may face the national judge arises from the fact that Community Regulations, in the agricultural markets in particular, may necessarily be extremely complicated and they frequently impose on the national administration obligations to achieve a certain result without always clearly defining how the obligation is to be implemented. There have thus been many cases where the national administration has thought it desirable to add to the Community rules in matters of detail. **The Court has always construed the Regulations in a way that ensures uniformity throughout the Community** and has set its face against unilateral additions to a Community rule which increase the obligations which it imposes.

In *Hamburg v Bollman* (1970) CMLR 153, the Court had to consider Article 14 of Regulation 22, which is in the following terms :

"The Member States shall adopt all measures to adapt their legislative and administrative provisions so that this Regulation, unless therein otherwise provided, may be effectively applied from 1 July 1962."

"In the absence of provisions to the contrary the Member States are prohibited from adopting measures for the implementation of the Regulation intended to modify its scope or add to its provisions. To the extent that the Member States have assigned legislative powers in tariff matters to the Community in order to ensure the proper operation of the common agricultural market, they no longer have the power to make legislative provisions in this field."

(c) **Directives and Decisions**

Normally one would not expect a directive to be capable of creating enforceable rights at the instance of an individual since in terms of Article 189, although it is binding upon the Member State to which it is addressed, it leaves open to the national authorities

the choice of form and methods. However the case of *Grad v Hauptzollamt Traunstein* (1971) CMLR 1, has shown that this is not always the case.

Article 75 of the Treaty empowers the Council to make appropriate provisions to implement a common transport policy. The Council in pursuance of this article issued a Decision which imposed two obligations on member states:

(1) to apply the Common Turnover tax system to freight transport by road rail and water not later than by a certain date and
(2) to remove existing specific taxes on such transport by this date.

The case was concerned with this second obligation. **The Court held that such an obligation was unconditional and sufficiently clear and precise to be capable of creating direct effects in the legal relations between the Member States and individuals.** It required only a **date** to complete it. This was provided by a Council **Directive** on the harmonization of the legal provisions relating to Turnover tax which laid down the date by which the common system of V.A.T. had to be introduced.

The obligation created by the decision was therefore completed by the first directive and the obligation from that date could give rise to rights; i.e. specific taxes still existing would not be payable, and if paid could be claimed back.

In its judgment the Court had this to say:

"It would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected might invoke the obligation imposed by a decision. Particularly in cases where, for example, the Community organs impose an obligation on a Member State or all the Member States by decision to undertake certain conduct, the useful effect of such a measure would be weakened if the nationals of this State could not invoke it in the Courts and the National Courts could not take it into consideration as part of Community law. Although the effects of a decision may be different from those of a provision contained in a regulation this difference does not prevent the end-result, namely the right of the individual to invoke the measure in the Courts, from being the same in a given case as that in the case of a directly applicable provision of a regulation."

**Incompatibility of national law with Community law**

From time to time a national judge will be faced with a provision of national law which appears to differ from a provision of Community law covering the same terrain. This difficulty is sometimes expressed in terms of conflict, sometimes in terms of the supremacy of Community law but this may be to overdramatize the situation. There has been much theoretical discussion of the problem of the effect to be given by a national judge to a law deliberately promulgated by a presumably seccessionist Member State subsequent to and in direct opposition to a Community regulation or, indeed, to the Treaty itself. I do not propose to deal with such an improbable situation, striking as it would at the political basis of the Treaty. Should it arise, whatever political solution might have to be found, it would still be the task of the national judge to cope with it, since the problem would arise before him.

In practice, however, where discrepancies have arisen, the cause has been either inadvertence or, more frequently, the inability of the national legislative machinery to ensure that differences between Community law and older domestic law are eliminated. When such a difference arises it is for the national judge, in the first place, to see whether the apparent difference is real. That is to say it is for him to construe his national law, if he reasonably can, so that it is compatible. If the meaning of the Community rule is in doubt then there may be a reference under Article 177 and, indeed, there have been a number of such references in such circumstances, of which *SpA Marimex* v. *Ministerio delle Finanze* is a recent example.

**The Marimex Case** (1972) CMLR 907

The Marimex company imported into Italy various consignments of beef both from Member States and from non member states. For each consignment they were required by Italian law to pay certain administrative charges. One of these charges was imposed by Presidential decree later in date than the relevant Community regulation. Marimex sued before the Tribunal of Turin for the sums paid, alleging that the charges were contrary to certain relevant Community regulations prohibiting the levying of customs duties or taxes having equivalent effect. A reference was made to the Court of Justice asking, in effect, whether the prohibition against taxes having equivalent effect were directly applicable and created rights which the national court was required to protect. In the course of its judgment the Court of Justice of the European Communities made it plain that the effect given to a regulation by Article 189 prevents the application of all legislative measures, even later in date, which are incompatible with its terms.

In practice, however, such conflicts are relatively rare and form an exception to the normal pattern where the Community legal order and the national legal order complement and reinforce one another. The rarity of such conflicts is in part due to the fact that where potential conflict is foreseen the national legislature has normally taken the necessary steps in time. In part also, much of Community legislation is so novel in its content that there is only limited room for divergent rules on the same topic.

None the less it must be affirmed that **when true conflict has been identified it is essential for the Community solution to prevail.** Sometimes this is referred to as the supremacy of Community law but, for my own part, "supremacy" has pejorative undertones. Community judges are, of course, omniverous in their reading, and I recently learnt from a pamphlet printed and published in the People's Republic of China that, in the New Year celebrations, "Local Party, government and army leaders led participants in singing the song 'The Three Main Rules of Discipline and the Right Points for Attention'." To judge from some commentators the suggestion is more than implicit that the Community political and administrative institutions aided and abetted by the Court of Justice are seeking to substitute such a song for Beethoven's Ode to Joy as the anthem of the enlarged Community. Nothing of course is further from the case. **The reason why the Community solution must be adopted arises not from the existence, real or pretended, of a supra-national hierarchy; not from any intrinsic merit of the Com-**

**munity rule but from the very nature of the aims and objects of the Community.**

**The Costa Case** (1964) CMLR 425

This has been realised from the beginning in the now famous passage of the judgment of the Court in *Costa* v. *ENEL*. I make no apology for citing it again:

> "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic legislation without endangering the attainment of the aims of the Treaty; ... the obligations assumed under the Treaty establishing the Community would not be unconditional, but merely presumptive, if they could be affected by subsequent legislative acts of the signatories; ... the law stemming from the Treaty, an autonomous source of law, could not, by virtue of its specific original nature, be overridden by domestic legal provisions, however framed, without disregard for its character as Community law and without the legal basis of the Community itself being called into question; the transfer by the States from their domestic legal order to the Community legal order of the rights and obligations arising under the Treaty carries with it a clear limitation of their sovereign rights, against which a subsequent unilateral law incompatible with the Community cannot prevail ...".

This reasoning has been the basis of many subsequent decisions of the Court of Justice, although there may be, as some writers have suggested, a variety of emphasis. As broad a formulation as any is to be found in *Internationale Handelsgesellschaft* v. *EVST*, already mentioned, where the Court in its judgment emphasised that:

> "The law created by the Treaty, the issue of an autonomous source, could not by its very nature have the courts opposing to it rules of national law of any nature whatever without losing its Community character and without the legal basis of the Community itself being put in question."

Increasingly this viewpoint has been understood and accepted by the judges of the courts of the original member states.

Much has depended upon the particular constitution of the Member State. For example, Article 66 of the Netherlands Constitution provides:

> "Legislation enforced within the Kingdom shall not apply, if this application would be incompatible with provisions of agreements which are binding upon anyone and which have been entered into force before or after the enactment of such legislation."

A similar attitude is adopted in Luxembourg. It has thus been comparatively easy for the judges of these countries to accept the necessary primacy of Community law. As regards Germany, the position is more complex and I cannot do better than quote my colleague Dr. Hans Kutscher.

> "The German Federal Constitutional Court has, however, recognised in its decisions the precedence of Community law—including secondary Community law—over earlier or later laws, and has also recognised the independence and the direct effect of Community law. This question has thus been settled in a binding manner for all German courts. What has not yet been fully clarified by the decisions, on the other hand, is the relationship of Community law to the German Constitution, and in particular to its provisions dealing with basic rights.'

In Belgium, on the other hand, the Cour de Cassation in its judgment in *Minister for Economic Affairs* v. *S. A. Fromagerie Franco-Suisse 'Le Ski'* has fully accepted the primacy and direct effect of Community law. In France Article 55 of the Constitution provides that:

> "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws subject, for each agreement or treaty, to its application by the other party"

and opinion appears divided whether or not this article can be invoked as regards Community law. Moreover opinion appears to vary between the Conseil d'Etat (in the well known *Semoules* case) and the Cour de Cassation.

**The position of Italy, Ireland and Britain**

In Italy the position has been greatly clarified by the recent decision of the Constitutional Court on references made to it by the Tribunals of Turin and Genoa.

Italy has always had a dualist conception of international obligation, that is to say that they could only become part of domestic law through domestic legislation. This was exemplified by the Italian law of 1957 giving executory effect to Article 189 of the EEC Treaty. The question raised before the Constitutional Court was the compatibility of that law with the Italian Constitution. The Constitution Court, in a judgment of great lucidity and force, held that it was so compatible and, moreover, affirmed that regulations made under Article 189 were indeed directly applicable "that is to say immediately beinding upon both the Member States and their citizens without the necessity of any internal rule of adaptation or reception".

As regards the new Member States, all three of which have been strongly dualist, Denmark in its Act of Accession adopted purely Community terminology: Section 3 of this Act provides that the provisions of the treaties shall take effect in Denmark to the extent that they are directly applicable in Denmark under Communiy law.

Ireland has altered its Constitution to provide 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 institutions thereof, from having the force of law in the State."

The United Kingdom, which has no written constitution and is traditionally dualist in its approach to obligations incurred by treaty, passed the European Communities Act 1972, which by section 2 provides:

> "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law, and enforced, allowed and followed accordingly."

The only judicial comment which I have so far discovered on the relationship between Community law and national law comes from Mr. Justice Graham, who has said in *Aero Zipp Fasteners* v. *Y.K.K. Fasteners (U.K.) Ltd.*:

> "This Act ... to put it very shortly, enacted

that relevant Common Market law should be applied in this country and should, where there is a conflict, override English law."

For the new Member States many of the problems which the national courts of the founder members have encountered in the past still lie ahead, though it is to be hoped that the experience gained by the latter will be of assistance to the former.

As yet there has been no reference under Article 177 from Denmark, Ireland or the United Kingdom, although one is shortly expected to arrive from the latter country. Questions of Community law have also been in issue in a number of cases in Great Britain, although not in such circumstances as to make a reference appropriate.

Finally, may I mention a topic which is probably that of most concern to national judges. Once the rule of Community law has been interpreted, or if no interpretation is needed, it is plain that the application of that rule of law is for the national judge and, of course, application includes remedy. What is the appropriate remedy is, according to Community law, a matter for the national judge, provided that in so doing he gives proper protection to the party whose rights he has a duty to safeguard.

As was said in *Molkerei Zentrale* :

"Difficulties arising within a Member State cannot change the legal character of an immediately effective rule of Community law, especially as the rule must apply with equal force to all Member States ... and Article 95 does not restrict the *right of national courts* to apply whichever of the various *remedies provided by their own judicial systems* are suitable for protecting rights conferred on individuals by Community law."

In many actions, perhaps most, the appropriate remedy will be an order for payment of an ascertained sum of money.

My theme today has been that Community law depends for its efficacy upon national judges, who in applying it are thereby judges not only of their own countries but of the whole Community

# Company Law Changes to Protect Workers' Rights

by JOHN TEMPLE LANG

In twenty years it will be inconceivable that anyone would try to run a company without consulting the people who work in it, John Temple Lang, a solicitor who is now a Legal Adviser to the EEC Commission told the Incorporated Law Society in Wexford. The idea of consulting workers, whether through Works Councils with a right to be consulted and a veto, or through their representatives on Supervisory Boards of directors, is becoming more accepted in the EEC countries. The EEC Commission has suggested two-tier boards, with one-third of the Supervisory Boards of large companies elected either by or with the agreement of the workers. None of these rights exist at present under Irish law. It was up to Irish workers to decide if they wanted these rights, and if so on what basis. Consultation between managers and workers, on a proper basis, offered a chance of changing the present antagonistic relationship into a working partnership, and making a huge improvement in the whole climate of labour relations. It is a pity that such discussion as there has been in Ireland had consisted of arguments for and against the whole idea of worker representation, without much recognition of its colossal potential. The way in which industrial democracy would work, indeed whether it would work at all, and whether it would fulfil that potential would depend on how it was made to work. The EEC's proposal could not create the atmosphere in which it would work best; that had to be done here.

**Unions and workers' representatives**

There are two basic questions about industrial democracy which only trade unionists could really resolve. What is to be the relationship between trade union officials and workers' representatives on company boards and what are to be the functions of collective bargaining and of industrial democracy? Until these questions were answered Irish unions would not be ready for industrial democracy. Where the employees of a company belong to more than one union, or some are not unionised, how would each group be represented on the supervisory board?

If employees representatives are not union officials, unions might be reluctant to transfer many important questions from the collective bargaining sphere to be dealt with by workers representatives. If they are union officials, the job of representing employees on Supervisory Boards might be a source of inter-union rivalry. The present structure of the trade union movement in Ireland would create unnecessary problems, if worker representation was introduced. If Irish unions want to get the benefits of industrial democracy for their members, they would have to rationalize themselves on "one firm, one union" lines, or at least agree on their approach to the questions involved.

**Important problems**

A lot of important questions arose from the EEC proposals which would have to be answered by

Irish law, by agreement between employers and workers, or by the Courts, before worker representation would work satisfactorily. Would the representatives be untrained or specially trained workers, or would they be lawyers or accountants appointed by the workers? How far would workers' representatives have the right to have their own professional advisers examine the books of their companies for them? How far would they be free to report to their fellow employees or trade union officials? Should worker representation in management be introduced without joint works councils, or only after councils had worked for a while? Works councils are a much less novel idea than worker representation on the board. How far would workers' representatives have a right to insist on particular matters being discussed by the Supervisory Board? If these questions were answered before the legislation to implement the EEC plan was introduced, worker representation would be well on the way to making a big contribution to labour relations; if they were not, the legislation would be hard to frame and difficult to work.

**Workers protected in mergers**

Another EEC proposal requires directors of a company planning a merger to give the employees a "detailed report" on the effects of the merger on them, and the way they are to be treated. The employees would have a right to be consulted about this, and to give their views to the shareholders, who decide on the merger. If the merger is contrary to the employees' interests, there must be negotiation with management, and if agreement is not reached, there should be mediation by a public authority (such as the Labour Court).

This would all be new in Irish law, because it recognizes explicitly the legal rights and interests of employees in the company's affairs. At present Irish company law allows the interests of workers to be taken into account only insofar as it is in the interests of the company and the shareholders to do so. If adopted the EEC proposal would have to be extended to the kinds of mergers and take-overs usual here. This would be a strong stimulus for reforms giving safeguards to workers in circumstances other than mergers, and for safeguards for employees of private companies, industrial and provident societies, and partnerships. **The biggest influence for reform of Irish company law is now the EEC.**

**Shareholders rights**

Under EEC proposals Supervisory Boards of directors are designed to look after the interests of shareholders better than they are likely to themselves. The idea originated in Germany where shareholders rarely take an active interest in their companies' affairs. German law is democratic about workers (worker representation has existed there for many years) and paternalistic about shareholders: Irish law is democratic about shareholders and paternalistic about workers. At present Irish shareholders have the right to dismiss directors and, usually, the right to give directors instructions. It is not clear how far these rights were compatible with the EEC proposals, which would give these powers to the directors on the Supervisory Board. In Ireland all the directors would be on first-name terms; it is not clear whether a director who deserved dismissal would be more likely to get it from a Supervisory Board or from the shareholders. Clearly anything that increases supervision over the executives in a public company, such as a Supervisory Board, is desirable. The balance of power would be altered much less if it was made clear that the powers of direction and dismissal which would be exercised on behalf of the shareholders, could also be exercized by them. It is important that shareholders powers to protect themselves should not be weakened.

**Private companies' accounts**

The EEC proposals would cause a major change in Ireland by requiring private companies' accounts to be made public. At present it was impossible for an employee, a creditor or a potential creditor to find out a private company's financial position if the company wanted to conceal it. It is therefore impossible to find out if 99 per cent of the companies in the country are creditworthy or not. The publication of these accounts would have many important effects. Shareholders would be able to compare for profitability of their own company with that of other companies, for the first time, and to complain if it was low. They could also see whether the directors of their companies were getting more or less remuneration than those of other companies. Overall this should tend to increase efficiency and reduce excessive remuneration in Irish companies. It would also be likely to cause a spate of take-overs, as the financial attractions of private companies would become widely known. It would also give employees some at least of the information they need to gauge the prospects of successful wage claims. Some companies might change their character rather than publish their accounts, but when private companies in Britain had been required to publish their account none of the ill-effects that had been anticipated actually occurred.

**Rationalising company law**

When the EEC measures are adopted into Irish law, it would be important that the new principles should be dovetailed neatly into the existing Irish rules. If this was not done, there was a danger of Irish law becoming a patchwork of unrelated rules and remedies, complicated, difficult to understand, and full of anomalies. The adoption of the EEC measures should be used as a chance to rationalise Irish law, instead of making it more complicated. This work of rationalisation would require public discussion. The EEC measures themselves would leave a good deal of detail to be filled in by national law, and would leave alternative courses of action open to national parliaments; all of this should be worked out in advance. The EEC measures should improve Irish company law, but only if they were properly implemented and fully discussed and understood.

**Uniformity not imposed**

It was sometimes said, mostly by people who seemed to be against all change, that the EEC measures were standardisation for its own sake. This is not so. The EEC measures were drawn up with much trouble before Ireland and the U.K. joined. Everyone is reluctant to alter them more than is necessary. But it is recognised that they involve bigger change for Ireland and Britain than for the other countries, and that the proposals may therefore need modification. It is also understood that the huge number of companies in Britain (more quoted companies than in the whole of

the old six EEC states) represent a huge body of experience and expertise, which should be used for the Community's benefit. The Commission does not want to inhibit improvements in national company law, or to inhibit lawyers in developing new arrangements. Lawyers in the new member countries should recognise that their company laws have weaknesses which are more obvious to foreign lawyers than to themselves. To ensure interpenetration of economies, pitfalls for investors had to be eliminated. But there is no reason to replace the principles of Irish law with other principles. Irish lawyers could contribute to the marriage of Irish and Continental law.

# KENNY REPORT ON PRICE OF BUILDING LAND

**Submission to the Minister for Local Government by the Incorporated Law Society**

By Article 35, Section 2, the Constitution establishes an independent Judiciary.

The powers of the Judiciary and the Executive are absolutely separated and one of the major functions of the judicial arm of the State is to protect the individual against the encroachments of the Executive.

The majority report of the Committee on the price of building land ("the majority report") refers in the chapter entitled "The Constitution" to that part of the Constitution under the heading of "fundamental rights" and refers in particular to Articles 40 and 43.

At paragraph 87 on pages 45 and 46 the relevant articles of the Constitution are set forth. At page 49, paragraph 93, the majority report state that they propose that the High Court should be authorised to operate a form of price control in designated areas, "... the proposal involves a delimitation of property rights but one which is no more restrictive than other forms of price control".

At page 52, paragraph 100, however, the majority clearly and unmistakeably set forth that they are of the opinion that the price control which they envisage is such that "its exercixe could affect in a far reaching way the fortunes and property of the owner" and that therefore it would be unconstitutional having regard to Article 37 of the Constitution unless exercised by the High Court.

What the Majority report makes clear is that because the powers they wish to give to Local Authorities to "designate" areas could affect in a far reaching way the fortunes and property of land owners, a new jurisdication must be conferred on the High Court to overcome what would otherwise be unconstitutional. We have doubts that such a new jurisdiction would be held to be constitutional because in its efforts to be so, it may itself erode the fundamental rights of the individual under the Constitution.

Indeed, the decisions reached by the Supreme Court in three recent Constitutional cases would seem to indicate that the reasoning in the *Attorney General v. Southern Industrial Trust Limited* (1960) 94 I.L.T.R. 161 (which is relied upon by the Majority report in the Chapter entitled "the Constitution") will not be followed in subsequent cases. In fact in the case of *Central Development Association Limited v. The Attorney General* (Judgment given in the High Court on 6 October, 1969) Mr. Justice Kenny considered that the Supreme Court wrongly interpreted the Constitution in the Southern Industrial Trust case.

The three cases we refer to are *Byrne v. Ireland* (1972) I.R. 241, *O'Brien v. Keogh* (1972) I.R. 144 and *McGee v. Attorney General,* unreported, Judgment in which was delivered on 19 December 1973.

These cases are extremely important because they indicate the high duty the Supreme Court appears to place on the Oireachtas in relation to the protection of property rights.

The Majority report does not deal with the interesting developments relating to the right of private property contained in the decisions of Byrne v. Ireland and O'Brien v. Keogh and seeks to make use of the Attorney General v. Southern Industrial Trust Limited in support of their argument that their proposals are not unconstitutional while the same case was subsequently criticised in both the High Court and the Supreme Court.

**Danger of extending High Court jurisdiction**

It is vital to the welfare of the State that the Courts should retain their independence of the Executive and should be known and seen as a force to protect the rights of the individual against any invasion of the individual's rights by the State. The Majority report at page 64 quotes from a writing of Lord Devlin which in our view underlines the dangers of entrusting a new controversial jurisdiction to a Senior Court of Law. Lord Devlin wrote :

> "It is a wise instinct which has led Governments so often to entrust the initiation of new and untried jurisdictions, even when uncontroversial, to Statutory Tribunals. Non-compliance with the Tribunal's Order is of course an offence but it is the Executive who prosecute and the police, not an Officer of the Court, who act. The High Court plays a remote and supervisory role; and if the Tribunal suffers from the embroilment, the prestige of the Court is not involved."

The Majority report considered that the advantages of a Statutory Tribunal would be obtained if the Judge exercising the new jurisdiction was obliged by the Act to sit with two Assessors, one with Town Planning experience and the other with qualifications in valuation matters. We do not share the views of the Majority Committee and believe that if the High Court is made use of in the way suggested that the independence and dignity of the Court will be seriously damaged. In support of this statement we will examine the "machinery" by which an application will be brought before the High Court.

It is proposed that each Local Authority would have power to apply to the High Court to designate areas

which are suitable for development. How will this machinery operate?

The majority report at page 62, paragraph 118, states that the decision to apply to the Court for an Order designating an area and to buy lands within such an area should be an Executive function of the Local Authority to be performed by the City or County Manager.

In practice, how will this work? It means that there will have to be a body of men working under the City or County Manager rather like planning personnel and even if such a staff could be found it is likely that both they and the Managers would be subjected to pressures from various sources to see that particular peoples lands were not going to be included in an area to be designated.

**Pressures exerted on local authorities**

Anyone with practical experience will know the pressures that have been exerted on the Planning Authorities and Planning Committees in relation, for example, to draft plans and the changing of zoning.

We foresee that not only will there be pressures brought to bear on the personnel or the drafters of "designated area schemes" but there will be tremendous efforts made by people (and naturally so) to try and find out if their lands are going to be included in any proposed application to the High Court. This could lead to grave rumours of corruption, if in fact not corruption.

When the Local Authority has formulated its application to apply to the High Court, the owner of the land will be legally advised that there exists little hope (if any) of succeeding in having his land excluded but, nevertheless, as the fortunes of the owner are to be radically changed he will presumably object in each case so that the High Court will have a full hearing in almost every case.

The Majority report sees it as essential that there should be public confidence in the impartiality of the High Court and the Majority state that "as Local Authorities will be making application to it, neither of the Assessors should be officers or employees of any of the parties to the Application or have any interest in the result of the proceedings".

We do not share the confidence of the Majority that the High Court Judge (whose decision as the Majority point out will be his alone) by virtue of sitting with Assessors of technical qualifications will thereby prevent the prestige of the Court from being adversely affected.

**High Court will become arm of local authority**

In our opinion the effect of the proposed procedure will be to make people feel that the High Court is no longer a defender of the rights of the individual, and by allowing the High Court Judge to become an instrument to implement the decision of the County or City Manager, the High Court will be thereby brought into disrepute and will be seen to be an arm of the Local Authority and not as an independent incorruptible judiciary.

The allegations about decisions in regard to planning appeals have already brought the Minister for Local Government and his Officials into sharp controversy. There have been unsubstantiated allegations of improper activity and indeed of corruption, and the same is almost bound to follow in the case of decisions of the High Court.

Our main objection therefore, to the Majority report (and presuming the proposals are not unconstitutional) is that it proposes to make the High Court a tool of the Executive and thereby bring it into disrepute and any such law will be bad law and bad for the Country as a whole.

But there is also the serious constitutional objection which we have referred to earlier and, in this respect, it is recognised by the Authors of the Majority Report that the Law they envisage will be such a radical departure from the present Law that it will be contested as unconstitutional, and, therefore, before signing, it should be referred by the President to the Supreme Court for a decision as to whether or not it will be unconstitutional. It is an unhealthy start to the life of any Law when its Promoters admit the certainty of the legislation being challenged by the ordinary process of an action in the High Court on grounds that it is unconstitutional.

**Open market principle should be determinant factor in compensation for land acquired compulsorly less the enhanced value of the serviced land**

Apart altogether from what we refer to above, if one takes the view that the retention of the open market value principle in the determination of compensation for land acquired compulsorily is in the interest of the common good, then one cannot accept the proposals of the Majority Report. It is not part of our function to comment here, but it seems clear that if the open market value principle is held, then, the only way to secure for the Community the "betterment" element in serviced (or to be serviced) land is to provide for some sort of tax or levy. The problem is that this tax or levy is almost certain to be passed on to the ultimate purchasers of the houses.

While the proposals of the "Minority Report" would not involve the High Court in the problems attendant on the Majority Report, the suggested levy scheme would probably result in increasing the cost of housing to individual purchasers and thereby defeat one of the Committee's terms of reference. The difficulty is that the Minority Report accept the principle of open market value in the determination of compensation for land acquired compulsorily, and any proposals which accept this principle will also have to accept that the only way of securing the element of betterment for the Community is to impose a levy or tax of some kind. It is only where one accepts that on an acquisition by the Local Authority the owner of the property is entitled to a sum which is less than the full market value of the property that the element of betterment is effectively secured to the Community and housing does not become more expensive for the ultimate Purchaser.

We feel that the Majority Report examined in a limited manner a scheme which would appear to go a long way to meeting the Committee's terms of reference. At page 19, paragraph 38, in the Chapter entitled "Legislation and Reports in Britain" the Majority Report referred to one of the suggestions considered by the Uthwatt Committee (established in January 1941 under the Chairmanship of Mr. Justice Uthwatt). This suggestion was that Local Authorities should be given the right to acquire compulsorily land which had been or would be improved by Local Authority works at a price determined by reference to its use value before

the works were carried out. We quote from the Majority Report at page 19, paragraph 38 :

"Compensation assessed on this basis would not therefore include anything for the development potential which the works carried out by the Local Authority have created. In this way the increase in price caused by Local Authority works would accrue to the Local Authority which would get the benefit of it by selling the lands at their full market price or by letting them at the economic rent. This method is usually called recoupment because the Local Authority are recouped for some part of the gross cost of the work which they have carried out by the profit which they make on the sale or letting. Recoupment as a principle had not been adopted at all in Ireland and in Britain, when the Uthwatt Committee reported; it had been restricted to cases where roads, streets and bridges had been constructed or widened."

The Majority Report does not seem to examine this suggestion in further detail and we feel it is a suggestion which merits further examination.

Could it not be suggested that the Planning Authorities power should be extended to enable them to designate future areas for development with the right of compulsory acquisition of any part of the land so designated on the basis that the owners of the lands should be paid the full market value of them less what in the opinion of the Valuers or Assessors is the enhanced value by reason of the lands being serviced or about to be serviced within the next five to ten years.

Far more difficult valuations have to be made from time to time than would be involved in deducting from the full market value the enhanced value by reason of the actual services being there or likely to be there within the next five to ten years. The difficulty in assessing the value on this basis would be no more complicated than the job of any other Arbitration Tribunal as at present operating.

In this way the owners of the land would get what would be a fair price having regard to the *nature* of their lands (e.g. whether the lands were easy to develop or whether they enjoyed special amenities—all the factors that go to making up the price of land) and at the same time would not exploit to their financial advantages the services provided or to be provided by the Local Authority. The owner would receive the enhanced value due to inflation and general urbanisation (where this is relevant) but would not be asked to accept the completely artificial value of usage plus the magic 25% proposed by the Majority.

We appreciate that there may be constitutional difficulties attendant on this proposal, but if so, we would hope that they would be less problematic than those posed by the Majority Report. We also appreciate that we are not aware of the arguments put forward to the Uthwatt Committee in favour of and against the scheme we have been discussing. We mention it merely as one deserving of further attention and to prevent our submission being too negative in nature.

We also appreciate that while these proposals should keep the price of building land within bounds in transactions between Vendor and Local Authority (with the attendant benefits in subsequent transactions between the Local Authority and third parties), they may not necessarily keep down the price of building land in transactions between private persons. This is a weakness to which even the majority proposals are prone (as the minority have pointed out) and would appear to be impossible to overcome unless there was absolute certainty that the Local Authority would acquire all building land in a designated area including that for which planning permission has been granted.

The principal advantage in the proposal would be that the increase in the value of land attributable to the decisions and operations of Local Authorities would be secured for the benefit of the Community and without the total elimination of the open market value principle in compensation.

Both the Majority and Minority Reports suggest a number of legal changes in our Planning Law and in our Law relating to compulsory acquisition.

Certain of the proposed changes already appear in the recent Planning Bill and the others deserve serious and detailed examination. We would certainly welcome a modernization of the Compulsory Acquisition code so as to give Local Authorities a more expeditious method of acquiring lands and paying for them.

However, we are very much against the recommendation of both the Majority and the Minority that members of the public should be freely able to obtain information of the price at which property changed hands.

There is far too much invasion of privacy at the present day without extending it and we think that the suggestion of the Majority Report that the public should be able to find out what prices have been paid for land is unwarranted and unnecessary. A purchaser should be entitled, if he so wishes, to keep private from the world at large the cost of a land acquisition. Such a desire for privacy is deeply embedded in human nature and we see no reason why it should be disturbed.

Signed on behalf of the Committee :
John Mathews
Anthony Dudley
S. Millington
Anthony Twomey

# TRUST RECORDS BY SOLICITORS

By J. DUNCAN MORRISON, Solicitor, Member of the Stock Exchange

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Whenever a Trust is created, or comes into force under a Will, a duty falls upon the Trustees not only to keep accounts, but to ensure proper, effective and continuous attention to the Trust's affairs. This very wide duty is frequently delegated to the solicitors and other professuonal advisers involved. The management of substantial funds is usually well carried out, but difficulties arise in the case of medium or small Trusts. Yet it is just these where the need for management is greatest. Also, the failure to manage can have the greatest personal consequences upon the beneficiaries where the amounts involved are relatively small.

The first step in management is proper records and a means of ensuring that no Trust is ever overlooked. The object of this article is to present some ideas for a single system to maintain office and individual Trust records. It is not concerned with Trust accounts.

The aim is to keep the *minimum* records necessary to achieve three principal objectives :

(i) That all Trusts are centrally recorded in the office.
(ii) That all Trusts' records are maintained on a similar basis, so that they can be interchanged between personnel and the position quickly seen.
(iii) That each Trust is adequately reviewed and kept under observation.

It is believed that these objectives can be achieved by three simple basic records :

(a) A Central **Trust Record Book.**
(b) An individual **Trust Record Folder** for each Trust; and
(c) **A Review Diary.**

In the first place some work in setting up the system for existing Trusts, and at the commencement of each new Trust, is absolutely essential, but it can be kept to a minimum. It will be repaid by a very substantial reduction of work (and a better service) for the duration of each Trust.

The Central **Trust Record Book** should be maintained by a legal executive in the office who has some trust work experience, and is himself running some of the Trust matters to be recorded. The **Record Book** will cross-refer to the Trustees, so that if anything comes into the office in the name of the first-named Trustee "and Another" it can be traced by the Trust Legal Executive (TLE).

The **Trust Record Book** should be an A4 size loose-leaf strongly bound book and be maintained by and kept in the room of the TLE. It will be divided with cardboard dividers into **Four Sections** showing:

(a) **Trusts** in alphabetical order. As each Partner and Legal Executive brings his Trusts into the system, a copy of the first page of the **Trust Record Folder** (see below) will be sent to the TLE for insertion in the **Record Book.** (For those who dislike loose-leaf records the **Trust Record Book** could be bound and the details entered from this copy, but both extra work and risk of error arise.) When any material change occurs a replacement "first page" is prepared and a copy should reach the **Record Book.**

(b) **Office Personnel** in either alphabetical or seniority order. This is simply sheets each headed with the name of any person in the office handling Trust matters with a list of the Trusts currently in his charge.

(c) **List of Trustees** in alphabetical order and with a note of each Trust they are concerned in and the entry "(1)" for the first-named Trustee. This section has two main values, first for "tracing" purposes and secondly on the death or retirement of anyone involved in a number of Trusts.

(d) **Date List** of redeemable and convertible securities etc. In some instances this will be maintained by the Brokers concerned, and is very much "an optional extra". In most cases it will be sufficient to have one page headed with the year of each of the next five years and thereafter five year pages. A list of equity holdings is **not** included. To this extent the "tracing" element of the **Record Book** and the system breaks down, but to incorporate this would, in the author's view involve unnecessary work and therefore put the maintenance of the whole system at risk.

The **Trust Record Folder** can take the form of a cardboard loose-leaf type folder, or an envelope type folder, and in either case A4 is suggested.

Provided it contains the "first page" which is the basic information, its exact contents are very much a matter for the partner or legal executive in charge of the Trust. It should on its own, and with no or only minimal reference to the "file", contain a precise picture of the purpose and current state of the Trust and be clear to any other partner or legal executive (and especially the TLE) who has occasion to refer to it.

The most important item, the "first page", is a short record of the details of the Trust and reference is made to the example at the end of this article. It will contain the following information and will be prepared in duplicate at least, one copy going to the TLE :

(1) Name of the Trust.
(2) Names and addresses of the Trustees.
(3) Whether created by **Settlement** or **Will** and its date or date of death. A copy of the document or of the relevant clauses should also go into the Trust Folder.
(4) If there is a Tenant for Life or other recipient of income, name, address and age. Short details of residuary interests should also appear.
(5) Names of brokers, estate agents or others concerned according to the nature of the Trust.
(6) Names of bankers (and any divident mandate instructions or account numbers).
(7) Name of any accountants or other specialists involved.
(8) Short particulars of type of Trust assets, e.g. "mainly property", "mainly Stock Exchange securities", and on the back or attached any information to be recorded in the **Date List** section (if maintained) of the **Trust Record Book.**
(9) Details of investment powers, etc.
(10) Date of preparation and dispatch to TLE and of **Review Dates**—see below.

It is strongly recommended that this "first page", when settled to the requirements of an individual office, be printed or at least duplicated.

Where the Trust contains Stock Exchange investment then a copy of the "first page" should go to the brokers, and their analysis and reviews (or at any rate the last one) should always be in the folder.

Where any of the main items on the "first page" are amended—e.g. change of Trustees, death of a Tenant for Life, even change of bankers, etc.—an amended "first page" should be prepared. A copy goes to the TLE who replaces the previous entry in the **Trust Record Book,** but in the folder the original entry and all the amendments (latest on **Top**) are kept together to show the history of the Trust, dates of changes, etc.

Where any item on the **Date List** is changed a note must go to the TLE. Again a short printed or duplicated slip would be useful. (The information can then be dictated as can the whole of the "first page" so as to limit senior work. How much the TLE can delegate will depend on each office and whether he has a senior girl or legal executive trainee working with him—he should have!)

Copies of attendance notes of interviews with Trustees or beneficiaries should go into the Trust Folder. In detail the file and the folder should be complete and related, but the information in the Folder should always be maintained and processed so it is concise and up-to-date.

Each Trust should have a full review once a year and an interim one at the six month stage. The "first page" should show these review months. For example, a Trust coming in force in January should be shown for review as **January/July.**

The **Review Diary** should be a loose-leaf A4 size book of 12 sections or pages, one for each calendar month. Each Trust is entered twice (once in capitals) and followed by the initials of the person in charge of it.

The duties of the TLE are:

(a) To maintain the **Trust Record Book** and **Review Diary.**

(b) To use the **Personnel List** to ensure Trusts are being properly looked after and to control (by reference to our consultation with the partners) a reasonable division of the Trust work load.

(c) To follow up **Review** dates and action revealed necessary by the **Date List.**

(d) To ensure a consistency and continuity of office policy to all Trusts to the advantage of clients and the intentions of the creators of settlements and of testators in particular.

If the ideas in this article have any appeal to your office they can be progressively implemented in **Four Stages:**

**Stage 1**—Appoint a TLE and let him get his own Trusts into the system first.

**Stage 2**—Let him show this article to others involved and be prepared to explain the merits of the system to them.

**Stage 3**—Ensure that all **New Trusts** then come into the system.

**Stage 4**—Aim to get "first pages" done for all existing Trusts within four months.

The system is simple and flexible and can be adapted to the requirements of individual firms whether large or small.

**Specimen "First Page'"**

Office Reference: NOP/TLE/C

TRUST RECORD
(OR AMENDED TRUST RECORD)

| | |
|---|---|
| Name of Trust: | Frederick Adams, Deceased. |
| Trustees: | Mr. N. O. Partner (1)<br>Freda Adams (Widow)<br>and William Adams (Son).<br>1 Somewhere Road,<br>Anyplace AP6 7SW.<br>Deal with Son—Tel: Anyplace 2345. |
| Source: | Will of Deceased.<br>Date of Death: 14/11/73. |
| Income: | To widow for life (aged 67 at date of Deceased's death).<br>Mandated to George Bank, Anyplace Branch, A/C No. 00060071. |
| Residue: | ½ to son, William, absolutely.<br>½ to daughter, Mrs. Jane Eve, for life and then to her children absolutely. |
| Agents: | Acres & Miles, Estate Agents, 18 Wide Street, Anyplace.<br>Bear Bull & Co., Stockbrokers, 17 Market Street, Anyplace. |
| Accounts: | No Accountants. Accounts kept and tax done in the office. |
| Trust Assets: | Riverside, River way, Anyplace—occupied by widow on payment of rates.<br>One private mortgage (existing at date of death).<br>14 Superblock, Central Avenue, Anyplace. Let as flats.<br>Stock Exchange securities as per Brokers' valuation.<br>New Houses Building Society Share A/C.<br>3 Local Authority Mortgages. |
| Powers: | Only to postpone sales.<br>Trustee Investment Act 1961 applies.<br>Charging clause for N. O. Partner. |
| Reviews: | December and June. |

18/12/73 TLE
NOP/TLE/C

**Date-List** Information re: F ADAMS, Deceased.

£2,000 Anywhere Corporation 6¾% Redeemable 31 March 1976.

£1,500 Anyplace Corporation 7½% Redeemable 30 October 1978.

£500 East Anyhow Water Board 5% Redeemable 30 September 1979.

£1,000 National Westminster Bank 8¼% Subordinated Unsecured Loan Stock 1980.

£750 Greater London Council 9½% Stock 1980-82.

# BOOK REVIEWS

**Lawson (R. H.)—Remedies of English Law.** 20 cm.; 367p; London: Penguin Books, 1972. Collection "Law and Society' '(Paperback). £1.50.

Professor Lawson has exposed in a clear and erudite fashion the remedies that are available to a person, who seeks a legal remedy, having failed to obtain restitution. The limitations of self-help, whether by preventing trespass, or entering upon the lands without a Court order, are fully explored. The damage of penalty clauses is mentioned and the manner in which liquidated damages can be asked for and awarded is fully treated. Money remedies arise essentially from a breach of contract, quasi-contract, trust, or from committing a tort. Whereas a liquidated debt is an amount claimed before the trial, there are several sums which are only assessed in the course of the trial, such as (1) the value of goods supplied, (2) the loss suffered by the plaintiff at the hands of the defendant, (3) a nominal sum awarded in vindication of a right, (4) a penal sum marking disapproval of the defendant's conduct, (5) the unjustified enrichment of the defendant at the plaintiff's expense.

If under case (1), the value of the goods sold which requires assessment constitutes the action of *quantum valebat,* whereas an action of assessment for services rendered constitutes a *quantum meruit.* On the other hand in case (5), there appears to be no general doctrine of unjust enrichment. The principle that a plaintiff cannot recover, when he is unjustly enriched at the expense of the defendant is illustrated by *Reading v. A. G.* (1951) A.C. In that case a sergeant stationed in Cairo was paid a large sum of money for helping in the illegal transportation and sale of whisky and brandy, by riding in uniform on lorries transporting the liquor and so protecting the cargo from inspection. When this was discovered, the Crown impounded the money due in his bank account. As the sergeant had earned the money in his official position, it was held that he was bound to hand it over to his employers, and he consequently could not recover. In case (3), Constantine, the famous West Indian cricketer was awarded £5 against the Imperial Hotel for refusing to admit him—see (1944) K.B. Lord Devlin in *Rookes v. Bamard*—(1964), A.C. laid down that normally exemplary damages were an anomaly which should be removed from the law. The only exceptions were (a) oppressive, arbitrary, unconstitutional action by servants of the Government; (b) defendant's conduct has been such as to make a larger profit than the plaintiff would recover by compensation and (c) exemplary damages authorised by statute. The extraordinary case of *Re Diplock*—(1948) Ch. D.—is fully discussed. It will be recalled that the will was badly drawn, where the executors were directed to apply the estate for such institutions with a charitable *or* benevolent object as they might select; this clause made the will void for uncertainty. Nevertheless the executors were allowed to distribute most of the estate of more than £200,000 without a court order amongst a number of charities. The next of kin only discovered that they were entitled after a few years and took proceedings. As the mistake which induced the executors to distribute the estate was one of law, the next of kin could not recover the money as having been paid under a mistake; presumably this case is unique.

All the relevant English statutes and case law are fully treated. Practitioners will benefit immensely from reading Professor Lawson, who, on account of his clarity and precision, is an erudite mine of information on this involved subject.

**Keeton (George W.)—English Law—The Judicial Contribution.** 23 cm.; 383 pp.; Newton Abbot: David & Charles; £5.50.

Professor Keeton is one of our most prolific writers; apart from his well-known works on Equity, he has also written on the Soccer Football Revolution. In this volume he has tried to assess the contribution of English Judges to various aspects of law. In the early chapters, the learned author deals with legal history, such as Anglo-Saxon Law, Norman England and the Mediaeval Judiciary and the Common Law. The making of modern Equity extends through the Chancellorships of Lords Nottingham, Hardwicke, Thurlow and Eldon, yet it must be recalled that all Lord Chancellors were also active politicians, and some of them made little impact upon the law. Lord Eldon enforced the doctrine that a precedent in equity was as substantially binding as a precedent in common law. In *Blackwell's Settlement*—(1953) Ch. D.—Lord Denning rebutted the suggestion that the Court of Chancery had no jurisdiction to sanction acts which are not authorised by the trust instrument; this has now received statutory effect in the English Variation of Trusts Act, 1958. As recently as in *Baden's Will Trusts* —(1970) 2 W.L.R. the majority of the House of Lords per Lord Wilberforce, in a case where a fund was established for the officers and employees of a company, and where Clause 9 (a) of the Trust Deed stated that the trustees were to apply the net income of the fund in making at their absolute discretion grants to or for the benefit of the officers and employees and their relatives in such amounts and on such conditions as they think fit, held—(1) that the trust was valid if it were construed as a power, and, if it could be said with certainty that any given individual was or was not a member of the class of beneficiaries designated and (2) the terms of clause 9 (a) were mandatory and constituted a trust. Lord Mansfield was the ablest judicial law maker to sit in an English Court; he wisely said "I never give a judicial opinion upon any point, until I think I am master of every material argument and authority related to it." In *Macartney v. Garbutt*—(1890) 24 Q.B.D., the plaintiff, a British subject employed as English secretary in the Chinese Embassy in London was held to have diplomatic status by virtue of international law. But the decision cannot be compared to those of Lord Stowell, who, being a master of both Common Law and Civil Law, combined the widest knowledge of classical and modern learning. The principle which Lord Stowell established that a prize Court is essentially an international Court, was re-

affirmed in *The Zamora*—(1916) 2 A.C., when the Privy Council held that an Order in Council violating the rules of international Law was not binding upon a Prize Court sitting in England. Professor Cheshire deserves the strong criticism heaped upon him for being a pragmatist. With regard to natural justice, there are some extraordinary English decisions. For instance, in *Jacobson v. Fraihon*—(1928) 138 T.L.R., the Court of Appeal held that a biased French judgment could not be said to be contrary to natural justice since French procedure had been strictly observed. In *Igra v. Igra*—(1951) P the Court refused to invalidate a German decree of divorce where the proceedings were tainted by racial bias. An extreme example where natural justice was ignored is *Arlidge's* case—(1915) A.C. On the other hand, in *General Medical Council v. Spackman*—(1945) A.C. the House of Lords held that the Medical Council must give a doctor an opportunity to state his case, and to exculpate himself. In *Lee v. Showmens Guild*—(1952) 2 Q.B., Denning L.J. laid down the principles that the tribunal must observe the principles of Natural Justice, and that such tribunal may not oust the jurisdiction of the Courts. Lord Denning who gave a famous dissenting judgment in *Breen v. Amalgamated Engineering Union*—(1971) 2 W.L.R., in which he rightly held that a decision of a union district committee not to re-appoint a shop steward on the ground of bias was inexcusable. The Minister for Agriculture was soundly rebuked by the House of Lords for not observing the rules of Natural Justice in *Padfield's* case—(1968) A.C. and so should the trade unions. In discussing the Wagon Mound principle of foreseeability in torts, the author rightly wonders whether the principle could be applied to the Torre Canyon disaster in 1967, or to the more recent oil spillage in Bantry Bay.

It will be seen that the learned author in his erudite volume has covered many interesting legal problems. But this reviewer condemns one serious flaw, namely, that the reference to a case is not contained on the same page as the case, but in separate notes at the end of the volume. Nevertheless this flaw can be overlooked if the reader concentrates on the interesting and readable text.

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# DAIL EIREANN—MOTION ON FREE LEGAL AID

## STATEMENT BY MINISTER 5 NOVEMBER 1974

**Minister for Justice (Mr. Cooney):**

The motion deals with both criminal and civil legal aid. I shall speak first on the criminal legal aid side. Deputy Haughey was Minister for Justice when this was introduced and he deserves credit for what was then a pioneering move. As he freely admitted, it was a tentative move. It did not go into the field of civil legal aid. I think Deputy Haughey used the word "timorous" at one stage to describe the approach of himself and his Government, an approach which was, I think, necessarily forced on them by the need of having regard to the Exchequer. The Exchequer is in the background for all of us when we want to introduce reforms or improvements in our society. We can only move within the constraints of the national budget and those constraints, I have no doubt, loomed large in Deputy Haughey's field of vision when he was pioneering this move in our legal system. Nevertheless, the move was a good one and it is wrong to denigrate or run down our present system of criminal legal aid. I believe that both the structure and the administration of our legal aid system are quite satisfactory. It can be criticised on the level of fee made available, and the involvement of the legal profession in it can also be criticised. Whether that is the fault of the legal profession, or whether it is the fault of the level of the fee which has been offered from the beginning, is something on which we can have an argument. There are faults on both sides.

I speak as a person who practised law in a country town and who, from the time this system came into being, was glad to avail of it and considered that the fees were an improvement on the fees I had been getting for similar type of work before, which are very often nil or nominal because the type of litigant in much criminal work in the District Court is not in a position to pay fees—petty larcenies and the like. I found this system a great boon. Unfortunately—and I have to say this against my own profession—there was a rather superior approach to it, that this was a charity law, and that if solicitors came into it at all they came into it very grudgingly. There was not the co-operation in the scheme from the legal profession that should have been forthcoming. That is my opinion as one who practised law up to 18 months ago.

There is no doubt that, having regard to the amount of time criminal work demands from a solicitor who might have other lucrative business which has to be forgone, the level of the fee was not attractive in the context of other business to be done. But in the context of having an obligation to provide services for people charged with breaches of the criminal law, and in the context of the level of fees up to then pertaining, they were generous. However, that is the only criticism I have to make of the system of legal aid in criminal cases.

After the first couple of years—and I will not embarrass Deputy Haughey by guessing why in the first couple of years there was some slowness on the part of the Courts in granting certificates of legal aid—it became clear that it would not break the Exchequer and I found that the Courts were forthcoming, and reasonable, and sensible, in granting applications for legal aid certificates. This is still the position. The percentage rate of applications granted is away up in the high nineties and it is only the very odd litigant, the very odd offender, or person charged, who is refused a

certificate to enable him to have legal aid in criminal cases.

At the moment there is agitation by both the solicitors' and barristers' branches of the profession to have the level of the fees changed. I am having discussions, and in some cases my Department are having discussions, with both branches of the profession to see if we can reach a figure that will satisfy them, all the time keeping an eye over our shoulder on the Exchequer, as we must. I would be anxious that the fees would be such that neither branch of the legal profession would have any excuse for dodging what I think is a professional obligation to come into the legal aid scheme, put their names on the panel, and take their turn in providing services for offenders or alleged offenders. This is very important.

There are only two criteria for granting legal aid. One, that it is essential in the interests of justice, having regard to a number of factors including the seriousness of the charge, or if there are exceptional circumstances. This gives the Court wide discretion. The other is that the means of the applicant must not be such that he could provide the service for himself. My experience is that the Courts are generous in granting the certificates of legal aid.

During the year we made two amendments to improve the structure. These amendments were to enable legal aid to be paid in respect of preliminary hearings in the District Court. This was an odd gap in the system and led to some injustice. I suppose that originally it was felt that, if a person pleaded guilty and was sentenced, that was the end of the matter and that, if there was an appeal, it would be a mere formality. There have been cases of actual hardship with regard to the sentence where there were grounds for appeal on grounds of severity and legal aid was not available and this inhibited appeals being taken. That improvement was made during the year.

We also provided a further change during the year to deal with a person who, having pleaded guilty in the lower court, was sent forward for sentence only to the higher court. This was another gap in the system. That person was not entitled to legal aid in the higher court. We have closed that gap, too. At all stages in the criminal legal process, legal aid is available for offenders. It is my hope to increase the level of legal aid for both solicitors and barristers and it is my hope that this increased level will induce more and more professional lawyers to participate in the scheme so that it will not just be a social service provided by some lawyers with a social conscience but that the profession as a whole will discharge their professional obligation and take part in the scheme.

There has never been any system of civil legal aid with the one exception mentioned by Deputy Haughey and, if I might use a phrase which Deputy de Valera does not like, it was an *ad hoc* arrangement to provide assistance in *habeas corpus* cases, which of course were usually important cases involving the liberty of an individual and probably an important constitutional point. It was important that such cases would not be inhibited by financial considerations. Consequently legal aid is provided on an *ad hoc* basis by the Attorney General and the Minister for Finance to defray applicants' expenses in such cases.

It might be interesting for the House to know with regard to criminal legal aid that there has been a steady increase in the number of claims or applications for it. In 1970-71, the number was 470. It went to 1,271 in 1973-74. That shows there is a greater public awareness of the availability of legal aid. I have not got a breakdown as to how many of those were in Dublin. Applications in the Children's Court in Dublin have increased and this would probably be a contributory factor. This is another figure which it may be of interest to hear. Taking the same period: in 1970-71 expenditure on legal aid was £13,201 and in 1973-74 it was £34,666. This was a considerable increase and possibly—I am subject to correction on this—there was an increase in fees in that period.

Even with that the budget, the amount provided, has not been used up each year. For example, in 1972-73, £35,000 was provided and £31,699 was spent. To the end of March, 1974, £45,000 was provided and £34,000 odd was used. The scheme is there and my experience is that it is being used on a pretty wide scale. It is not an extravagant scheme. I say this looking over my shoulder at my colleague in Finance: I think it could stand some increases in fees.

# RIGHTS, DUTIES, RESPONSIBILITIES AND OBLIGATIONS OF SOLICITORS

## A LECTURE TO APPRENTICES

By BRUCE ST. JOHN BLAKE, Vice-President, 1973-74

Despite the rather formidable title of this lecture it gives us an opportunity to consider many fundamental matters affecting the Solicitors profession which need to be clearly understood by the members of the profession itself and which are not sufficiently appreciated by the public at large whom it is the role of the profession to serve.

### Essential characteristics of a profession

Before attempting to examine in any detail such fundamental matters as these it is desirable first to consider the nature and role of a profession. The word professional has certain definite conotations as far as the general public are concerned and is broadly speaking suggestive of competence and ability, whether in fact

the term is applied to a professional person as such. The word professional is further applied to a person with special training for a very particular type of work. It would be further true to say that ideally any person who decides to embark upon a professional career should have a vocation as well as a commitment to and aptitude for the type of work involved. The practise of a profession requires that its members maintain a code of conduct and standards of the very highest integrity and specialised training and aptitude for the calling in question is not sufficient without the essential requirement of commitment to the role which also involves dedication, reliability, common sense, impartiality and above all the highest respect for the dignity of the individual. In the case of the practise of the legal profession and with particular regard to solicitors in addition to the foregoing qualities, total honesty, respect for the truth, common sense and a broad mind are also essential. In practising a profession we are not buying or selling commodities but rather **we are offering a service.** It is precisely this essential difference between the running of a business and the practising of a profession that creates a lot of misunderstanding of the role of a profession on the part of the public. In the case of the legal profession and in particular with regard to solicitors, a great deal of our work is unseen by the clients whom we serve and is almost totally unknown to the public at large and any publicity we receive is usually adverse and concerns high fees. What the public do not hear or appreciate, however, is the number of hours, days, weeks, months or even years that a solicitor may spend on a particular problem or series of problems for a client and this is one of the probably rather unfair facts of life with which we in the Solicitor's Profession must contend, nevertheless, considerable consolation can be gained if we are secure in the knowledge that we have performed the service for which we were retained. I think that the essence of the Solicitor's role could best be summed up by a reply that I was given recently by a young aspiring Solicitor's Apprentice to my question as to why they wished to become a Solicitor. The reply was simply "because I want to help people".

**The image of the profession**

It is difficult to give a clear picture not to mention summarise, the image that the legal profession creates from without when one is of necessity speaking from within to what is in effect not just a captive but hopefully a sympathetic audience and the following two quotations may serve to illustrate what I have been attempting to describe in regard to the profession. "True, we build no bridges. We raise no towers. We construct no engines. We paint no pictures—unless as amateurs for our own principal amusement. There is little of all that we do which the eye of man can see. But we smooth out difficulties; we relieve stress; we correct mistakes; we take up other men's burdens and by our efforts we make possible the peaceful life of men in a peaceful state"—John W. Davis.

"I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with, than most other varieties of mankind"—Harrison Tweed.

We should next turn briefly to the role of the legal profession in our community and here I feel personally that we are not as influential a body as we ought and deserve and are entitled to be. **We are one of the few, if not in fact the only, truly independent professions.** We are not in any way a State service nor are we dependant for our remuneration as are so many of our brother professions upon the State. We are not an arm of Government although many of our members are in the Government service but as such the practising legal profession is totally and essentially independent from all the organs of the State and in our own way we have a type of independence which is similar to that of the judiciary and this is indirectly recognised from the fact that we are by statute *officers of the Court* and as a result are in a privileged position which does not have any real comparison with any other profession. In the last resort it must never be forgotten that we are by virtue of our total independence from the organs of State and Government an essential bulwark between the liberty of the individual citizen and the State with its attendant panoply of bureaucracy. In this regard probably **our most important and fundamental role is that as a profession we are the guarantor of the freedom of the individual** and the liberty of the subject. We are the vehicle or the means whereby the citizen can ensure that his fundamental rights as guaranteed to him by our Constitution can be vindicated and upheld. Without the legal profession the Courts would be unable to ensure that the fundamental rights of the individual citizen could be effectively guaranteed to him. This does not mean that the individual citizen is not entitled to seek his own remedies and redress in the Courts if he is being denied his fundamental rights or his liberty as a subject but in practice due to the complexities of the law in the vast majority of cases he will require the services of the legal profession. I hope that another quotation will serve to underline the very comprehensiveness of the part that the legal profession is called upon to play in its service to the community.

"You have everything that goes into life: they get married, get divorced, they have children, they buy property, they sign contracts. The law is the only profession I know of which is from before the cradle to after the grave. That's why it is such a satisfying way to spend a life"—Martin Gang, California Bar.

**The role of the solicitor as a member of the profession**

Let us next consider the role of the individual Solicitor as a member of his profession. I personally prefer the term Lawyer rather than Solicitor. I feel that the word Solicitor, suggesting as it does the actual soliciting of business is outmoded in the context of the present day world, when there are so many vast fields of work open to Lawyers which completely eliminate the necessity of having to solicit or canvass business. In any event, it need hardly be added, that soliciting and canvassing are rightly regarded as unprofessional and, paradoxically enough, would, under the Solicitors' Acts, be construed as of professional misconduct or conduct unbecoming of a Solicitor. As a member of the Solicitors profession, all the above remarks with regard to integrity, honesty, dedication, the necessity to show and command respect apply with equal force. A Solicitor must at all times be conscientious in his dealings both with his colleagues, his clients and the public, but he must never do anything that might leave him open to the accusation of being guilty of professional misconduct. In these days of monetary inflation resulting in high property values and large damages it is necessary

for Solicitors to be even more conscientious than ever of the necessity for scrupulous honesty and the utmost integrity in their handling of their clients affairs and in particular with regard to the handling of clients monies. **The only thing a Solicitor has that is worth having and which cannot be estimated in financial terms is his** good name. Once this is lost, he has nothing further to offer as a member of the profession. It is thus absolutely essential that in the course of practice a Solicitor must not only be both completely and scrupulously honest but must also be patently seen to be honest. I trust that it is hardly necessary to spell out this requirement of our profession in any greater detail but it is a matter that all practising Solicitors should constantly keep in the forefront of their minds because the temptations are great. While the spirit may indeed be willing, the flesh, as we know too well, can sometimes be too weak to withstand them. Human nature being what it is, as a practising member of the Solicitor's profession, one should be constantly on one's guard against any temptations that may present themselves and if they transgress it, it is only then that the necessity for the maintenance of the highest standards becomes fully apparent.

**Negligence and professional misconduct**

A clear distinction should be drawn between negligence and professional misconduct. As I am sure you are well aware, negligence has been defined as the doing of something that a reasonable man would not do, or the failure to do something that a reasonable man would do. In the context of the Solicitor's profession, it could be described as the absence of such care as it was the duty of the Solicitor to take. Professional misconduct could be summarised as arising where a Solicitor has acted in a manner either towards a colleague or a client which falls below the standard of conduct required and expected from him as a member of the profession.

**Solicitor's Rights**

It can be briefly stated that a Solicitor's rights are few and cannot be considered in isolation from his duties, responsibilities and obligations and such as they are they only exist to enable him to carry these out. The rights of Solicitors are largely statutory and are contained in a number of enactments, principally the Solicitors Acts 1954-1960 and recently the Courts Act 1971 which gave Solicitors a right of audience in Civil matters in all Courts. Broadly speaking, the Solicitor's profession has a monopoly in conveyancing and company work and in regard to litigation in Court but this does not extend to the increasing number of Tribunals and Enquiries and like quasi judicial bodies. It should be clearly born in mind that any individual has a right to perform on his own behalf any of the services which a Solicitor performs for a client but an unqualified person may not indulge on behalf of another person in any of the work in regard to which the services of a Solicitor are required by statute or otherwise. In practise, lay litigants receive a great deal of indulgence from the Courts but they are not usually as successful for the obvious reasons that they lack both qualifications, legal training and experience to enable them to present their cases. This is rather effectively summed up by the well known saying that "Anyone who is his own lawyer has a fool for a client". It is worth noting that the legal profession in Sweden does not have any monopoly but this does not appear to provide any problem for them or inhibit their activities or diminish the requirement for their services.

A factor that is a direct result of the monopoly which the Solicitor's profession holds in regard to certain types of legal work is the statutory control of Solicitor's costs which is designed as a safeguard to the public but of which they do not appear to be sufficiently aware and certainly do not seem to appreciate. In this regard we are the only profession whose charges for professional services as such are controlled by statute.

**Solicitors' Privileges**

Co-extensive with a Solicitor's rights are his privileges conferred both by statute and of necessity under the circumstances of his activities for and relationship with his clients. It must be understood that a Solicitor's rights and privileges derive essentially from his retention as such by his client and a **Solicitor's retainer is the foundation on which the relationship between Solicitor and client is built.** This relationship of Solicitor and client is created by the retainer, given freely by the client, and accepted by the Solicitor which then becomes a Contract between the Parties. A retainer is thus essentially a contract whereby in return for a client's offer to employ a Solicitor, the Solicitor undertakes to perform certain services. The ordinary law of Contract applies to a retainer and, as in the case of most contracts, it need not be evidenced by writing, and can be either express or implied.

**Duties and Responsibilities**

One of the most essential and fundamental differences between Solicitors and all other professions is that Solicitors handle clients monies and in the present day these amount to quite vast sums. As you are aware, Solicitors are required to comply strictly with the Solicitors' Accounts Regulations both in regard to the handling of and accountability for clients monies. It is hardly necessary to spell out in detail the duties and responsibilities that are thereby incurred by Solicitors.

One of the most important duties of a Solicitor is the *taking of proper instructions* because he will obviously not be able to implement his client's instructions or be of any use to the client unless they have been accurately taken. It is thus highly desirable that at every available opportunity that a Solicitor should take clear and unimbigous notes of attendances on his clients. If he feels in any doubt as to the client's exact intentions or if he is unhappy about his instructions for any reason, he should take the precaution of having the client sign the attendance sheet acknowledging that he has read it and that it represents his instructions. In more serious matters the Solicitor should obtain written instructions from his client in the form of a letter. This is particularly important where the Solicitor is requested to give an undertaking on behalf of the client, especially for the payment over of monies; in such circumstances, an irrevocable authority to act for the client in regard to the particular matter in question, whether it be a property transaction or the handling of a litigation matter, should be obtained in writing.

**Solicitor's undertakings**

One of the cornerstones of the Solicitor's dealings with his colleagues, with institutions, or members of the public is the giving of undertakings. In the course of

practice as a Solicitor it is necessary from time to time to give written undertakings, whereby a Solicitor undertakes to do certain things. The common form of undertaking is that given to a Bank on a client's behalf to lodge either the proceeds or the net proceeds of the sale of property with the Bank on completion. It cannot be emphasized too strongly that the very greatest care must be taken with the wording of an undertaking to ensure that it correctly covers the position, that it is in accordance with your instructions and above all that you are absolutely certain that you will be able to comply with its obligation. It must never be forgotten that a Solicitor is personally liable on foot of his undertaking and this is the reason why he must have clear instructions and the fullest authority necessary to give the undertaking in the first place.

**Diplomacy before the Judge**

It is quite obviously not possible to adequately cover in one lecture the range, extent and scope of a Solicitor's duties and responsibilities and these will become very apparent as one acquires experience in practice, because in any event they derive from the essential standard that, as a Solicitor, you will be required to maintain. There is one area in the field of litigation and in particular with regard to advocacy where an inexperienced Solicitor may have considerable difficulty in appreciating his duties and responsibilities to his client and to a considerable extent these derive from the nature of the practical application of the rules of evidence that obtain in our Courts and our adversary trial system. This could be summed up by saying that **a good pleader knows the law and a better one both knows the law and knows the Judge.** While it is not only desirable but usually essential to know the law with regard to any particular point, it is also most important to have the common sense to resist the temptation to expound one's knowledge where the Judge is not particularly interested in the point of law but may, if properly handled, nevertheless give the desired decision. An advocate must at all times bear in mind that he is in Court to serve the best interests of his client and he must *never* indulge his fancies or expound his knowledge or in fact enjoy himself at the expense of his client. His duty is to achieve a particular result. The art of knowing when to speak up and when to shut up, which is largely bound up with the essential requirement of having some knowledge of the personality of the Judge, is usually a greater advantage than the most expert knowledge of the particular point of law in question. It should at all times be borne in mind that Judges are human and while they usually appreciate and welcome assistance from the members of the legal profession who appear before them, and without which they could not properly discharge their functions and exercise their jurisdiction, they do not like being told their business. It should therefore always be remembered that Judges usually do, or can reasonably be expected to know more about the Law and in particular its practical application, than a young legal practitioner is likely to do. The showing of respect and deference for the occupant of the bench will achieve greater results even in a bad case than a most expert knowledge of the Law or its most brilliant exposition or presentation is ever likely to do. If one word were to be selected to summarise the essence of the proper relationship within the atmosphere of the Courtroom between the Judge and the Solicitor I would choose the word "diplomacy". Each party in this rather peculiar relationship has a job to do and a clear but sympathetic understanding of the others position and role is the best recipe for the effective discharge of their respective functions. Confrontation has no place in the atmosphere of the Courtroom, either with Judges or witnesses. It should always be borne in mind that it is the duty of the Lawyer to present the facts in the clearest and fairest manner possible in such a way as will assist the Court to discharge its essential function which is the dispensation of justice. In the context of litigation, a Solicitor has very grave duties and responsibilities to discharge, in aid of his role in the entire process of the dispensation of justice and the judicial function. In this respect it must always be borne in mind that a Solicitor, as distinct from a barrister for that matter, is an officer of the Court and as such is required and can be expected to give the Court every assistance possible, subject to the paramount consideration of the interest of his client.

**Obligations**

Probably the most important obligation of a Solicitor is the essential requirement to which reference has already been made as an integral part of a Solicitor's makeup that he be completely honest and this does not apply to money matters alone. "Honeste vivere, non alienum laedere, suum cuique tribuere". These words are taken from an inscription on the wall of the Harvard Law School Library which reads. **"The precepts of the law are these: to live honourably, not to injure another, to render to each his due."** It is surely reasonable to expect that those who practise the law would keep these precepts clearly in their mind and it begs the question whether the last precept is the obligation referable to justice? Are the duties of good faith and due care legitimate concerns of law and society but not exactly of justice? Professor Paul A. Freund of the Harvard Law School in a Treatise on "Social Justice and the Law" suggests that instead, each of these precepts ought to be comprehended in justice and that each is an aspect of a more general notion. He goes on to pose the question whether each of Justinian's precepts is not an instance of the fulfilment of reasonable expectations: that a person may rely on the good faith of another, that he may expect another not to injure him carelessly or wantonly, that he may expect to receive what reasonably may be deemed to be due to him? Hopefully it is not necessary to labour this point but for no man is honesty more important than for a Solicitor. It is the quality of honesty that creates the essential bond of confidence that must exist between Solicitor and client, because, without confidence on the part of his client in him both as a practitioner and a person, a Solicitor will not be able to serve his client to the fullest extent desirable.

**Solicitor should respect confidence of his client and his right to privilege**

The duty of a Solicitor to respect the confidence of his client is intimately allied to the right of a Solicitor to claim privilege in respect of virtually all Solicitor and client communications and his obligation to preserve the utmost secrecy with regard to his client's affairs. This obligation in turn derives from the Solicitor's right of privilege which simply stated means that a Solicitor may never, without the permission of his client, be

compelled to reveal any confidential information or communication that he may have obtained from, for or on behalf of his client. This right of privilege creates the protection that a Solicitor needs to enable him to preserve this essential secrecy in regard to Solicitor and client communications and information. It can be compared to the seal of confession in the Catholic religion and in fact it has been argued that the Law regards the privilege of a Solicitor concerning his Solicitor/Client relationship as even more sacrosanct than the seal of confession whether it be under the Civil or under the moral law. Thus even when giving evidence in Court, a Solicitor is entitled to claim privilege as justification for refusal to answer a question that might involve his having to reveal confidential information obtained from a client in the course of a Solicitor and client relationship.

Edmund Burke once said that the practice of Law, while it broadens the intellect, narrows the mind. I have often given much thought to the full implications of this remark and while it is open to various interpretation I feel that it nevertheless serves to remind us of the necessity that, as practising Solicitors, we should involve ourselves in the continuing process of education. While it is highly desirable to endeavour to familiarise oneself as a practising Solicitor with all important new pieces of legislation, the simplest method of keeping up to date with current developments in the Law is to subscribe to at least one, and preferably several, of the available Law Journals. Each member of the Incorporated Law Society of Ireland receives the Society's monthly Gazette, the scope and content of which have happily undergone considerable improvement under its Editor, Mr. Colum Gavan Duffy. A Solicitor's obligation to keep himself fully informed of all new developments and changes in the Law, particularly in the context of Ireland's membership of the European Economic Community and the current programme of Law Reform, can be discharged by attendance at the Seminars and Study weekends organised by the Incorporated Law Society of Ireland and the Society of Young Solicitors and other organisations which from time to time organise Seminars on specific legal topics.

I am personally convinced that the Solicitor's profession is about to undergo very considerable expansion and steps are now being taken to ensure that the system of legal education is adequate to meet the demands of such expansion and the new areas of work which will properly be the reserve of the legal profession if we equip ourselves by our education and training as I feel we must, to handle it. Notwithstanding this projected expansion and the increase even in the range of our existing activities and services and the public's requirement for us to handle these it must be remembered that we are only some 1,500 Solicitors who have traditionally been rightly regarded as a conservative profession not given to specialisation. Notwithstanding the lack of scope for specialisation for various economic and technical reasons apart from limited specialisation in the larger cities there is a very firm obligation on Solicitors not to take on or attempt to perform work for which they have neither aptitude nor experience and while it is appreciated that this may be a problem in the remoter rural areas it is highly desirable that Solicitors should refer particular types of work to colleagues experienced in that type of work and that reciprocity in this regard from their colleagues should apply. This is a difficult question but there is a clear obligation on Solicitors in this regard and the taking on of work which is subsequently not performed because a Solicitor has neither the experience nor capacity to perform it is the root cause of some of the most consistent complaints against the Solicitors' profession.

Before concluding, there is one other obligation which in this instance you owe as a duty to your professional colleagues and that is not to indulge in undercharging as a means of unfairly attracting business which is simply another form of touting. Any Solicitor who indulges in this type of activity is compromising himself seriously with the prospective clients and becomes their virtual hostage before he even starts to act for them. From the client's point of view, the invariable experience is that a cut price fee involves a cut price job resulting in a considerable diminution of the service given. This brings not only the Solicitor in question but the entire profession into serious disrepute. Every man is worthy of his hire and this applies particularly to the Solicitors' profession and it is not necessary to go into the reasons why Solicitors need to be adequately remunerated for their services. It is an economic fact of costing that undercharging results in the entire operation of the Solicitors' practise being uneconomic and thus in effect unremunerative.

Never forget that your professional colleagues are amongst your best guarantees of your survival and you can rely on them with very few exceptions to render you whatever assistance you may require and to help you over any difficulties that you may encounter either through inadvertance or inexperience. In addition, the services of the Secretariat of the Incorporated Law Society are fully at your disposal and I would finally strongly advise you to become members of the Incorporated Law Society of Ireland whose membership and services are very well worth the modest annual subscription. You should also join your local Bar Association and involve yourself responsibly in the affairs of your local community, which as a member of the Solicitors' profession you will already be regarded in somewhat of a privileged position although you may not fully appreciate this fact at first. You should also join the Society of Young Solicitors which runs Seminars and supplies transcripts of lectures which are now an invaluable and integral part of the continuing process of the Irish Solicitors' education. I would also strongly encourage you to give every assistance to the Free Legal Advice Centres known as FLAC whose magnificent work in the absence of a Civil Legal Aid Scheme and adequate Social Advice Services is not even yet fully appreciated and their efforts and their activities depend to a considerable extent on the assisvidual members of the Solicitors' profession and on whom they voluntarily depend. It is also most desirable that you become a member of the Solicitors' Benevolent Association which has for so long done so much for the less fortunate members of the profession and their dependants.

It only remains for me to hope that your patience and attention will be rewarded by a long and fruitful career in one of the noblest professions which I hope it will soon be your privilege to practise in the service of your community and your country.

# SOLICITORS NAMES ON PROFESSIONAL STATIONERY

It is quite common to observe the names of young recently qualified solicitors appearing on the office stationery of well established firms. More than likely, these young solicitors will merely be salaried assistants whose names are placed on office stationery at their own request. It is true that some firms are strict about the names appearing on their office stationery and adopt a vigorous view of "partners only". However there is presently such a wide variance in practice that the Council of the Society have become concerned.

From the point of view of the assistant, the placing of his name on office stationery is purely a matter of prestige which vests in him an ostensible authority and responsibility with the firm. From the point of view of the partners of the firm, it helps to satisfy an employee's demands without real cost to them. It furthermore helps the partners refer business to the assistant involving clients who would not be prepared to deal with any other than a partner of the firm.

The appearance of the assistant's name on the professional stationery of the firm will satisfy most clients as to the assistant's standing and authority in the firm.

However the placing of an assistant's name on the professional stationery of his employers is not without legal effect, particularly for the assistant—Cordery on Solicitors 6th Edition, page 468 says :

"If an associate has his name displayed on his firm's notepaper he will generally be deemed to be a partner. The mere fact that there is a line between his name and those of other partners will not of itself rebut the presumption."

It is clear from partnership law that each member of a firm has implied authority to bind the others by acts falling within the scope of partnership business, e.g., if one partner receives money on behalf of the firm, in law the firm cannot deny receipt of the money. More important still, an undertaking given in the ordinary course of business of the firm will bind the firm. Innocent partners (and salaried assistants are ostensible partners) will find themselves both jointly and severally liable for such undertakings. It has come to the notice of the Council in recent times that solicitors' personal undertakings to pay very large sums of money have been given by a number of large firms in somewhat dubious circumstances on the sole authority or responsibility of one partner of that firm without his colleagues in the firm knowing anything about the undertakings. Of course, it should hardly be necessary to point out that most assistants seeking to have their names placed on the professional stationery of the firm very seldom know the true financial position of the firm. It would be wise for such people to enquire carefully before having their names placed on the notepaper of the firm lest they awake one morning to discover they have undertaken the full liabilities of their employers vis a vis third parties—all for a salary well below partners' earnings.

The Council of the Society felt that it would be desirable for solicitors to adopt the practice of a well known South-Eastern firm of Solicitors in placing partners' names in one column on the notepaper, and assistants' names in a separate column designated "Assistant Solicitors".

PATRICK CAFFERKY

# NOTICE TO SOLICITORS

From time to time the Society receive enquiries from persons looking for documents, wills, etc., formerly held by deceased solicitors. The Society preserves a register for all takeovers, amalgamations, etc., but unfortunately same is not always complete, as solicitors taking over a practise do not always notify the Society.

This register is particularly helpful both to solicitors and clients and your co-operation is requested to ensure the register records any take-overs which have been effected by your firm.

P. CAFFERKEY
*Assistant Secretary*

# LAND REGISTRY—SUB DIVISION MAPS

The form of application to the Land Commission for consent to subdivision or subletting formerly specified that the part being subdivided or leased and the part being retained is to be shown on a Land Registry Map. The Land Commission have now agreed that they will accept a suitable Ordnance Survey Map properly and accurately marked and the necessary amendment in the application form has been made in due course. The practice of using Ordnance Survey maps may, therefore, cimmence immediately.

The following points must be carefully noted :

(a) Boundaries must be clearly marked on the Ordnance Survey Map sheets by a thin line.
(b) Such map sheets must be the latest edition of the current largest scale map published by Ordnance Survey for the area.

c) The subdivision map should be prepared certified and dated by a competent Land Surveyor.

d) In cases of small plots a larger scale map than the Ordnance Survey Map may be necessary. Such maps will be accepted by the Land Commission and the Land Registry if they conform with (c).

e) It should be noted that the responsibility for the accuracy of the areas and boundaries given in documents lodged rests solely with applicant.

It is my experience that maps drawn by unqualified persons cause delays and refusal of registration and subsequently often necessitate deeds of rectification. The result is that great difficulty is caused to solicitors and Land Registry arrears are increased.

There are Ordnance Survey agents in Dublin, Belfast, Galway, Cork, Kilkenny, Waterford, Sligo, Wexford, Tralee, Dundalk, Athlone and Ennis who carry stocks of maps and from whom maps may be purchased. In many other towns booksellers and stationery shops will be able to provide the map required. Any map may be obtained from the Ordnance Survey, Phoenix Park, Dublin.

If Solicitors or the Land Surveyors architects or engineers they employ obtain copy Ordnance Survey Maps where possible this will enable me to direct mapping staff to the actual work of the registration of transfer of parts and leases and thus reduce the delay in registering this type of dealing. This would be very much in the interest of the Legal Profession, their clients and the Land Registry. I would be grateful for your co-operation in this matter.

D. L. McALLISTER
*Registrar of Titles*

# END COMPULSORY IRISH FOR SOLICITORS —DEBATING SOCIETY

The Solicitors' Apprentices Debating Society has called for the abolition of compulsory Irish for entry to the solicitors' profession.

A motion to this effect was carried at a meeting of the society recently.

It was pointed out that the present Irish requirement fails miserably if the aim is to encourage sufficient proficiency for solicitors to be able to conduct their clients' cases in Irish. It was suggested that the Government and the Law Society were merely paying lip service to the language by retaining the compulsory examinations. Instead, they should encourage the use of the language by providing proper facilities, rather than force the apprentices to pass an examination without providing the necessary encouragement or instruction.

# SOLICITORS' GOLFING SOCIETY

**Autumn Meeting at Tullamore, Saturday, 5 October 1974**

*Captain's Prize*: T. D. Shaw (5) 36 points; Runner-up: B. Gannon (11) 33 points.

*St. Patrick's Plate* (Handicaps 12 and under): G. O'Sullivan (6) 35 points; Runner-up: N. O'Meara (9) 33 points.

*Veteran's Cup*: N. Jameson (18) 31 points; Runner-up: P. Nutley (24) 30 points.

*Best Scores*:
Handicaps 13 and over: J. Sheedy (14) 33 points.
1st Nine: P. McLaughlin (7) 19 points.
2nd Nine: G. M. Doyle (21) 18 points.
From more than 30 miles: M. P. Keane (9) 33 points.
By Lot: W. L. Carroll (18) 30 points.

# FIFTEENTH CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION

Approaching 1,400 delegates and guests from 50 nations attended the 100 different meetings held at the IBA's Fifteenth Biennial Conference in Vancouver, British Columbia from July 28 to August 3, 1974. The Conference was welcomed to Canada by the Chief Justice of Canada, The Rt. Hon Bora Laskin, the Federal Minister of Justice, the Hon. Otto Lang and the President of the Canadian Bar Association, Neil McKelvey, Q.C., who presided as Chairman of the Conference.

The main topics for general discussion were:

1. The Right to Practise and of Establishment Abroad;
2. Continuing Legal Education;
3. Delays in Trial Procedures;

4. Rape Prosecutions;
5. Extra-Territorial Application of National Laws with special reference to Anti-Trust Law;
6. The Relative Merits and Present Day Suitability of the Adversary (or Accusatorial), Inquisitorial, Mediatorial and Other Systems of Trial for Breaches of the Criminal Law and for the Resolution of Disputes;
7. International Legal Problems in Connection with the Drafting and Proving of Wills;
8. The Freedom of the Press v. the Right to Privacy; and
9. Financing Legal Aid Plans.

Open Meetings of IBA Committees on Professional Ethics, the Practice of the Law by Non-Lawyers, European Affairs and United Nations Affairs were also held. All the Conference Papers together with summaries of the discussions that took place wull be printed in full in the November 1974 issue of the International Bar Journal, the Journal of the Association sent free to members.

All delegates and their guests were invited to the numerous meetings and special events organised by the IBA Section on Business Law and also to the inaugural meeting of the Section on General Practice. Whilst the Section on Business Law concentrates on the laws, practices and procedures affecting business, financial and commercial activities throughout the world, the General Practice Section will promote exchanges of information and views as to the laws, practices and procedures affecting the general practice of law throughout the world, and upon all other matters affecting the legal profession, its development or the improvement of legal services *to* the public. Membership of both Sections is open to Patrons and Associate Members of the IBA on payment of an additional U.S. $10 per annum per Section. The Section on Business Law holds annual meetings and publishes a quarterly journal and an annual Directory of its members and the Section on General Practice hopes to do likewise.

During the Conference the General Meeting of Members elected Dr. Werner J. Deuchler of Hamburg, President of the German Bar Association from 1970 to 1974 as President of the IBA. He succeeds Sir Denys Hicks of Bristol, England, whom the General Meeting elected an Honorary Life President of the Association in recognition of his outstanding contribution to the IBA. Mr. Colin McFadyean of London was appointed Chairman of the Section on Business Law and Sir Desmond Heap, also of London, Chairman of the Section on General Practice.

The very full social and ladies programmes were assisted by cloudless blue skies throughout the conference week. They included a reception by the Canadian Bar Association, a garden party given by the Hon. Walter Owen, Lieutenant-Governor of British Columbia, a barbecue on the invitation of the Federal Government of Canada, a closing banquet and dance, boat cruises, excursions by cable-car, coach tours and luncheons.

The IBA is a non-political organisation established in 1947 to "promote the administration of justice under Law among the peoples of the world". It has 73 member Bar Associations and Law Societies from 50 countries and approximately 3,500 individual lawyers active in its work. Its next conference is to be held in Stockholm, Sweden from August 15 to 21, 1976. Any lawyer interested in becoming an Associate Member (annual dues U.S. $25) is invited to write to the Director-General, Sir Thomas Lund, International Bar Association, 93 Jermyn Street, London, SW1Y 6JE, England.

# TAXATION SEMINAR

A Seminar on **Taxation and the Finance Act 1974** was held in Solicitors' Buildings, Four Courts, Dublin, on 26 September 1974. Approximately 100 attended. The President, Mr. Prentice, opened the proceedings. The Senior Vice-President, Mr. Osborne, presided at the first lecture which was delivered by Mr. Walter Beatty on Tax Planning, who dealt principally with relief on certain bridging loans. Mr. John J. Nash presided at the second lecture which was delivered by Mr. John Bourke, Senior Inspector of Taxes, on the subject of Taxation and the Farming Community; no script is available of this lecture, but a transcript of Mr. Brendan O'Brien's lecture delivered at the Waterford Seminar in November on the same subject is available from Mr. Norman Spendlove. Mr. Bruce St. John Blake, Junior Vice-President presided at the third lecture delivered by Mr. Brendan O'Brien, Chartered Accountant, on Taxation and Property; this dealt mainly with taxation of rents, and mentioned some recent English case law in connection therewith. Mr. Gerald Hickey presided at the fourth lecture, which was delivered by Mr. John H. Sides on Trusts and the proposed Capital Taxes; this included Capital Gains Tax, Capital Acquisitions Tax, Capital Transfer Tax including Gift Tax, Inheritance Tax and Health Tax. Mr. Brian O'Connor presided at the fifth lecture which was delivered by Mr. J. F. Kearney on Irish Mining Taxation, which is often an emotive subject. The 20 years tax holiday on mining, repealed by the Finance (Taxation of Profits of Certain Mines) Act 1974, was fully described. Those attending found the lectures delivered at the seminar most instructive.

# SEPTEMBER EXAMINATION RESULTS

## FIRST LAW EXAMINATION

The following candidates passed the First Law Examination which was held in September 1974.

Allen, Michael; Ahern, Dermot; Beirne, Vincent; Bourke, John; Boyle, Peter; Brennan, Gerard; Callinan, John; Campbell, Marion; Carey, Margaret; Clinton, Evanna; Collins, Helen; Condon, Michael; Cooney, Evelyn; Cooney, Thomas; Costello, John.

Crowe, Vivienne; Cullen, Mary; Davy, Eugene; Duffy, Bridget; Duffy, Margaret; Duffy, Patrick; Duffy,

Raymond; Duncan, Anthony; Dunne, Cormac; Egan, Frances; Elder, Shaun; Fanning, Gerard; Fingleton, Sheila; Fitzpatrick, Hilary; Flanagan, Peter.

Flynn, Desiree; Gleeson, William; Grace, John; Graham, Alan; Greene, Michael; Griffin, Anne; Hanna, Barbara; Harrison, Brigid; Hayes, Michael; Hederman, Mary; Higgins, Michael.

Jacobson, Denis; Jordan, Andrew; Joyce, James; Judge, Patrick; Keller, Mark; Kelly, Mary; Kelly, Philip; Kilrane, Kevin; Lacy, Nathaniel; Lawlor, Florence; Lee, Muriel; Leyden, Joseph; Loughnane, Gemma.

Mellotte, Michael; Molloy, Denis; Moran, Terence; Moylan, John; Muldoon, Fiona; Mulloy, Sheila; Mulryan, Patrick; Murphy, James; Murphy, Mary; Murran, Thomas; McBride, Edward; McBride, John; McCarthy, Gerard; McCormack, David P. S.; McDonnell, Peter; McElligott, Mary; McGovern, Patrick; McLaughlin, Ciaran.

Nagle, John; Olliffe, Ann; O'Boyle, Terry; O'Connell, Deirdre; O'Connor, Deirdre; O'Connor, Michael; O'Doherty, Niall; O'Donoghue, Hugh; O'Herlihy, John; O'Malley, Michael; O Murchu, Pol; O'Loughlin, Anne; O'Reilly, Ann; O'Reilly, Niall; O Tuama, Cliodhna.

Rooney, Fergal; Roundtree, Henry; Scully, Paula; Sexton, Henry; Shannon, Robert V.; Sowman, Jennifer; Stokes, Adrian; Territt, John; Tomkin, David; Tormey, Eugene; Twohig, William; Walsh, Anne; White, William; Wren, Margaret.

Out of 179 candidates who attended the examination 100 passed.

## SECOND LAW EXAMINATION

The following candidates passed the Second Law Examination which was held in September 1974.

Ahern, Michael; Brady, Patrick; Branigan, Ciaran; Brophy, John; Browne, Geoffrey; Buckley, Roderick; Burke, Thomas; Butler, Nicholas; Carroll, Patricia; Carton, Beatrice; Casey, Niamh; Caulfield, Joseph; Clear, Eoghan; Coghlan, Terence; Comyn, Joseph.

Cooke, Frances; Crowley, Donagh; Crowley, Vincent; Devine, William; Doherty, Randal; Dunne, Andrew; Ensor, Anthony; Erskine, Janet; Farquharson, Elizabeth; Ferris, Paul; Finn, Denis; Fitzpatrick, Hugh; Gillan, Julia; Graham, Alan; Grogan, Christopher.

Harvey, Ita; Hayes, John; Healy, Henry; Hegarty, Declan; Hughes, Seamus; Kennedy, Niall; Joyce, Philip; Lucey, Helen; Lucey, Margaret; MacDonagh, Neasa; McAuliffe, Sarah; McCarthy, Jeremiah; McCarthy, Michael; McDowell, Karen; McGuire, Michael.

Mathews, Derek; Matthews, Kevin; Moore, Michael; Morton, Joseph; Mulcahy, Thomas; Murray, Anthony; Neilan, Dermot; Neilan, Gerard; O'Callaghan, Kieran; O'Connor, Mary; O'Donnell, Thomas; O'Gorman, Adrian; O'Sullivan, Thomas; Richards, Graham.

Rogers, Patrick; Ryan, Margaret; Strahan, Bryan; Sweeney, Anne; Swift, Brian; Turner, David; Ward, Henry; Watchorn, Veronica; Whitaker, Brian; White, Michael.

Out of 105 candidates who attended the examination, 68 passed.

## THIRD LAW EXAMINATION

The following candidates passed the Third Law Examination which was held in September 1974.

Adams, Brian; Agnew, Henry; Bergin, Catherine; Binchy, James; Bouchier-Hayes, Timothy P.; Buckley, Daragh; Butler, Patrick A.; Butler, Patrick J.; Brady, John; Byrne, Eamonn B.; Cantrell, Mary; Carlos, John; Carroll, John; Connellan, Marie; Coughlan, Stephen.

Cunningham, Anastasia M.; Cush, Eugene; Daly, James; Davy, Geraldine; Devins, Philomena; Devlin, James; Dillon-Leetch, John; Doherty, Anthony; Durcan, Ivan; Emerson, Vivian; Ensor, Anthony; Fanning, Eugene; Ferris, Paul; Gaffney, Kevin; Garvan, William.

Gaughran, Geraldine; Gaynor, John; Griffin, John; Hanahoe, Terence; Hanrahan, Michael; Hayes, Thomas; Heffernan, Helen; Hughes, Edward; Hutchinson, Mary; Keane, Caroline; Kennedy, Anne.

Kennedy, Simon; King, Alan; Langwell, Joseph; Matthews, Kevin; Morris, David; Mullaney, Desmond; MacDermott, Dermot; McAlister, Bryan; McBride, Sean; McCarthy, Rose; McCarton, Patrick, McCrann, Roderick; McEntee, Rory; McGrath, George.

McGuire, Fiona; McLaughlin, Peter; McMahon, David; Neilan, Dermot; O'Brien, David; O'Brien, John; O'Connell, Isolde; O'Connor, Mary; O'Connor, Patrick; O'Dwyer, John; O'Grady, Leonie; O'Leary, Kathleen; O'Malley, Michael; O'Regan, Ann.

O'Reilly, Brian; Pearse, Geraldine; Quinn, Thomas; Redmond, Peter; Reidy, John; Ryan, Rosemary; Scales, Linda; Shields, Vincent; Stafford, Thomas; Staines, Michael; Sweeney, James; Synnott, William; Tracey, Michael; Tyndall, Rosaleen; Walsh, Michael.

Out of 93 candidates who attended the examination, 84 passed.

# CORRESPONDENCE

The Irish Insurance Association,
50 Northumberland Road,
Ballsbridge, Dublin 4.
24th October, 1974

The Secretary,
The Incorporated Law Society of Ireland,

*re : Irish Insurance Association—*
*Insurance Information Service*

Dear Sir,

The Irish Insurance Association was formed in 1952. Membership is available to Insurance Companies whose Head Offices are situated in Ireland.

The Irish Insurance Association realises fully that considerable knowledge and expertise and information are available in Ireland on matters concerned with Insurance. The Association is, however, concerned at the fact that, on numerous occasions, members of the Public, Institutions, Trade Associations and Companies have frequently indicated that they did not know where to make a particular insurance query, technical or otherwise, and accordingly did not know how to go about solving a particular insurance problem.

Over a period of time, the comments made to the

Association members ranged over a wide variety of types of insurances and, accordingly, the advisability of providing an Insurance Information Service, without cost to the Inquirer, has been felt by the members as being beneficial to the Public and, particularly, Trade Associations and Companies.

Naturally, the Information Service Officials will not be expected to process the details of an individual matter to a conclusion, but the facility is available so that, without obligation or commitment, members of the Public, Institutions, Trade Associations or Companies can receive help which, at a minimum, would assist towards the solution of whatever particular insurance problem with which they may be concerned.

The Association, therefore, established a Permanent Secretariat to provide this facility. The Service is under the personal direction of Mr. A. J. Hatch, Deputy Secretary of the Association, and operates from the offices of the Association at 50 Northumberland Road, Ballsbridge, Dublin 4. (Telephone Nos. 765100 and 765109.)

The members of the Irish Insurance Association are as follows:

Irish Catholic Church Property Insurance Co. (established 1902).
Hibernian Insurance Co. Ltd. (established 1908).
New Ireland Assurance Co. Ltd. (established 1918).
Irish National Insurance Co. Ltd. (established 1919).
Irish Public Bodies Mutual Insurances Ltd. (established 1935).
Insurance Corporation of Ireland Ltd. (established 1935).
Irish Life Assurance Co. Ltd. (established 1939).
P.M.P.A. Insurance Co. Ltd. (established 1967).

It is hoped that the fullest possible use of the Insurance Information Service will be made. Requests for information or advice, especially welcome from Trade Associations or their members, may therefore be in respect of Personal or Commercial Insurances. In this way it is hoped to encompass all the various branches of General Insurances and Life Assurances. All such information and advice will be provided free of charge.

The Irish Insurance Association is confident that the Information Service will commend itself to your Association, and its individual members. We would, therefore, appreciate your drawing the attention of your members to the existence of this new Service.

Yours faithfully,

A. J. Hatch (*Deputy Secretary*)

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Christ's College,
Cambridge,
CB2 3BU.

7 December 1974

From Dr. Paul O'Higgins
*Tutor for Advanced Students*

Dear Sir,

I am engaged in compiling a biography of Irish law reports, digests and books containing reports of trials, etc., which I hope will be published in the course of 1975.

There are a number of reports, listed in Sweet & Maxwell's *Legal Bibliography of Irish Law*, copies of which I have been unable to locate. I wonder whether any of your readers might have copies of these reports (which I list below) that they would be willing to allow me to have a look at.

1. S. V. Peet, *Digest of Cases in 3rd Volume of Irish Chancery and Common Law Reports, and in the 7th Volume of the Irish Jurist* (Dublin, 1855);
2. S. V. Peet, *Digest of Cases in the 8th Volume of the Irish Jurist and in the 4th Volume of the Irish Common Law and Chancery Reports* (Dublin, 1856);
3. *Notes of Cases decided under the Sheriffs or Receivers Act, 5 and 6 Will. IV., c. 55* (Dublin, 1839).
4. A. D. Bolton, *Some Recent Decisions on the Labourers (Ireland) Acts, 1883 to 1905* (Dublin, no date).
5. G. F. Brunskill, *Recent Judicial Decisions Affecting the Law of Landlord and Tenant* (6 vols., Dublin, 1891 to 1895).
6. A. P. Cleary, *Registration Cases, 1886 and 1887* (Dublin, 1887). This was published as a supplement to Cleary's book, *Law of Franchises and Registration of Parliamentary Voters in Ireland* (Dublin, 1886).
7. W.(?) Green, *Four Land Cases, reprinted from Irish Reports* (Dublin, 1900).
8. W. Lawson, *Notes of Decisions under the Representation of the People Acts and Registration Acts* (Dublin, 1886).
9. C. R. Roche, L. Dillon and D. Kehoe, *Land Acts Reports, 1881-1882* (Dublin, 1882).
10. *Unemployment Insurance Acts. Selected Decisions given by the Umpire for Northern Ireland, respecting Claims to benefit,* vol. 1 et seq (Belfast, 1932 onwards).
11. J. Cantwell, *Law of Tolls and Customs* (with additions by W. C. M'Dermott, Dublin, 1829).
12. *Irish Petty Sessions Journal* (1893-1901).

Yours sincerely,

Paul O'Higgins

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(Department of Labour)
(Dublin 4)
4 December 1974

Mr. James J. Ivers,
Director General,
The Incorporated Law Society

Dear Mr. Ivers,

I refer to your letter of October 15 (your ref. L/42) and to previous correspondence on the subject of non-compliance by some Solicitors with the terms and conditions of the Law Clerks Employment Regulation Order. I am writing now to tell you that the Minister intends to institute proceedings against Solicitors found to be in breach of the conditions of the Employment Regulation Order.

In the course of inspection not many law clerks have been found to be paid monthly and if they are, there is no special difficulty in checking on compliance with the terms and conditions of the Employment Regulation Order.

Yours sincerely,

T. O Cearbhaill

5300 Bonn,
Heerstr. 155,
West Germany
1/7/1974

Dear Mr. Gavan Duffy,

It was with the greatest interest that I read Mr. J. Mathews' assessment of the situation of Federalism in West Germany which you published in the May issue of the *Law Gazette*. However, I feel I ought to add a few observations which might throw a different light upon the matter. I am sure the present Bonn Government would like to see the Federal Council (Bundesrat) in as inferior a position as depicted by Mr. Mathews. Unfortunately for them this is not so. The opposition in the Federal Assembly, the German equivalent of the Dail, at present hold a majority in the Federal Council; this is due to a number of Länder being governed by the Christian Democratic Party, while Social and Free Democrats form the Federal Government. Frequently members of the Federal Government have accused the Christian Democratic Party of using their stronghold in the Federal Council to frustrate Government Bills. The influence of the Federal Council and its independence from other Federal authorities cannot be doubted. The recent controversy of the two Chambers on a bill amending the Criminal Act's section on abortion and in fact generally legalising abortion when committed during the first three months after the conception of the foetus is another shining example of this. It is true that it is a rare occasion when a bill actually falls through owing to the Federal Council's opposition. However if a compromise cannot be found before the bill is presented to Parliament the Government understandably will rather put it back than risk a defeat. Although there is no such principle established in the Basic Law, the bulk of Government Bills cannot be enacted unless expressly approved of by the Federal Council. This is mainly due to the fact that all Acts regulating the procedure of Länder administration need the approval of the Federal Council. A vast number of Acts must include such regulations as the Federal Government lacks in any administrative substructure; the constitutional principle being that Federal Law is carried out by Länder authorities in their own right. Thus the Länder Executive is neither responsible to the Federal Government nor subject to their instructions. Any administrative regulations to avoid miscarriage of Federal Law must have the consent of the Federal Council (art. 83, 84 of the Basic Law). However, the approval must be given to the Act as a whole, not only to the specific section dealing with the administrative procedure. As far as Land Law is concerned I am not aware of any federal statutes determining its application or any other interference by federal authorities. On balance the Federal Council cannot be denied its quality as a highly-political assembly.

As for the legislative jurisdiction, art. 70 of the Basic Law unequivocally states that the legislative jurisdiction on principle lies with the Länder. This is of the greatest importance as legislation is gradually spreading into all walks of life. Any addition to the enumerated areas of federal jurisdiction needs the consent by two thirds of the members in both Federal Chambers. The subject-matter named in Mr. Mathews' article—education, culture, religious affairs, police, local government etc.—are in practice as well as in theory covered by Länder Acts and in fact the Bonn Parliament has never intruded therein. Also one must not forget that foreign affairs, defence, citizenship and immigration, which Mr. Mathews sees as suggestive of the overwhelming power of the federal legislator, even in the United States have at all times been controlled by Federal authorities.

One should bear in mind that notwithstanding the importance of legislature there are other State activities to consider. I have mentioned that domestic administration is almost entirely a matter for the Länder. Moreover the executive power in Germany and indeed in most European states has outgrown the stage of merely performing Acts of Parliament or ensuring that they are observed. The foundation of new universities, the construction of public swimming-pools and roads, the running of local transports, etc., is done by local authorities and Länder on their own or in co-operation. All these projects may receive financial assistance from the Federal Government, yet the latter is not allowed to embark upon them. Finally the Länder Courts are invested with full and original jurisdiction in all judicial matters. No case can be brought before a Federal Court unless two Länder Courts—the second being the appropriate Court of Appeal—have given their decisions. In no event can a Federal Court make inquiries into questions of facts. The only exception to this rule is the Federal Constitutional Court, who functions as a guardian of the Constitution rather than an umpire between the Federal State and the Länder. However it was the Federal Constitutional Court which in 1961 derived an all-important principle from the federalistic structure of this country, namely that both the Federal State and the Länder are obliged to act in co-operation and in consideration of each other's interests. This rule was established following a complaint by the Länder Hessen and Hamburg that the Federal State had founded its own Television Company though at that time the Federal State and the Länder were engaged in negotiating a TV Channel based on a common effort.

Those are some of the reasons why I myself and presumably a great many of my countrymen do not see eye to eye with Mr. Mathews' conclusion that West Germany is 'no longer a truly democratic or federal state'. Yet I cannot but share Mr. Mathews' pessimistic view as regards a federalistic Europe. Would not Mr. Mathews agree that for once a lesser 'diversity in government and politics' would do much to advance the envisaged European Union?

Yours faithfully,

Michael Berg.

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Irish Banks' Standing Committee
Nassau House,
Nassau Street,
Dublin 2.
30 September 1974

The Secretary,
Incorporated Law Society,
The Kings' Hospital,
Blackhall Place,
Dublin 7.

*Marking, Certifying and Guaranteeing Cheques before Issue*

Dear Sir,

It has been decided by the member Banks of this Committee that, with effect from 31 October 1974, the

practice of marking, certifying and guaranteeing cheques "Good for Payment" will be discontinued.

After that date back drafts only will be available to customers seeking a means of effecting guaranteed payments.

While notices to this effect will be in all bank offices, the member Banks wish, as a matter of courtesy, to bring this decision to your attention directly.

Yours faithfully,
R. F. Brennan,
*Secretary*

# THE REGISTER

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

Dated this 31st day of December, 1974.

D. L. McALLISTER (Registrar of Titles).

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

(1) Registered Owner: Francis L. Scott. Folio No.: 45729. Lands: Kilcoolishal. Area: 5a. 3r. 21p. County Cork.

(2) Registered Owner: Stephen Daly. Folio No.: 3219. Lands: Derryvahalla. Area: 81a. 0r. 0p. County Cork.

(3) Registered Owner: Thomas Sheridan. Folio No.: 9621. Lands: (1) Rusheen S. West, (2) Tavraun. Area: (1) 14a. 0r. 5p., (2) 1a. 0r. 0p. County Mayo.

(4) Registered Owner: Michael James Monagle. Folio No.: 3570. Lands: Carthage. Area: 23a. 3r. 5p. County Donegal.

(5) Registered Owner: John O'Brien. Folio No.: 19221. Lands: (1) Red Cow, (2) Red Cow. Area: (1) 0a. 2r. 31p., (2) 0a. 0r. 20p. County Dublin.

(6) Registered Owner: Denis Charles Cully. Folio No.: 9716. Lands: (1) Cloghleagh, (2) Cloghleagh. Area: (1) 8a. 3r. 34p., (2) 25a. 3r. 33p. County Wicklow.

(7) Registered Owner: Margaret Nugent. Folio No.: 5443. Lands: (1) Timullen, (2) Cordoogan, (3) Cordoogan. Area: (1) 1a. 2r. 20p., (2) 12a. 2r. 30p., (3) 11a. 0r. 16p. County Louth.

(8) Registered Owner: Mary Geraldine Cooney. Folio No.: 14973. Lands: (1) Glooria (E. D. Tumna South), (2) Cloongreaghan. Area: (1) 33a. 0r. 6p., (2) 0a. 3r. 35p. County Roscommon.

(9) Registered Owner: Nora Condron. Folio No.: 9120. Lands: Urraghry. Area: 70a. 3r. 36p. County Galway.

(10) Registered Owner: Julia Burke. Folio No.: 163L. Lands: Crumlin (part) (being a plot of ground situate on the north side of Crumlin Road). Area: 0a. 3p. 25sq. yds. County Dublin.

(11) Registered Owner: Cormac Quinn. Folio No.: 13855. Lands: Gortnamucklagh (part). Area: 1a. 1r. 15½p. County Donegal.

(12) Registered Owner: Mary Anne Molloy. Folio No.: 6495. Lands: Ballycosney (parts). Area: 28a. 2r. 0p. County: King's.

(13) Registered Owner: Peter Mullan. Folio No.: 3957. Lands: Drumartigan. Area: 5a. 0r. 23p. County Monaghan.

(14) Registered Owner: Thomas Nyhan and Margaret Nyhan. Folio No.: 8618 Lands: Crohane (Bandon). Area: 43a. 1r. 30p. County Cork.

(15) Registered Owner: Raymond Kane. Folio No.: 11976L. Lands: The leasehold interest in the property situate in the part of the Townland of Burrow (E. D. Malahide). Area: 0a. 0r. 12p. County Dublin.

(16) Registered Owners: Michael Broaders and Mary B. Broaders. Folio No.: 15722. Lands: Rathaspick. Area: 0a. 1r. 10p. County Wexford.

(17) Registered Owner: Barbara Mary Hanna. Folio No.: 24568. Lands: Magheranure. Area: 1r. 7p. 15 square yards. County Cavan.

(18) Registered Owner: Dalcash Labels Limited. Folio No.: 27016. Lands: Leagard North. Area: 8a. 1r. 3p. County Clare.

# NOTICE

**Dalton, Mary (otherwise Mollie)**, deceased, late of Main St., Borris, in the County of Carlow, Spinster. Any practitioner having knowledge of or custody of any Will of the above-named is requested to communicate with John M. Foley, Solicitor, Bagenalstown, County Carlow. The Will may have been drawn at Sir Patrick Dun's Hospital, Grand Canal Street, Dublin, in or about the month of May, 1973.

# OBITUARIES

**Mr. William Conway** died on 1st December 1974 in St. Vincent's Hospital, Elm Park, Dublin. Mr. Conway was admitted in Hilary Term, 1938, and practised as an Assistant State Solicitor in the Chief State Solicitor's Office, Dublin Castle.

**Mr. Dominic Spellman** died on 18th December 1974 in Dublin. Mr. Spellman was admitted in Trinity Term, 1954, and practised in Castleblaney, Co. Monaghan, until 1970, when he was appointed a District Justice.

**Mr. Peter J. McDwyer** died on 15th December 1974 in Cavan. Mr. McDwyer was admitted in Trinity Term, 1934, and practised in Belturbet, Co. Cavan, until 1958, when he became County Registrar for Cavan until his retirement.

**Mr. John D. Ross** died on 28th December 1974 in Mullingar. Mr. Ross was admitted in Hilary Term, 1923, and practised in Mullingar until 1937, when he became County Registrar for Westmeath until his retirement.

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