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PROFESSOR SALLY WHEELER

Queen's University Belfast
School of Law

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New landlords: problems and solutions: Part 1

ALAN DOWLING

Senior Lecturer in Law, Queen's University Belfast

Recent years have seen a growth in the popularity of land as an investment. Both commercial property and domestic property change hands not only for owner–occupation but because purchasers see the property as attractive in producing a healthy return on their capital investment, or in terms of capital growth, or both. Unarticulated but implicit in the marketability of land purchased as an investment is an understanding that purchasers of the land will step into the shoes of the former owners insofar as the occupiers of the land are concerned; that rent will continue to be paid by the occupiers, albeit to the purchaser instead of the original landlord, and that covenants entered into by the occupiers will continue to be performed and observed. Without the ability for purchasers to enforce payment of rent and to ensure that such covenants are performed, the attractiveness of land currently occupied by someone other than the vendor would be hard to explain.

This is the first part of an examination of the law founding the understanding mentioned above, namely that purchasers of land will step into the shoes of the former owners of the land, so far as occupiers of the land are concerned. More specifically, it considers the law regulating the relations between the various parties where a tenancy has been created and the interest of the landlord is subsequently transferred to a purchaser. In this part the law from the time of Coke until the passing of Deasy's Act[1] is considered. In the second part (to be published in *NILQ* 59(4)), the law contained in that measure, along with later developments, is examined.

Licences and tenancies

One concern for a potential purchaser of property which is occupied by someone other than the vendor will be to determine the nature of the arrangement between the current owner and the occupier. Whether an arrangement for the occupation of land amounts in law to a tenancy or to a licence is a question with which property lawyers have long been familiar. In many of the cases in which the question has been the issue, the background has been the danger for the landowner that the person with whom he has made the arrangement is protected by statutory provisions conferring security of tenure, or

1 Landlord and Tenant Law Amendment Act (Ireland) 1860.

controlling the amount which the owner can charge for the use of the land, or both.[2] Faced with the risk of such statutory provisions applying, the landowner will likely seek to establish that the arrangement amounts merely to a licence. His opponent will, of course, be taking the opposite view.

Whether the arrangement amounts to a tenancy or a licence is also important, however, for present purposes. So far as third parties are concerned, the difference between the arrangement amounting to a tenancy or to a licence is crucial. Privity of contract means that only the parties to an agreement are bound by it, so that if the arrangement is a licence, a third party acquiring the land from the owner should in principle take the land free of the obligations to the licensee created by the licence. Equally, however, the purchaser will take the land without the benefits enjoyed by the former owner in the form of the payments for the land promised by the licensee. There are, of course, ways round these problems. A novation between the original owner, licensee and new owner will bring a new contract into existence and the obligations of that contract will be enforceable between the new owner and the licensee, because they are parties to it. If, however, the licensee is not party to the transfer of the land to the new owner, novation will not assist. In cases where third parties come on the scene, attention has usually focused on the position of the licensee, with attempts being made to burden the new owner with the obligations of the licence, whether by constructive trust or estoppel, but a recent Australian case shows the weakness in the position of the new owner who wants to receive the payments for the use of the land which the licensee agreed to make to the original owner.

In *South Dowling Pty Ltd* v *Cody Outdoor Advertising Ltd*,[3] the owner of a building entered into a deed with another party whereby the latter was granted a licence to display signs on the building for a period of ten years, the owner receiving a licence fee. Later during the term the owner contracted to sell the building. The contract was completed by a transfer of the building to the appellant. Shortly afterwards, the respondent (who was now entitled to the benefit of the licence) received two letters. One was from managing agents for the appellant, directing future payments of the licence fee to be made to the agents. The other was from the original owner, advising that the building had been sold, and that the respondent should cancel further payments of the licence fee to the original owner. The respondent replied to this letter by saying that that the original owner's conduct was a repudiation of its obligations under the licence and that the respondent was accepting that repudiation and terminating the licence. To complete the narrative, shortly after the respondent's reply, a deed was prepared for execution by the original owner, the appellant and the respondent. The deed provided for the assignment, with the respondent's consent, by the original owner of its interest in the licence to the appellant, and for the latter to become bound by the obligations of the licensor as if originally a party thereto. This deed was later executed by the original owner and the appellant, but not by the respondent.

The appellant brought proceedings against the respondent for, inter alia, declarations that the respondent was bound to the appellant as assignee of the original owner, and that the respondent's purported termination of the licence was of no effect. The trial judge held that the licence had been terminated by repudiation and acceptance as the respondent had said. The New South Wales Court of Appeal upheld the decision. On the question of the appellant's right to future instalments of the licence fee, the court's view was that the

2 E.g. *Street* v *Mountford* [1985] AC 809 (Rent Acts); *Gray* v *Taylor* [1998] 4 All ER 17 (Housing Act 1988); *National Car Parks Ltd* v *Trinity Development Co (Banbury) Ltd* [2002] 2 P & CR 253 (Landlord and Tenant Act 1954 (cf. Business Tenancies (NI) Order 1996)).

3 [2005] NSWCA 407.

purported assignment "could not be effectual to assign any viable cause of action for future licence fees, either at law . . . or in equity . . . [W]hat was required was a novation, and that did not occur".

South Dowling shows the position of a successor in title to someone who has granted a licence. If the arrangement between the owner for the use of his land amounts not to a licence but to a tenancy, the case of a successor in title to the owner is very different. A combination of the common law and statutory provisions operate to enable a landlord's successor in title effectively to step into the shoes of his predecessor. As we will see, recovery of rent was not the problem. Enforcement of covenants made by the tenant was, however, a different matter, requiring the legislative provisions mentioned. Enacted by Henry VIII, to ensure that purchasers of land acquired from the monasteries following their dissolution could take the advantage of tenancies of the monastic lands, the first measure survived in England until the property reforms of 1925. As well as ensuring that purchasers could obtain the benefit of existing tenancies, the legislation subjected the purchasers to the burdens of the former landlords, so that, at the risk for the moment of some inaccuracy, the law of landlord and tenant became such that a successor in title to the landlord would simply take the place of the original landlord, so far as concerned the ability to enforce the obligations of the tenant, and the liability of the landlord. Henry's legislation did not apply in Ireland, but a century later the Irish Parliament introduced an Act in the same terms. These measures, and the development of the law in the years which followed them, form the subject of this article. Examination of the situation in the time of Coke and subsequently is not only worthwhile for its own sake, but is useful in showing the dual nature of tenancies as contracts and as grants, and in showing the evolution of the principles of privity of contract and of estate which remain fundamental today. It also allows for a better understanding of the rights and remedies open to a successor in title to a landlord whose tenant neglects to do what the tenancy requires of him. Finally, such examination affords an opportunity to consider some cases which receive little notice in modern texts, yet which form the foundation of our law of landlord and tenant.

The relation of landlord and tenant

As background to the discussion which follows, it will be helpful to consider both the aspirations of a landlord upon the creation of the relation of landlord and tenant, and the means by which he can ensure the fulfilment of such aspirations, as what a successor in title to the landlord can hope to enjoy from the relation will be the same. Whether a new landlord enjoys the same means as the original landlord for realising the benefits is one of the questions to be addressed.

What a landlord obtains from granting a tenancy of his land is the rent payable by the tenant, and the benefit of any covenants the tenant enters into. The landlord's concerns will therefore be to ensure that the rent is paid and the covenants are performed. Today, failure by the tenant to pay the rent or perform his covenants will likely lead to an action for the debt owed or for damages, or result in termination of the tenancy by forfeiture. So too in the period with which we are concerned, but consideration of the situation in the seventeenth century requires a more precise analysis, because of the different forms of action which existed to afford the landlord a remedy on the tenant's default, and because of the different view taken at the time of the relation of landlord and tenant.[4]

4 While Lord Hoffmann has recently commented that the forms of action no longer trouble us (*Douglas* v *Hello! Ltd* [2007] UKHL 21 at [5]), Maitland's well-known comments remain valid: "Already owing to modern reforms it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question [What was a form of action?], but it is still one which must be answered if [*cont.*]

Nowadays, we think of the relation of landlord and tenant in terms of a contract between the parties for the use of land by the tenant in consideration of the rent he agrees to pay.[5] Indeed, one question for the courts at present is the extent to which disputes arising under leases can be resolved simply by application of rules of contract law.[6] The contract will likely contain other obligations on the part of the tenant – such as to keep the premises in repair, or not to use them in a particular way – and it may contain obligations on the part of the landlord as well. Either way, the arrangement looks like a contract for hire of land, much the same as a contract for the hire of a car. There are, however, of course, significant differences. A tenancy of land gives the tenant an estate or proprietary interest in the land. The tenant can, unless he has agreed otherwise, transfer this interest to a third party by assignment, or create a derivative interest by subletting. Again, while the benefit of a contract can be assigned, the burden cannot: in the case of an assignment of a tenancy, however, the assignee will take on the burdens of the assignor under the tenancy, or at least those which touch and concern the land.[7] And the remedies which exist where a tenant defaults may not be the same as those where our hirer of a car fails to observe the terms of the agreement. These differences reflect the view of a tenancy not simply as a contract, but as the grant of an estate in land. The contractual obligations of the original tenant pass to the assignee not because the burden of a contract passes – it does not – but because they are imprinted on the estate which the assignee has acquired.[8] A similar point was made recently by Neuberger LJ when explaining the right of a new landlord to recover rent payable under the lease:

> when the reversion to a lease is transferred, the transferee, that is the new landlord, has the right to recover the rent under the lease in his own right, and does not need to claim through the transferor, that is the original landlord. The position in this connection should be contrasted with an assignment of a right to recover a debt or other chose in action. In such a case the common law courts did not recognise the assignment, so that the assignee had to sue in the

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[*n. 4 cont*] he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of action we have buried, but they still rule us from their graves..": F W Maitland, *The Forms of Action at Common Law* (Cambridge: CUP 1909/1981, page numbering from 1981 reprint), p. 1. Less well-known, but equally persuasive of the need for understanding of the forms of action, are Sutton's comments: "If you can fit the facts laid before you in your instructions into one of them, you may feel fairly confident that if the facts are true . . . you will be successful but if you cannot, the strong probabilities are that you will fail . . . There is no better means of finding out exactly where the strength or weakness of your case lies, than by going back to the old system and ascertaining in what way it would have been necessary to formulate your case under it." (R Sutton, *Personal Actions at Common Law* (London: Butterworth, 1929), p. 13), quoted in W S Holdsworth, *History of English Law* 5th edn (London: Methuen, 1942), vol. xv, p. 105 (hereafter Holdsworth).

5 See e.g. *Smith* v *Muscat* [2003] EWCA Civ 962 at [11] per Sedley LJ: "It has been common ground before this court that a lease or tenancy agreement is today to be regarded as a contract like any other. If it has special characteristics, these are a function of construction or statutory interposition, not of principle." The contractual element of the relation is emphasised in s. 3 of Deasy's Act which provides that the relation of landlord and tenant "shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service".

6 See *Highway Properties Ltd* v *Kelly, Douglas & Co Ltd* (1971) 17 DLR (3d) 710; *Progressive Mailing House Property Ltd* v *Tabali Property Ltd* (1985) 157 CLR 17. The courts in England have accepted the principle that the law of contract can be applied to resolve landlord and tenant disputes but have been more conservative than their counterparts in Australia. See *Hussein* v *Mehlman* [1992] 32 EG 59; *Abidogun* v *Frolan Healthcare Ltd* [2001] EWCA Civ 1821; *Reichman* v *Beveridge* [2006] EWCA Civ 1659; contrast *Apriaden Pty Ltd* v *Seacrest Property Ltd* [2005] VSCA 139.

7 See below p. 284.

8 *City of London Corp* v *Fell* [1993] QB 589, at 604 per Nourse LJ, cited with approval on appeal, [1994] 1 AC 458. See also *Friends Provident Life Office* v *British Railways Board* [1996] 1 All ER 336.

> name of the assignor. . . . However, the right of a transferee of the reversion to recover rent is, both in common law and under statute, an incident of the ownership of the reversion.[9]

He continued:

> while it is fair to say that the contractual character of a lease has tended to become more prominent over the past 50 years, it remains a fact that it is also an interest in land, and it is not hard to see that the right to recover the rent should be an incident of the reversion, and that accordingly it may have different features from the right to recover a debt unassociated with any interest in land.[10]

It is the proprietary nature of a tenancy that can be seen from a consideration of the early cases. In the analysis of the situation at the time of Coke, a landlord who granted a tenancy of his land was seen as reserving to himself out of the land demised an item of property, the rent.[11] The rent was not just a payment the tenant had promised to make.[12] Indeed, the landlord's entitlement to this rent did not require any promise for payment to be made by the tenant.[13] The land, rather than the tenant of it, was seen as the debtor.[14] The landlord was entitled to the rent as it fell due because it had been reserved to him on making the tenancy. If the tenant covenanted to pay the rent, so much the better for the landlord, for he then had two remedies available to him if the rent was not paid: a remedy based on the rent as an item of property unlawfully detained by the tenant and a remedy based on failure of the tenant to perform his promise to pay. And, independently of these remedies, he had the right to take the law into his own hands by distraining for the rent due. Each of these requires explanation. Before that, however, we may note two illustrations of how the difference between payments to be made by a tenant being classified as rent reserved by the landlord or simply as money covenanted to be paid was important. In *Drake* v *Munday*,[15] an action was brought by the plaintiff as executor of a landlord. The action was brought on

9 *Edlington Properties Ltd* v *JH Fenner & Co Ltd* [2006] EWCA Civ 403 at [13]–[15].

10 Ibid. [16].

11 For the changing perception of rent, from that of an item of property reserved to the landlord and issuing out of the land demised to that of consideration under a contract made between the landlord and tenant, see *CH Bailey Ltd* v *Memorial Enterprises Ltd* [1974] 1 All ER 1003; *United Scientific Holdings Ltd* v *Burnley DC* [1977] 2 All ER 62; *Smith* v *Muscat* [2003] EWCA Civ 962 at [30] per Sedley LJ: "it is far too late to correct the asymmetry by restoring the aura of inviolability with which the law came, during the seventeenth and eighteenth centuries, to invest rent. It would be wrong in principle to do so: rent today is correctly regarded as consideration not merely for granting possession but for undertaking obligations which go with the reversion."

12 See *Ards* v *Watkin* (1598) Cro Eliz 637 per Gawdy and Fenner JJ: "there is no doubt but that rent may be devised, and be divided from the reversion; for it is not merely a thing in action, but quasi an inheritance". The report of the case sub nom. *Ardes* v *Watkins* at Cro Eliz 651 makes the same point: "although a contract, or thing in action, cannot be transferred or divided, yet rent only may be".

13 See F Pollock and F W Maitland, *The History of English Law Before the Time of Edward I* 2nd edn (Cambridge: CUP, 1898 (hereafter Pollock and Maitland)), vol. II, p. 125: "We have here no enforcement of an obligation: we have the recovery of a thing . . . the idea of a personal obligation or contract plays but a subordinate part in the relation between lord and tenant . . . the landlord who demands his rent that is in arrear is not seeking to enforce a contract, he is seeking to recover a thing." Also Holdsworth, vol. III, p. 151; vol. VII, p. 262.

14 Pollock and Maitland, vol. II, p. 129: "the governing idea is that the land is bound to pay the rent, and it is by no means necessary that any person should be bound to pay it". See also *Kidwelly* v *Brand* (1551) 1 Plowd 69 at 70: "if a man makes a lease for life or years, rendering rent at such a feast, and if it be in arrear that he shall enter, there the lessor ought to come to the land and demand the rent, or else he shall never enter, for the rent is only payable upon the land, and the land is the debtor, for in assise for the rent the land shall be put in view, and he shall distrain in the land for the rent, so that the land is the principal debtor, and the person of the lessee is no debtor but in respect of the land". The same view is put forward in argument in *Walker's Case*: (1587) 3 Co Rep 22a. See further T C Williams, "The incidence of rent" (1897) 11 *Harv LR* 1.

15 (1631) Cro Car 206; Jones W 231.

an agreement whereby in consideration of covenants by the landlord that the defendant should have the use of a house for six years, the defendant covenanted to pay an annual rent. The plaintiff argued that the action lay on the covenant, and not on the basis of a reservation of rent, for in an action on the covenant the plaintiff could succeed as the landlord's executor, whereas if the action were based on reservation of rent, the death of the landlord would have resulted in the land passing to the landlord's heir, and the plaintiff would have had no right to sue. The action was unsuccessful, the court holding that the agreement amounted to a lease for six years, the wording to a reservation of rent, and that the reversion passed on the landlord's death to the heir. To like effect is *Attoe* v *Hemmings*,[16] in which an action of covenant was brought by an assignee of the devisee of a landlord, as a result of non-payment of rent. The tenant argued that the sum he had covenanted to pay was not rent, but merely an annual payment, so that the plaintiff had no right to sue. The court held that the wording in the tenancy was sufficient to amount to a reservation of rent, the right to which had passed on the landlord's death to the heir, with the result that the plaintiff was entitled to succeed.[17]

Recovery of rent

The concerns of the landlord following the grant of a tenancy will be to ensure that the rent is paid and the covenants entered into by the tenant are performed. The remedies available to ensure such concerns are met need to be understood for the discussion following. Beginning with the rent, we need to examine both recovery by action, and the landlord's ability to distrain for it.

Actions of debt for rent

So far as an action based solely on the reservation of the rent is concerned, it might seem surprising that there is anything to discuss. Today, landlords who are owed rent would surely be surprised to be told that there was any doubt that they could sue for the rent as a debt due to them. Nor of course is there: but the case is really the exception rather than the rule. To explain why this is so, we need to understand the difference between cases involving rent payable under a lease where the tenant held a life estate, and cases where the tenant was entitled to the land for a term of years. To the former may be added cases where no relation of landlord and tenant existed at all: cases in other words where the rent payable was a rentcharge rather than a rent service.[18]

As at the beginning of the period we are considering, rent was looked on as an item of property of the person entitled to receive it, so the failure to pay rent was seen as the unlawful detention of such property by the person who ought to pay it. The situation was much the same as that where someone was wrongfully in possession of land belonging to someone else. The only essential difference was that rent was an incorporeal hereditament, whereas land was a corporeal one. Just as dispossessed landowners had an action for recovery of their land, so rent owners had an action for recovery of the rent which they had not received. The action was what the law calls a real action rather than a personal action, and would lead to recovery of the property, rather than compensation, in the same way as

16 (1612) 2 Bulst 281; sub nom. *Athowe* v *Heming* 1 Rolle 80; sub nom. *Alfo* v *Henning Owen* 151.

17 See also *Browning* v *Beston* (1552–1554) 1 Plowd 131.

18 For a full discussion of the nature of rent as a charge payable out of the land, see Williams, "Incidence" (n 14 above); T C Williams, "Landowners' liability to pay rentcharges in fee – an argument against the doctrine of *Thomas* v *Sylvester*" (1897) 13 LQR 288. See also *In re Herbage Rents* [1896] 2 Ch 811.

a landowner dispossessed of his or her land would recover possession.[19] An action of debt was not available for recovery of rent,[20] so long as the estate out of which the rent was reserved was in existence.[21] Eventually, Parliament did provide that a landlord who had made a lease for life would be entitled to bring an action for debt,[22] and later again, on the abolition of the real actions in 1833, the courts determined that an action of debt for rent would lie for others who were entitled to rents.[23] Finally, actions of debt became possible for owners of fee farm rents by legislation in 1851.[24]

In the case of a lease for years, the situation was different, and an action of debt had always been available to the landlord where rent was unpaid.[25] Bacon explains:[26]

> The remedy by action of debt extended only to rents reserved on leases for years, but did not affect freehold rent; the reason whereof is this: actions of debt were given for rent reserved upon leases for years, for that such terms being of short continuance, it was necessary that the lessor should follow the chattels of his tenant, wherever they were, or wheresoever he should remove them: but when the rents were reserved on the durable estate of the feud, the feud itself, and the chattels thereupon were pledged for the rent . . .

The fact that an action of debt was available to recover rent reserved on a lease for years should not obscure the view that failure to pay rent was the unlawful detention of property belonging to the landlord. A comparison of the writs of debt and detinue shows the similarity between the two forms of action: in the examples given by Maitland[27] the writ in an action of debt commands the defendant to render £100 *quas ei debet et injuste detinet*; in detinue, that the defendant render chattels *quae ei injuste detinet*. It can be seen from the examples that in an action of debt, as in an action of detinue, the allegation was that the defendant was unjustly detaining the plaintiff's property. Holdsworth makes the point that in an action of debt the plaintiff sought *restoration* of money belonging to the plaintiff.[28] The nature of the action led Maitland to comment that: "We are tempted to say the Debt

19 Pollock and Maitland (n. 13 above), vol. II, p. 126: "Mere default in render of services will not be a disseisin, but the tenant will probably become a disseisor if he resists the lord's distraint . . . The lord will bring against him an assize of novel disseisin. The writ will be word for word the same as that which a man brings when he is ejected from the occupation of land. It will report how the plaintiff alleges that he has been disseised of 'his free tenement' in such a vill, and only at a later stage will come the explanation that the thing to be recovered is, not so many acres of land, but so many shillingsworth of rent." For recovery of rent by real actions, see Holdsworth (n. 4 above), vol. VII, 263. Further, ibid., vol. III, pp. 19, 99, 151.

20 *Andrew Ognel's Case* (1587) 4 Co Rep 48b; *Marler* v *Wright* (1589) Cro Eliz 141; *Webb* v *Jiggs* (1815) 4 M & S 113; *Kelly* v *Clubbe* (1821) 3 Br & B 130; *Randall* v *Rigby* (1838) 4 M & W 130; *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

21 Once the estate out of which the rent was reserved was determined, an action of debt was available to recover arrears of rent: *Lillingston's Case* (1607) 7 Co Rep 38a.

22 Distress for Rent Act (Ireland) 1710, s. 5.

23 See *Thomas* v *Sylvester* (1873) LR 8 QB 368; *Whitaker* v *Forbes* (1875) LR 1 CPD 51.

24 Fee Farm Rents (Ireland) Act 1851, extending provisions already in existence for owners of such rents reserved in grants made under the Renewable Leasehold Conversion Act 1849. See *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

25 *Prescott* v *Boucher* (1832) 3 B & Ad 849; *Bally* v *Wells* (1769) Wilm 341; 3 Wils KB 25; *Midgleys* v *Lovelace* (1693) 12 Mod 45; sub nom. *Midgley* v *Lovelace Carthew* 289; Holt KB 74.

26 *Bacon's Abridgement* 7th edn (London: 1832 (hereafter *Bac Abr*)), vol. VII, p. 47.

27 Maitland, *Forms of Action* (n. 4 above), p. 71; cf. Holdsworth (n. 4 above), vol. III, p. 420 and sample writs at pp. 662–3.

28 Holdsworth (n. 4 above), vol. III, pp. 366, at 368.

is a 'real' action, that the vast gulf which to our minds divides the 'Give me what I own' and 'Give me what I am owed' has not yet become apparent."[29]

Finally, an action of debt for rent could be maintained in all cases where there was a demise, whether the demise was by deed, by instrument in writing not under seal, or by word of mouth.[30]

Actions of covenant

Apart from an action of debt, the landlord might be able to bring an action of covenant if the rent was not paid. If successful, the action would lead to an award of damages. The action depended on there being a promise by the tenant (to pay the rent), and such promise being made under seal. If the landlord considered that difficulties stood in the way of successfully bringing an action of debt, it might be preferable to bring an action of covenant instead. In doing so the landlord would have to show that a promise was made by the tenant to pay the rent. In cases where the lease did not contain an express covenant by the tenant to pay the rent, the landlord might still be able to succeed if he or she could rely on an implied covenant.[31]

Assuming that a covenant by the tenant did exist, express or implied, to pay the rent, it might be expected that an action of covenant would not present any difficulties. That was not the case: the courts took the view that if the covenant was to pay a sum of money, an action of debt, rather than an action of *covenant*, was the appropriate action available for the money sought by the plaintiff.[32] Eventually, however, the law came to allow an action of covenant where the covenant was to pay rent, so that by the early part of the seventeenth century landlords had a choice of action available to them.[33]

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29 Maitland, *Forms of Action* (n. 4 above), p. 31.

30 *Gibson* v *Kirk* (1841) 1 QB 850 at 856 per Lord Denman CJ.

31 In a number of instances, actions of covenant for rent were brought by landlords in reliance on the words of the reddendum in the lease "Yielding and Paying". Whether the covenant arising from such wording was an implied covenant or an express one gave rise to different views, though the weight of authority is in favour of the covenant being implied rather than an express one. The authorities are collected in T Platt, *A Practical Treatise on the Law of Covenants* (London, 1829), pp. 503: see *Newton* v *Osborn* (1653) Sty 387; *Porter* v *Swetnam* (1654) Sty 406 & 431; *Hellier* v *Casbard* (1665) 1 Sid 240 & 266; sub nom. *Helliar* v *Casebrooke* 1 Keb 923; sub nom. *Helliar* v *Caseborough* 1 Keb 839; sub nom. *Helier* v *Casebert* 1 Lev 127; *Hollis* v *Carr* (1676) 2 Mod 91; 3 Swanst 647; *Barker* v *Keete* (1678) 1 Freem 250; sub nom. *Barker* v *Keate* 1 Mod 262; 2 Ventr 35; sub nom. *Barker* v *Keat* 2 Mod 249; *Norris* v *Elsworth* (1678) 1 Freem 463; *Anon* (1670) 1 Sid 447; *Harper* v *Burgh* (1678) 2 Lev 206; sub nom. *Harper* v *Bird Jones* T 102; *Webb* v *Russell* (1789) 3 TR 402; *Vyvyan* v *Arthur* (1823) 1 B & C 416; *Iggulden* v *May* (1804) 9 Ves 330; *Church* v *Brown* (1808) 15 Ves 264. The point becomes important in relation to the ability for grantees of the reversion to sue on the covenant without reliance on the Statute of Reversions (see below, p. 266).

32 See Holdsworth, vol. III, p. 419. J B Ames (*Lectures on Legal History* (Cambridge, Mass: Harvard University Press, 1913) p. 98) explains: "The earliest covenants were regarded as grants, and suit could not be brought on the covenant itself. So a covenant to stand seised was a grant, and executed itself. The same is true of a covenant for the payment of money; it was a grant of the money, and executed itself. For failure to pay the money, debt would lie. Afterwards an action of covenant was allowed."

33 See Ames, *Lectures* (n. 32 above), pp. 152–3. The relevant authorities are *Anon* (1585) 3 Leon 119; *Anon* (1589) 1 Leon 208; *Sicklemore* v *Simonds* (1600) Cro Eliz 797; *Chawner and Bowes' Case* (1613) Godb 217 where the court is divided on the point; *Browne* v *Hancocke* (1628) Hetley 111; sub nom. *Brown* v *Hancock* Cro Car 115; *Mordant* v *Wats* (1619) 1 Brownl 19; *Anon* (1646) Sty 31; *Frere* v ____ (1648) Sty 133.

Assumpsit

Similar concerns existed with the ability of a landlord to bring an action of *assumpsit*.[34] Developments in this form of action relevant for present purposes coincide with the early part of the period we are looking at. The form of action had certain advantages over those of debt and of covenant. The action was based on a promise made by the defendant and, following *Slade's Case*,[35] a promise to pay might be implied from there being a debt already in existence. It would seem that a count of *indebitatus assumpsit* would therefore be open to landlords seeking payment from their tenants, as an alternative to an action of debt. Not so, however, at least at the outset. A series of cases makes clear that where the action was for rent, the only form of action available to the landlord was debt.[36] Ames notes this was the case even where there was an express promise by the tenant to pay the rent, citing a number of decisions.[37] *Munday* v *Baily*[38] is one, in which judgment in an action of *assumpsit* was given against the landlord, despite the tenant having lost earlier on his plea of *non assumpsit*. Ames notes also the one exception where an action of *assumpsit* was successful, *Slack* v *Bowsal*,[39] but draws attention to the reporter's note that the point that debt was the appropriate action was not argued. The cases refusing to allow *assumpsit* by landlords speak of debt being "a higher remedy",[40] or being the "proper action",[41] and of *assumpsit* being of "a less nature".[42] In *Acton* v *Symon*,[43] the reason put forward for the view that *assumpsit* did not lie for rent was that the execution of a lease determined the personal promise upon which the *assumpsit* was founded.[44] The argument divided the court. The same case marks, however, the possibility of *assumpsit* being brought if there was an *actual* or *express* promise (and not just a promise implied merely from the existence of the debt) by the tenant to pay

34 For the history of the action see Ames, *Lectures* (n. 32 above), pp. 152–71; also D Ibbetson, "Assumpsit and debt in the early sixteenth century: the origins of the indebitatus count" (1982) 41 *CLJ* 142.

35 (1602) 4 Co Rep 92b.

36 *Reade* v *Johnson* (1590) Cro Eliz 243; sub nom. *Read and Johnson's Case* 1 Leon 155; *Symcock* v *Payn* (1599) Cro Eliz 786; *Clerk* v *Palady* (1598) Cro Eliz 859; *Green* v *Harrington* (1619) Hobart 284; 1 Brownl 14; Hutton 34; *Dartnal* v *Morgan* (1620) Cro Jac 598; *Ablaine's Case* (1621) Winch 15; *Brett* v *Read* (1634) Cro Car 343; Jones W 329; *Munday* v *Baily* (1647) Aleyn 29; *Ayre* v *Sils* (1648) Sty 131.

37 Ames, *Lectures* (n. 32 above), p. 167, citing *Green* v *Harrington* (1619) Hobart 284; *Munday* v *Baily* (1647) Aleyn 29; *Anon* (1647) Sty 53; *Ayre* v *Sils* (1648) Sty 131; *Shuttleworth* v *Garrett* (1689) Comb 151; sub nom. *Shuttleworth* v *Garret* 1 Show KB 35; sub nom. *Shuttleworth* v *Garnet* 3 Mod 229; sub nom. *Shuttleworth* v *Garnett* Carthew 90.

38 (1647) Aleyn 29.

39 (1623) Cro Jac 668.

40 *Carter's Case* (1586) 1 Leon 43. See also *Gibson* v *Kirk* (1841) 1 QB 849 at 859.

41 *Read and Johnson's Case* (1590) 1 Leon 156. See also *Mason and Welland* (1685) Skin 238 & 242: "where a rent certain is reserved . . . there the law, where the thing savours of the realty, will not permit an action quite personal to be brought, but will restrain the party to his proper action, without confounding of them".

42 *Green* v *Harrington* (1619) Hutton 34.

43 (1634) Cro Car 414; sub nom. *Acton* v *Simonds* Jones W 364.

44 Cro Car 415 at 415: "the action lies not, because it is grounded upon a personal promise in a real contract; which real contract being executed, the *assumpsit*, which is merely personal, is determined; and the rent being real, [the landlord] cannot bring this action for the non-payment thereof"; Jones W 364: "le feasance del' lease pur ans extinguish le assumpsit, come un obligation extinguish personal contract". See also *Gibson* v *Kirk* (1841) 1 QB 849 at 859 per Lord Denman CJ: "the action of assumpsit was always looked upon, not only as a personal action, which the action of debt equally is, but as one wholly inapplicable to realty or matters arising out of it, as rent is: whereas the action of debt was always applicable to rent and some other matters connected with realty."

the rent.[45] Where such existed, the promise was "collateral, and *quasi* a special agreement to pay the rent, of the same effect as an express covenant in a lease by deed".[46]

Actions for reasonable satisfaction

An action of debt would, if successful, lead to recovery of the rent by the landlord. An action of covenant or of *assumpsit* on the promise of the tenant to pay the rent would, if successful, lead to an award of damages, which might be measured by the amount of the rent agreed on. Parliament later added to the remedies available to landlords seeking payment for the use of their land by tenants. By s. 3 of the Landlord and Tenant Act (Ireland) 1741, landlords were enabled to recover "reasonable satisfaction" for the use and occupation of land. Speaking of the comparable legislation applicable in England, the Distress for Rent Act 1737, Eyre LCJ explained in *Naish* v *Tatlock*[47] that "[u]nder the statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and enjoyed under the demise".

The section recited its purpose was "to obviate some difficulties which many times occur in the recovery of rents where the demises are not by deed". Ames[48] identifies these difficulties as two: first, that a landlord bringing an action for *a quantum meruit* would be nonsuited if a demise were proven showing that rent in a fixed sum had been agreed; and, secondly, that if the landlord sued for a fixed sum, the landlord would have to show an express promise by the tenant to pay the sum.[49] The section addressed these problems by providing that in cases where the tenancy had not been created by deed, the landlord might recover a reasonable satisfaction for the tenant's use and enjoyment of the land, and that proof of a parol demise in which a certain rent was reserved should not nonsuit the landlord, but the amount of the rent could be used in the assessment of damages in the action. Ames concludes by saying of the 1737 Act that "the statute gave to the landlord . . . the right to sue in assumpsit as well as in debt, without proof of an independent express promise".[50]

The statutes of 1737 and 1741 provided that landlords could recover reasonable satisfaction for the use of their land "in an action on the case", hence Ames' reference to *assumpsit*. Following the statute, however, actions of *debt* to recover reasonable satisfaction for the use of land became common. Lord Denman CJ referred to such actions in *Gibson* v *Kirk*[51] as being of modern introduction, tracing the earliest to *Stroud* v *Rogers*[52] in 1792.[53] Pleading in such actions did not share the technicalities which existed in actions of debt for

45 Also *Anon* (1647) Sty 53; *Trever* v *Roberts* (1664) Hardres 366; *Lance and Blackmore* (1655) Sty 463; *How* v *Norton* (1666) 2 Keb 8; 1 Sid 279; 1 Lev 179; *Chapman* v *Southwicke* (1667) 1 Lev 205; sub nom. *Chapman* v *Southwick* 2 Keb 182; 1 Sid 323; *Freeman* v *Bowman* (1667) 2 Keb 291; *Stroud* v *Hopkins* (1674) 3 Keb 357; *Falhers and Corbret* (1733) 2 Barn KB 386; *Johnson* v *May* (1683) 3 Lev 146 & 150.

46 *Johnson* v *May* (1683) 3 Lev 150.

47 (1794) 2 H Bl 319 at 323.

48 Ames, *Lectures* (n. 32 above), p. 170.

49 See also *Churchward* v *Ford* (1857) 2 H & N 446 at 449 and *Beverley* v *The Lincoln Gas Light and Coke Co* (1837) 6 Ad & E 829 at 841n: "Before the statute, an action for use and occupation might be maintained, unless an actual demise were shewn: but proof of such a demise was held . . . to be fatal to the action, either on the ground of its shewing a real contract, or because, the demise having passed an interest, the defendant could not be said to occupy by the plaintiff's permission."

50 Ames, *Lectures* (n. 32 above), p. 170.

51 (1841) 1 QB 850 at 854.

52 Noted at 6 TR 63.

53 For further early instances, see *Wilkins* v *Wingate* (1794) 6 TR 62; *King* v *Fraser* (1805) 6 East 348.

rent.[54] The ability to bring actions of debt for reasonable satisfaction was questioned in *Gibson* v *Kirk*, the tenant seeking to nonsuit the landlord in such an action on the basis that there had been a demise at an agreed rent, and that the English provision equivalent to s. 3 of the 1741 Act only applied in actions of *assumpsit*. The court, however, upheld the verdict which the landlord had obtained in the action. The result was that:

> Upon the relation which subsists between the lessor and the lessee upon a parol demise, either of two actions is maintainable at Common Law – either an action of debt for rent, or, according to *Gibson* v *Kirk*, an action of debt for use and occupation . . . In either case the contract of demise governs the relation between the parties, and precisely the same sums of money and at precisely the same times will be recoverable, whether in the action of debt for the rent, or in an action for the same amount for use and occupation.[55]

Distraint for rent

Actions, in whatever form, would involve the cost and delay inherent in litigation. Independently altogether of litigation, landlords had an effective remedy to secure payment of rent in the process of distraint. The law allowed them to enter onto the lands the tenant held under the tenancy and to seize and detain personal property which they found there.[56] Such property did not have to belong to the tenant. The property seized was not intended to be a substitute for the rent the landlord was owed: rather, the seizure and detention were intended to bring about payment by the tenant of the rent. By a statute of Edward IV,[57] landlords were entitled to sell the goods seized (and recover the money they were owed from the proceeds) if the tenant did not pay the rent and recover the goods seized within a certain time.

Breach of covenant

Leaving rent aside, the other benefit the landlord obtains from granting a tenancy of his or her land is the performance of covenants entered into by the tenant. Failure by the tenant to perform such covenants would entitle the landlord to bring an action of covenant,[58] the essentials of which have been noted. For cases where the tenant's promise was not under seal, an action of *assumpsit* was available.

Rights of re-entry

The last thing to be mentioned concerning the remedies available to a landlord where the tenant failed to perform his or her obligations relates to termination of the tenancy. If the tenancy contained a right for the landlord to re-enter the land on the tenant's default, then the failure of the tenant to pay rent or to perform covenants he or she had entered into put the tenancy at risk of termination. At common law, however, rights of re-entry could not be exercised by anyone other than the original grantor and his or her heirs.[59] Accordingly,

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54 See *King* v *Fraser* (1805) 6 East 348.

55 *Shine* v *Dillon* (1867) IR 1 CL 277 at 280 per Pigot CB.

56 For abolition of the remedy in Northern Ireland and England respectively, see Judgments (Enforcement) Act (NI) 1969, s. 122, and Tribunals, Courts and Enforcement Act 2007, s. 71.

57 Sale of Distress Act (Ireland) 1478.

58 The difference between covenants, breach of which would lead to an action, and conditions, breach of which would lead to entry, is brought out in *Michell* v *Donton* (1587) Owen 92; sub nom. *Michell* v *Dunton* Owen 54; sub nom. *Manchel* v *Dounton* 1 And 179; sub nom. *Machel and Dunton's Case* 2 Leon 33.

59 T Littleton, *Treatise on Tenures*, ss. 325, 326; *Coke on Littleton* 18th edn (1823), p. 201a n. 1; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

until the Statute of Reversions, discussed below, a grantee from the landlord of the reversion on the lease was unable to rely on any right of re-entry the lease contained.

The landlord's liability

So far we have been considering the aspirations of the landlord and the means by which he or she was able to ensure such aspirations were fulfilled. The lease might, however, contain obligations on the part of the landlord as well as obligations on the part of the tenant. What has been said about actions of covenant and *assumpsit* applies where the tenant was the injured party, and it was the landlord who was in default.

New landlords

The premise for the examination of the law presently being carried out is the arrival on the scene of a new party claiming the rights of the landlord under the lease. The easiest situations to envisage where such is the case are those of a purchaser acquiring the estate and interest of the original landlord, or where the latter dies and the claimant is the inheritor of the deceased's estate. Alternatively, the claimant may be someone who has acquired a lesser estate than his or her predecessor, as where the landlord has made a lease, rather than an outright transfer of the estate, to the claimant. The various possibilities are considered below. All mentioned so far, however, involve the acquisition of the landlord's reversion, or an estate in the reversion. There is, however, another possibility which needs to be considered, namely that our new party is someone who has acquired merely the right to receive the rent reserved by the lease.[60] In such a situation the original landlord remains the owner of the reversion, but the tenant will have to pay the rent to the person to whom the right has been granted. The rent has become severed from the reversion.

Severance of rent from reversion

Such a situation presented new difficulties: the lease continued in existence between the original landlord and the tenant, but there was now a third party interested in it. It was the relation between the third party and the tenant that was the problem. However, before looking at how the courts saw the rights of the parties, there was, of course, a preliminary issue to address, namely whether it was possible for the landlord to convey the rent separately from the reversion. The courts held that it was: as we have seen, rent was

60 For a modern instance, see *Inland Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35 (Lightman J); [2003] Ch 513 (CA). The judgment of Lightman J is of more interest for present purposes than those in the Court of Appeal, which deal only with the fiscal consequences of the transaction. The judgment of Lightman J contains also discussion of the effect of the assignment as transferring an interest in land or merely contractual rights.

regarded as an item of property, and not simply a chose in action incapable as such of transfer at common law.[61]

Where the rent reserved by a lease was assured without the conveyance also of the reversion, the rent was known as a rent seck. As the owner of such, the grantee had no right to distrain for the rent, until a right was conferred by s. 7 of the Distress for Rent Act (Ireland) 1712. In the absence of a power to distrain, the possible remedies for a grantee of the rent to recover payment were an action of debt or an action of covenant. Each presented difficulties.

A number of cases deal with the question of whether the owner of a rent seck could bring an action of debt for the rent. *Robins* v *Cox*[62] shows the concerns, Foster CJ and Mallett J thinking no action lay, since there was neither privity of contract nor privity of estate between the parties to the action, the reversion not having passed to the plaintiff. Twysden and Wyndham JJ, however, thought the action did lie, the latter of the view that privity of contract had passed to the plaintiff. The court being divided on the point, the case was adjourned and it seems later that the plaintiff obtained judgment by consent.[63] In *Allen* v *Bryan*,[64] *Robins* v *Cox* was seen as authority that an action would lie.[65] Attornment by the tenant to the grantee (which had taken place in *Robins* v *Cox*) was considered the determining factor in *Goodman* v *Packer*[66] and *Marle* v *Flake*,[67] as making a privity between tenant and grantee, sufficient to allow the latter to bring an action of debt.

There remains the question whether an action of covenant would lie for recovery of the rent by the grantee. No direct authority appears to exist. In the case of a rentcharge, however, the courts held that a transfer of the rent would not enable the grantee to bring an action of covenant on a covenant to pay the rent.[68] The situation appears to be similar to that where the rent reserved by a lease is severed from the reversion.

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61 *Austin and Smith's Case* (1588) 1 Leon 316; *Ards* v *Watkin* (1598) Cro Eliz 637; sub nom. *Ardes* v *Watkins* Cro Eliz 651; Moore KB 549. For choses in action at common law, see Holdsworth (n. 4 above), vol. VII, p. 520; G. Tolhurst, *The Assignment of Contractual Rights* (Oxford: Hart Publishing, 2006), para 2.07; M Smith, *The Law of Assignment* (Oxford: OUP, 2007), para 2.14. Shortly after choses in action became assignable at law by s. 25(6) of the Judicature Act 1873 (in Ireland, Supreme Court of Judicature Act (Ireland) 1877, s. 28(6); now Judicature (NI) Act 1978, s. 87) it was held in *Knill* v *Prowse* (1884) 33 WR 163 that a letter given by a landlord to his creditor, directing a tenant to pay rent in future to the creditor, amounted to an absolute assignment of a chose in action for the purposes of the subsection, with the result that the creditor was entitled to sue the tenant for the rent when it became due. The decision was cited by Nicholls LJ in *Rhodes* v *Allied Dunbar Pension Services Ltd* [1989] 1 All ER 1161 at 1166 when stating that "in law there can be an assignment of the right to recover rent simpliciter". The assignment of the right to receive rent was recently held by Lightman J in Inland *Revenue Commissioners* v *John Lewis Properties plc* [2002] 1 WLR 35 at [16] to be an assignment of an interest in land (point not discussed on appeal at [2003] Ch 513).

62 (1661) 1 Lev 22; Raym T 11; sub nom. *Robins* v *Coxe* 1 Keb 153 & 250; sub nom. *Robinson* v *Coxe* 1 Keb 153; sub nom. *Robins* v *Warwick* 1 Keb 1 & 72; sub nom. *Coxe* v *Warwick* 1 Keb 42.

63 1 Keb 250.

64 (1826) 5 B & C 512.

65 See also *Brownlow* v *Hewley* (1697) 1 Raym Ld 82; 3 Raym Ld 88; *Clarke* v *Coughlan* (1841) 3 Ir LR 427; *Williams* v *Hayward* (1859) 1 El & El 1040; *Corpn of Dublin* v *Herbert* (1861) 12 ICLR 502.

66 (1670) Jones T 1; sub nom. *Goodwin* v *Parker* 1 Freem 1.

67 (1701) 3 Salk 118.

68 *Milnes* v *Branch* (1816) 5 M & S 411, disapproving a dictum of Holt CJ in *Brewster* v *Kidgill* (1698) 12 Mod 166 at 170. Other reports of the case (sub nom. *Brewster* v *Kitchell* 1 Salk 198; sub nom. *Brewster* v *Kidgell* 3 Salk 340; Holt KB 670; Carthew 438; sub nom. *Brewster* v *Kitchin* Comb 466; 1 Raym Ld 317; sub nom. *Brewster* v *Kitchel* Holt KB 175; 2 Salk 615; sub nom. *Brewster* v *Kidgil* 5 Mod 368) do not contain the dictum. See also *Executors of Kennedy* v *Stewart* (1836) 4 Law Rec (NS) 160 and *Butler* v *Archer* (1860) 12 ICLR 104; *Grant* v *Edmondson* [1931] Ch 1.

Successors to the reversion

Turning to the more common situation where the new claimant is someone who has acquired the reversion on the lease rather than just the rent reserved by it, the arrival of the new landlord brings about problems that hitherto have not existed. The most obvious perhaps relates to covenants in the lease. Not being party to the original agreement, if our new landlord is to enforce covenants made by the tenant he or she has to overcome the rule that only a party to the covenant can sue on it. The other side of the coin of course is that the burden of covenants undertaken by the landlord should not trouble our new landlord. The difficulty this time lies with the tenant, who will be unable to enforce the obligations the landlord undertook. Leaving covenants aside, however, other consequences of a transfer of the reversion on the lease exist for consideration. Initially, a distinction needs to be made between cases where the new landlord is a successor as a result of the death of the original landlord, and cases where there has been a transfer of the reversion *inter vivos*.

Post mortem successors

Until the Wills Act 1540 made it possible in England to devise land by will, the death of a landowner would result in land owned by him or her passing to his or her heir.[69] The same was the position in Ireland until corresponding legislation was enacted in 1634. Following the legislation, the land would pass to the devisee of the deceased owner or to his or her heir, according to whether the owner had made a will or not. For the purposes of this section, we need not distinguish between testate and intestate successors. The question we need to consider is how the law apportioned the rights of a deceased landlord on his or her death between his or her heir or devisee on the one hand and those interested in the landlord's personal estate on the other. The question would arise if rent payable during the lifetime of the landlord had not been received by the landlord, or a breach of covenant by the tenant had taken place before the landlord's death.

For rent which was payable, but which had not been paid, during the lifetime of the original landlord, the landlord's heir had no cause of action. By definition, the rent was not due to the heir. It might be expected that for such rent the landlord's executors or administrators would have a cause of action to recover the money due, as it would increase the personal estate of the deceased. Such, indeed, was the case where the lease was a lease for years. To that extent the executors and administrators of a landlord who had created a lease for years were in a better position at common law than those of a landlord who had created a tenancy for life. For the latter, no power existed at common law to recover rent due to the landlord before the landlord's death. Legislation was enacted to remedy this problem.[70] It did so by empowering executors and administrators to bring an action of debt and to distrain for rent due to the deceased. After some doubts,[71] this legislation was held not to apply to cases where the rent was payable under a tenancy for a term of years,[72] for the reason that the legislation was seen as intended to apply only in cases where no power existed at common law to recover rent payable during the lifetime of the deceased landlord. The result was that from being in a better position than executors and administrators of a deceased landlord who had created a tenancy for life, the executors and administrators of a

69 "Land" in this context does not include land held by the deceased under a lease, such being personal property and vesting on the deceased's death in his executors or administrators. See Pollock & Maitland (n. 13 above), vol. II, pp. 115, 331.

70 Cestui Que Vie Act 1540; Arrears of Rent Act (Ireland) 1634.

71 *Meriton* v *Gilbee* (1818) 8 Taunt 159.

72 *Prescott* v *Boucher* (1832) 3 B & Ad 849.

deceased landlord who had created a tenancy for a term of years were now in a worse position, in that while they could bring an action of debt for the rent, they did not have the right to distrain which the statute conferred. They could of course bring an action of covenant, assuming a covenant by the tenant to pay the rent existed, since failure to pay the rent would be a breach of covenant, and breaches were choses in action which formed part of the deceased's personal estate.[73] The same would be true for covenants made by the tenant other than for payment of rent, and broken during the deceased landlord's lifetime. Eventually, the right to distrain for rent due to a landlord in the landlord's lifetime was conferred on all executors and administrators by s. 61 of the Debtors (Ireland) Act 1840, which provided that the executors and administrators of any lessor or landlord might distrain for arrears due to the lessor or landlord in like manner as the lessor or landlord might have done in his or her lifetime.

As on the death of a landlord the land owned passed to his or her devisee or heir, so rent payable after the death of the landlord by a tenant of the land became the property of the devisee or heir.[74] Even if the landlord died the day before rent for a quarter or half year became due, the heir would be entitled to the full gale accruing the next day, for there was no apportionment of rent in respect of time at common law.[75] The position was changed by statutory provisions discussed below.[76]

The only danger for the landlord's heir in claiming rent was payable to him or her after the death of the landlord appears to be that the death of the landlord resulted in the cessation of the rent: in other words, that the original landlord had a life estate only in the rent. The manner in which the rent was reserved was crucial. If the rent had been reserved to the landlord, the danger was that this was construed to mean it was payable only for the lifetime of the landlord. That the law was uncertain is clear from *Sury* v *Brown*.[77] A reservation to the landlord and his wife and the survivor of them failed to make the rent payable beyond the life of the landlord in *Bland* v *Inman*.[78] The difficulties were not removed if the lease provided that rent was reserved to the landlord or his or her heirs,[79] or to the landlord, the landlord's executors and assigns,[80] or to the landlord and the landlord's assigns.[81] The answer to the problem which the courts arrived at was that the rent

73 *Raymond* v *Fitch* (1835) 2 CM & R 588.

74 *Norris* v *Elsworth* (1678) 1 Freem 463. See also *Sealy* v *Stawell* (1867) IR 2 Eq 326.

75 *William Clun's Case* (1613) 10 Co Rep 127a; *Capron* v *Capron* (1874) LR 17 Eq 288; *Glass* v *Patterson* [1902] 2 IR 660. See also the notes to *Ex parte Smyth* (1828) 1 Swanst 337. The position was explained by Patteson J in *Slack* v *Sharpe* (1838) 8 Ad & E 366 at 373 in a passage which shows also the difference in this context between rent and compensation for use and occupation: "Rent accrues when it becomes due, and at no other time. If there be no demise, and an action be brought merely for use and occupation, then the compensation due for such actual occupation accrues, like interest, de die in diem. But when there is an actual demise, and an express reservation, the rent accrues on the day named in the reservation, and on no other." See also *Grimman* v *Legge* (1828) 8 B & C 324, where, in an attempt to avoid the consequence that no rent was recoverable from a tenant because the tenancy determined before the rent fell due, the landlord brought an action for compensation for use and occupation for the period for which he had occupied the land. The action failed, Holroyd J saying (at 325) that "Where, by express contract, rent is reserved, payable quarterly, the landlord cannot recover a proportionable part of the rent for the occupation of his premises for any period less than a quarter", and Bayley J stating (at 327) that "the parties having entered into an express contract, by which the rent was to be paid quarterly, I think the law will not imply a contract to pay rent for any period less than a quarter".

76 Below, p. 287.

77 (1623) Latch 99.

78 (1632) Cro Car 288; Jones W 308.

79 *Mallory's Case* (1601) 5 Co Rep 111b; sub nom. *Pain* v *Malory* Cro Eliz 832.

80 *Richmond's Case* (1591) Owen 9; sub nom. *Richmond* v *Butcher* Cro Eliz 217; 1 And 261.

81 *Wooton* v *Edwin* (1607) 12 Co Rep 36; sub nom. *Wotton* v *Edwin* Latch 274.

should be reserved *during the term*,[82] and so long as this was the case, the addition of a reference to the landlord, executors and assigns would not matter so far as the rent passing to the heir was concerned.[83] It was clear from the reference to rent being payable during the term of the lease that the rent was intended to be payable throughout, and was not limited to the lifetime of the landlord. The best thing, however, was not to mention anyone at all, and to leave the law to make the distribution, so long as "during the term" appeared in the reddendum of the lease.[84]

Assuming, however, that the rent did not cease to be payable on the landlord's death, it passed to the landlord's heir who could enforce payment by distraining for it, or by bringing an action of debt. As Wilmot LCJ explained in *Bally* v *Wells*,[85] "it [rent] always went with the reversion to grantees or heirs at law, and the legal remedy goes along with it". Unlike cases where the landlord's successor took by grant from the landlord,[86] attornment by the tenant to the landlord's heir was not needed.[87] An action of covenant might be available also, if there was a covenant by the tenant to pay the rent. Equally, an action of covenant would lie for the heir for breach of any other covenant entered into by the tenant. For such an action to succeed, it was not necessary that the covenant had been made with the landlord "and his heirs". In *Lougher* v *Williams*,[88] an action of covenant by the heir of a landlord was successful, even though the word "heirs" did not appear, the covenant being made with the landlord, and the landlord's executors and administrators.

Inter vivos successors

Where the successor to the original landlord was not someone who had become entitled to the land following the death of the original landlord, but was someone who took the land by disposition *inter vivos*, the position was more difficult, and led to legislation which formed the basis of the modern law in relation to the rights and obligations of the tenant and the new landlord. The difficulty was not that the grantee was unable to recover rent under the lease: grantees of reversions had the ability to bring an action of debt for the rent based simply on their ownership of the reversion and the tenant's ownership of the land out of which the rent has been reserved.[89] Levinz reports the court in *Thursby* v *Plant*[90] resolving that:

82 *Sury* v *Brown* (1623) Latch 99.

83 *Sacheverell* v *Froggatt* (1671) 2 Wm Saund 361 & 367; sub nom. *Sacheverel* v *Frogate* Raym T 213; 1 Vent 161; sub nom. *Sacheverell* v *Frogat* 2 Keb 798.

84 *Whitlock's Case* (1609) 8 Co Rep 69b.

85 (1769) Wilm 341 at 348; 3 Wils KB 25. See also *Overton* v *Sydall* (1595) Popham 120; Cro Eliz 555; Gouldsb 120; *Glover* v *Cope* (1692) 4 Mod 80 at 81: "it was premised, that without the aid of the statute [the Grantees of Reversions Act 1540] a grantee of a reversion might bring an action of debt; for so was the law before the statute was made; and it was grounded upon this reason, that wherever a man was entitled to a reversion, so that he had the rent which was incident to it, and which was given by law, there the law likewise created the privity on purpose to maintain an action of debt for the rent"; 1 Show KB 284; 1 Salk 185; Carthew 205; Holt KB 159; 3 Lev 327.

86 Below, p. 276.

87 *Ards* v *Watkin* (1598) Cro Eliz 637; sub nom. *Ardes* v *Watkins* Cro Eliz 651; Moore KB 549; *Doe d Wright* v *Smith* (1838) 8 Ad & E 255; W Sheppard, *Touchstone of Common Assurances* (1651, hereafter *Shep Touch*), p. 257; A Fitzherbert, *New Natura Brevium* (1666), p. 291; below, p. 285.

88 (1673) 2 Lev 92.

89 *Bally* v *Wells* (1789) Wilm 341; 3 Wils KB 25; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Standen* v *Chrismas* (1847) 10 QB 135.

90 (1669) 1 Lev 259; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Ventr 10.

> debt is maintainable only upon the privity of estate, and goes with the reversion at common law, and that an assignee could maintain it before the statute[91] upon the privity of estate, and perception of the profits; but covenant did not go to the assignee before the statute, because it lies only on the privity of contract.

Equally, grantees had the ability to distrain for the rent without the need for legislation. It seems also from *Standen* v *Chrismas*[92] that a grantee of the reversion might bring an action for reasonable satisfaction for the tenant's use and occupation of the property, as an alternative to an action of debt for the rent, notwithstanding the fact that the permission to occupy, on which the action was based, came from the original landlord rather than the grantee.[93] Lord Denman CJ considered that such an objection could be met by considering the permission of the grantee as included in the permission given by the original landlord:

> The permission to occupy emanated from Richardson, the grantor of the lease, and was complete when the lease was executed, and never could emanate from the person who subsequently became assignee of the reversion; unless indeed Richardson having granted for himself and his assigns, the permission of any person who might become assignee of the reversion during the lease can be said to be virtually included, so that the occupation became in point of law the permission on the part of the assignee as soon as his interest took place. We think that this is the right view of the case, and that the occupation being in point of law by the permission of the plaintiff, the action is maintainable . . .[94]

The quotation above from *Thursby* v *Plant* makes clear that it was the inability of a grantee of the reversion to bring an action of covenant that was the problem. Nor, however, was it the only one: we have seen already that rights of re-entry in the lease were exercisable only by the landlord and the landlord's heirs. It was these difficulties that the Grantees of Reversions Act 1540 and its Irish counterpart, the Statute of Reversions, addressed.

The statute of reversions

The Grantees of Reversions Act 1540 was enacted by Henry VIII to allow purchasers of reversions of land confiscated from the monasteries and later sold by Henry to enforce the obligations of the lessees of the lands under existing leases. The preamble of the statute makes clear its purpose in this regard. The volume of land passing into the hands of purchasers made clarity essential.[95] A century later, the Irish Parliament enacted in the Statute of Reversions similar provisions to those in the Grantees of Reversions Act, including a preamble referring to the same mischief. By this time, however, the dissolution of the monasteries was long complete, and the purpose of the Irish measure seems to have

91 The Grantees of Reversions Act 1540 (below).

92 (1847) 10 QB 135.

93 The problem could be overcome in the case of periodic tenancies by considering forbearance of the grantee from serving a notice to quit as evidence that a new tenancy had been created, between the grantee and the tenant:: below, p. 275.

94 *Standen* v *Chrismas* (1847) 10 QB 135 at 142.

95 For acquisition and later disposal of land by the Crown on dissolution of the monasteries see A R Buck, "The politics of land law in Tudor England, 1529-1540" (1990) 11 *JLH* 200; H J Habakkuk, "The market for monastic property, 1539–1603" (1958) 10 *Econ Hist Rev* (NS) 362; D Knowles, *The Religious Orders in England*, vol. III, *The Tudor Age* (Cambridge: CUP, 1959), ch. 32; F A Gasquet, *Henry VIII and the English Monasteries*, vol. II (London: John Hodges, 1902), ch. 10 and app. III; see also A G Dickens, *The English Reformation* (New York: Schocken Books, 1964), ch. 7.

been harmonisation of the law in Ireland with that in England.[96] By then also, a considerable body of case law existed on the effect of the Grantees of Reversions Act.

The preamble

The preamble of the Statute of Reversions reads:

> WHERE before this time divers, as well temporall as ecclesiasticall and religious persons, have made sundry leases, demises and grants to divers other persons, of sundry mannors, lordships, farmes, meases, lands, tenements, meadowes, pastures or other hereditaments, for terme of life or lives, or for terme of years by writing under their seale or seales containing certaine conditions, covenants and agreements to be performed as well on the part and behalfe of the said lessees and grantees, their executors and assigns, as on the behalfe of the said leassors and grantors, their heires and successors; and forasmuch as by the common law of this realm no stranger to any covenant, action or condition, shall take any advantage of the same by any means or wayes in the law, but onely such as be parties or privy thereunto, by reason whereof aswell all grantees of reversions, as also all grantees and patentees of the King our soveraign lord, and of his predecessors, of sundry mannors, lordships, granges, farmes, meases, landes, tenements, meadowes, pastures, or other hereditaments late belonging to monasteries and other religious and ecclesiasticall houses, dissolved, suppressed, renounced, relinquished, forfeited, given up, or by other means come into the hands and possession of the King's Majesty, or of some of his predecessors, since the last day of Aprill, in the eight and twentieth yeare of the raign of King Henry the eight of famous memory, be excluded to have any entry or action against the said leassees and grantees, their executors or assignes, which the leassors before that time might by the law have had against the same leasees, for the breach of any condition, covenant or agreement comprised in the indentures of their said leases, demises and grants . . .

It is apparent from the preamble that one mischief addressed by the statute was the inability of grantees of reversions to take advantage of covenants in the lease. Whether grantees were in that position was a matter of discussion in a number of cases on the corresponding preamble in the Grantees of Reversions Act. Different views can be found in the decisions, and the cases lead to no definite conclusion.

First, there are cases indicating that no action was possible at common law for grantees of reversions.[97] These are in line with the statement of the law found in the preamble to each of the statutes. While Holdsworth suggests that the preambles of Tudor statutes may

96 A number of other measures were enacted by the Irish Parliament in 1634 which corresponded to measures already in existence in England. The Statute of Wills and the Statute of Uses are the best known. The Arrears of Rent Act empowering executors and administrators to recover rent due to a deceased landlord has already been mentioned.

97 *Thursby* v *Plant* (1669) 1 Lev 257; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Vent 10; *Thrale* v *Cornwall* (1747) 1 Wils KB 165; *Webb* v *Russell* (1789) 3 TR 393; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Bickford* v *Parson* (1848) 5 CB 920; *Martyn* v *Williams* (1857) 1 H & N 81; *Wyse* v *Myers* (1854) 4 ICLR 101. See also G D Muggeridge, "The liability of an original lessee" (1934) 50 *LQR* 66. Williams' note at 1 Wm Saund 241 to *Thursby* v *Plant* that covenants ran with the land but not with the reversion, comes in for criticism by two American writers: see P Bordwell, "The running of covenants – no anomaly" (1950) 36 *Iowa LR* 1 & 484, at 498–501 and H Sims, "The law of real covenants: exceptions to the restatement of the subject by the American Law Institute" (1944) 30 *Cornell LQ* 1, at 11.

be open to doubt,[98] the preamble of the respective English and Irish statutes was relied on in argument in a number of cases[99] to show that at common law grantees of reversions could not sue on covenants by the lessee. The clearest statement is in *Butler* v *Archer*[100] where Lefroy LCJ considered that the recital in both the English and Irish enactments

> must be deemed conclusive as to the state of the Common Law upon this subject, [and] shows clearly that, at the Common Law, the assignee of the reversion, not being a party or privy to the covenants in the lease, could not take advantage of them.

Another view to be found in some of the cases is that a distinction must be drawn between *real* covenants and *personal* covenants, and that an action by the grantee of a reversion was possible at common law on the former but not the latter. Coke is reported in *Attoe* v *Hemmings*[101] as saying that it was "very plain and clear that such a grantee [a lessee of the reversion] may have an action of covenant at the common law, the old difference was between a covenant personal and real". The difficulty, however, is to determine which covenants fall into the former category, so that a grantee of the reversion could sue on them, and which into the latter. Two covenants are mentioned in the reports of *Attoe* v *Hemmings*. In Owen's report,[102] it is said that if a lessee covenants to do anything on the land, for example to carry out repairs, an action would lie at common law for a grantee of the reversion.[103] According to Rolle's report,[104] Coke considered that a covenant to pay rent would also be enforceable at common law by a grantee of the reversion, on the basis that as the rent went with the reversion, so a covenant to pay it would go also.

A third view is to be found in more recent authorities,[105] namely that a grantee of the reversion could sue at common law on covenants implied by law but not on express covenants. The distinction goes back, however, to the time we are considering. In *Harper* v *Burgh*,[106] the grantee of a reversion brought an action of covenant for rent. According to Levinz, the court held in favour of the plaintiff "for they would intend the action to be grounded upon the reddendum, which is a covenant in law, which ran with the reversion at

98 Holdsworth (n. 4 above), vol. VII, p. 288. See also Bordwell, "The running of covenants", 495–7, and Sims, 'The law of real covenants' (n. 97 above), p. 10: "The Statute has never been carefully construed by the courts. But it has been made the basis of the assumption that voluntary assignees of reversions before the Statute did not have the right to enforce covenants in leases, although . . . there is nothing in the early law to justify such a position."

99 See *Webb* v *Russell* (1789) 3 TR 393; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Twynam* v *Pickard* (1818) 2 B & Ald 105.

100 (1860) 12 ICLR 104.

101 (1612) 2 Bulst 281 at 282; sub nom. *Athowe* v *Heming* 1 Rolle 80; sub nom. *Alfo* v *Henning* Owen 151.

102 Sub nom. *Alfo* v *Henning* Owen 151.

103 The same view can be found elsewhere: see *Barker* v *Damer* (1690) 3 Mod 336; Carthew 182; 1 Salk 80; sub nom. *Barker* v *Dormer* 1 Show KB 191; also *Brett* v *Cumberland* (1616–1618) 1 Rolle 359 at 360: "l'assignee averoit advantage de cest covenant al comen ley, car ceo est un covenant pur reparation d'el chose leased, car Coke dit que appiert per Co. 5. Spencer. que un covenant gist vers l'assignee del lessee al comen ley, & sic pur mesme reson l'assignee d'un reversion avera action al comen ley sur tiel covenant"; Cro Jac 521; sub nom. *Bret* v *Cumberland* Cro Jac 400; Popham 136; sub nom. *Brett* & *Cumberland* 2 Rolle 63; sub nom. *Sir John Bret and Cumberland's Case* Godb 276.

104 Sub nom. *Athowe* v *Heming* 1 Rolle 80 at 81.

105 *Wedd* v *Porter* [1916] 2 KB 91; *Re King (deceased)* [1963] 1 All ER 781.

106 (1678) 2 Lev 207; sub nom. *Harper* v *Bird* Jones T 102.

common law, before the Statute of H. 8, and passed with the reversion".[107] In *Vyvyan* v *Arthur*,[108] the devisee of a reversion was successful in an action of covenant against the lessee for failure to perform an obligation to grind corn at a mill owned originally by the lessor and now by the plaintiff. The obligation was considered analogous to rent reserved by the reddendum, and the benefit of the obligation to run to the plaintiff at common law. A more modern example is *Wedd* v *Porter*,[109] in which a grantee of a reversion was successful in an action against a tenant for breach of an obligation to look after land in a proper manner. The plaintiff could not rely on the statute since the tenancy under which the tenant held the land had not been created under seal.[110] However, the plaintiff succeeded on the ground that the obligation on which the action was based was one arising by implication of law, for which a grantee of the reversion could sue without the statute.

The provisions of the statute

To enable successors to the landlord to enforce the obligations of tenants, the Statute of Reversions provided that:

> as well all and every person and persons, and bodies politique, their heires, successors and assignes, which have and shall have any gift or grant of our said soveraign lord, or of any his predecessors, by letters pattents, of any lordships, mannors, lands, tenements, rents, parsonages, tithes, portions, or any other hereditaments, or of any reversion or reversions of the same, which did belong to or appertaine to any of the said monasteries, and other religious and ecclesiasticall houses dissolved, suppressed, relinquished, forfeited, or by any other meanes come to the King's hands since the said last day of Aprill, in the eight and twentieth yeare of the raign of King Henry the eighth, or which at any time heretofore did belong or appertaine to any other person or persons, and after came to the hands of our said soveraign lord, or any of his predecessors, as also all other persons being grantees or assignees, to, or by the King's Majesty, or to, or by any other person or persons, than the King's Highnesse and their heires, executors, successors and assignes, and every of them, shall and may have and enjoy like advantage against the lessees, their executors, administrators and assignes, by entry for non-payment of the rent, or for doing of waste or other forfeiture, and also shall and may have and enjoy all and every such like and the same advantage, benefit and remedies, by actions onely, for not performing other conditions, covenants or agreements contained and expressed in the indentures of their said leasses, demises or grants, against all and every the said leassees, and farmors, and grantees, their executors, administrators and assignes, as the said leassors or grantors themselves, or their heires or successors, ought, should, or might have had and enjoyed at any time or times, in like manner and form, as if the reversion of such lands, tenements, or hereditaments had remained and continued in the said grantors or lessors, their heires or successors.

As with the preamble, this provision was in substance the same as its English counterpart.

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107 The report of the case by Jones indicates that there was an express covenant for payment of rent. The report does not, however, suggest the action would have failed without the express covenant, recording that covenant lay on the reddendum in a lease, and that a release by the lessor, after assignment of the reversion, was no bar to the action by the grantee "and this by the common law, and also by the stat. of 32 H. 8, for this covenant runs with the reversion".

108 (1823) 1 B & C 410.

109 [1916] 2 KB 91.

110 Below, p. 275.

As we have noted, the background to the Grantees of Reversions Act was the dissolution of the monasteries and the confiscation of the monastic lands by Henry VIII. Both the preamble and s. 1 of both English and Irish measures refer expressly to lands coming into the possession of the Crown as a result of such confiscation. Had the statutes been held applicable only in such cases, their benefit would have been enjoyed by purchasers of a large amount of land, but for land which had not been confiscated, the mischief recited in the preambles to the statutes would have remained. Unless the statutes were measures of general application, and so a fundamental part of the law of landlord and tenant, grantees of reversions of land which had not been confiscated would be unable to enforce the covenants of their lessees. Whether the provisions of the Grantees of Reversions Act were of general application was one of the matters argued in *Hill* v *Grange*.[111] The attitude of the courts in the case, and in other cases mentioned below, was of a willingness to give the Act a wide application, resulting in its becoming one of the cornerstones of the modern law.

The case involved two leases. The first had been made by one Pate to the defendant. Later, Pate granted the reversion to the plaintiff. The second had been made by the prior of a monastery. Again, the defendant was the lessee. After the lease was made, the prior surrendered the lease to Henry VIII. On Henry's death the reversion passed to his son, Edward VI, who granted it by letters patent to the plaintiff. In the case of each lease, the defendant failed to pay the rent, and the plaintiff re-entered. The defendant later ousted the plaintiff, and the plaintiff brought proceedings for trespass. The plaintiff succeeded in his claim based on the first lease, but failed (for reasons we need not pursue) in his claim based on the second lease. What is relevant for present purposes are the arguments concerning the applicability of the Act. Two difficulties had to be overcome if the plaintiff were to succeed. The first was that, in the case of the first lease, the reversion had not come to the plaintiff through the hands of the Crown as a result of confiscation of monastic land: rather this was the simple case of a grant of the reversion by the original landlord to the plaintiff. This difficulty did not arise with the second lease, but the problem was that the plaintiff was the grantee not of Henry, but of Edward.

With regard to the question whether the Act were one of general application, the defendant argued that the mischief addressed by the statute was traceable to the Dissolution of the Monasteries Act 1539, the statute by which the monastic lands had been vested in Henry. While no difficulty existed for Henry to enforce the obligations of the lessees of the land, the Act of 1539 conferred no power to enforce such obligations on grantees from Henry: hence the need for the Grantees of Reversions Act, and the remedy provided by it. The defendant argued that the legislation had no more general mischief in mind. The court, however, considered that Parliament had intended to deliver all grantees of reversions from the mischief recited in the preamble, and saw justification for its view that the Act was not limited to cases involving confiscation of monastic lands in the references in the statute to lands demised by temporal landlords as well as to cases involving religious houses.

On the point concerning the second lease, that the plaintiff was the grantee of Edward rather than Henry, the court was able to read the statute so as to include grantees of Edward within its terms. More important, however, is the view expressed that, even if this had not been the case, yet what the court called the equity of the statute required that the plaintiff should succeed. This view that the Act should be given a wide application can be seen also in other decisions.

It did not take much ingenuity to hold the Act applicable in cases where the estate passing to the grantee of the reversion was itself a leasehold estate, and the grantee was

111 (1555) 1 Plowd 164; 2 Dyer 130b.

seeking to enforce covenants in a sublease.[112] However, more of a challenge was presented by copyhold land. The trouble here was that succession took place not by the grant of the reversion by the landlord to the grantee, but by surrender of the land by the landlord to the copyhold lord and the latter's admittance of the successor in the landlord's place. Therefore, the issue was whether the successor was a grantee of the reversion for the purposes of the Act, when strictly he or she was not the grantee of the landlord at all. The court in *Glover* v *Cope*[113] held that the Act should apply to the successor in such cases.[114] According to the report by Carthew, it was

> adjudged by Holt CJ and the court that the grantee of the reversion of copyhold lands was within the intention and the equity of the statute, which is a remedial law, and of great and universal use, and absolutely necessary as well for copyholders as others.[115]

A more obvious example (not involving copyhold land) of the Act being held to apply to someone who was not a grantee from the landlord is *Sunderland Orphan Asylum* v *River Wear Commissioners*[116] in which the landlord's successor had taken the estate of the landlord by operation of statutory provisions rather than by act of the landlord.

Another situation in which the willingness of the courts to give the Act a wide application can be seen concerns leases of incorporeal hereditaments. Such leases presented a number of difficulties, one of which was whether the landlord had a reversion, so that a grantee from the landlord came within the provisions of the Act.[117] The matter was raised in *Martyn* v *Williams*,[118] the tenant arguing that on the termination of a lease of the right to extract clay, there was no reversion to the landlord in the same way as on the termination of an estate in possession of corporeal land. The court, however, saw the situations as sufficiently similar to conclude that the landlord had a reversion and the Act applied to enable his successor to enforce the covenants in the lease.[119]

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112 *Matures* v *Westwood* (1598) Cro Eliz 600 & 617; Gouldsb 175; sub nom. *Mathuris* v *Westoray* Moore KB 527; *Davy* v *Matthew* (1598) Cro Eliz 649; Moore KB 525; *Bristow & Bristowe's Case* (1610) Godb 161.

113 (1692) 1 Show KB 284; 4 Mod 80; 1 Salk 185; Carthew 205; Holt KB 159; 3 Lev 327.

114 The statute did not apply where the lessor held under a lease and surrendered the lease to the plaintiff: *Miles* v *Phillips* (no date) Moore KB 876.

115 Earlier authorities had taken the view that the statute did not apply or had left the matter unresolved: see *Beal* v *Brasier* (1612) Cro Jac 305; sub nom. *Brasier* v *Beale* Yelv 222; sub nom. *Brasier* v *Beal* 1 Brownl 149; *Swinnerton* v *Miller* (1617) Hob 177; *Platt* v *Plommer* (1622) Cro Car 24.

116 [1912] 1 Ch 191.

117 Another difficulty with such leases was whether payments to be made by the lessee were rent, the problem being that rent was reserved out of land onto which the landlord could enter and distrain. Such was not possible in the case of leases of property such as tithes, fairs, or profits *à prendre*. If payments the tenant had undertaken in such leases were merely contractual payments, the obligation to pay them would not pass to assignees of the lease. In *Jewel's Case* (1588) 5 Co Rep 3a, payments made by a tenant under a lease of a fair were considered not to amount to rent, as the fair was "but a franchise or liberty, not manurable, out of which a rent cannot be reserved". Later cases, however, made the distinction between payments undertaken by the lessee in a lease of an incorporeal hereditament being unenforceable by the remedy of distraint, yet the case being sufficiently analogous to a lease of a corporeal hereditament to enable the lessor to recover against an assignee of the lease in an action on a covenant to pay the rent. See *Tippin v Grover* (1661) Raym T 18; sub nom. *Tipping* v *Grover* 1 Keb 62; *Dean & Chapter of Windsor* v *Gover* (1670) 2 Wm Saund 296 & 302; 2 Keb 688, 727, 737 & 795; 1 Lev 308; 1 Vent 98; *Bally* v *Wells* (1769) Wilm 389; 3 Wils KB 25; *Earl of Lucan* v *Gildea* (1831) 2 Hud & Br 635; *Earl of Egremont* v *Keene* (1837) 2 Jon 307; *Earl of Portmore* v *Bunn* (1823) 1 B & C 694.

118 (1857) 1 H & N 817. See also *Coxe* v *Warwick* (1661) 1 Keb 42: "As on lease of a fair reserving rent, debt lieth, and yet no reversion but only a contract."

119 See also *Hooper* v *Clarke* (1867) 2 Ch 674; *Lord Hastings* v *North Eastern Railway Co* [1898] 2 Ch 674 (HC); [1899] 1 Ch 656 (CA); [1900] AC 260 (HL).

Finally, this willingness to apply the Act can be seen also in cases in which the Act was held applicable though the successor to the landlord did not possess the same estate as the original landlord. So those who had taken from the landlord a lesser estate than that held by the landlord, such as lessees of the reversion, were held to be able to rely on the provisions of the Act.[120] Equally, those who took a life estate in the reversion could benefit from the legislation.[121] The most interesting application of the Act, however, is in the case of land held in settlement, the lease being made by the tenant for life. On the death of the landlord, the remainderman would of course be entitled to the land, but the question was whether he could rely on the provisions of the Act to enforce the covenants in the lease. The argument that he could not was that the remainderman was not the grantee of the tenant for life. In *Isherwood* v *Oldknow*,[122] however, the court was prepared to consider the lease as having been created by the settlor for the purpose of allowing the remainderman, as the grantee of the settlor, to enforce the covenants.[123]

The operation of the statute

The Grantees of Reversions Act and the Statute of Reversions enabled grantees of reversions to sue in actions of covenant and to re-enter for breach of covenant though they were not party to the covenant. The absence of privity of contract between the plaintiff and defendant was, in other words, cured by the provisions of the statutes. In *Ashurst* v *Mingay*,[124] the effect of the Grantees of Reversions Act on a grantee was said in argument to be "as much as if he had been party to the deed". In *Isherwood* v *Oldknow*,[125] Lord Ellenborough CJ said that "the statute makes them [grantees of the reversion] privies to the covenants made with the original grantors".[126] In *Webb* v *Russell*,[127] the position was described thus by counsel in a passage cited with approval in *Bickford* v *Parson*:[128]

> There are three relations at common law, which may exist between the lessor and the lessee, and their respective assignees. First, privity of contract, which is created by the contract itself, and subsists forever between the lessor and lessee. Secondly, privity of estate, which subsists between the lessee, or his assignees in possession of the estate, and the assignees of the reversion. And thirdly, privity of contract and estate, which both exist where the term and reversion remain in the original covenantors. The statute 32 H. 8, c. 34, seems to have created a fourth relation, a privity of contract in respect of the estate, as between the assignees of the reversion and the lessees or their assignees. The statute *annexes, or rather creates, a privity of contract between those who have privity of estate* . . .[129]

120 *Leonard's Case*, unreported, noted at 2 Bulst 282; Godb 162; 1 Rolle 81; *Attoe* v *Hemmings* (1612) 2 Bulst 281; sub nom. *Alfo* v *Henning* Owen 151; sub nom. *Athowe* v *Heming* 1 Rolle 80; *Birch* v *Wright* (1786) 1 TR 378; *Horn* v *Beard* [1912] 3 KB 181; *Cole* v *Kelly* [1920] 2 KB 106. Contrast *Smith* v *Day* (1837) 2 M & W 684.

121 *Dowse* v *Cale* (1690) 2 Vent 126; sub nom. *Douse* v *Earle* 3 Lev 264. *Mascal's Case* (1587) Moore KB 242 is also authority, the report saying the grantee had taken an estate *pur vie*, but the report by Leonard (1 Leon 62) is that the grantee took an estate *in fee*.

122 (1815) 3 M & S 382.

123 Authority for this view of the situation existed in a line of cases on the validity of leases made by tenants for life pursuant to powers in settlements, going back to *Whitlock's Case* (1609) 8 Co Rep 69b. See also *Berry* v *White* (1662) Bridg O 81; *Hotley* v *Scot* (no date) Lofft 317; *Greenaway* v *Hart* (1854) 14 CB 340; *Yellowly* v *Gower* (1855) 11 Ex 274; *Bath* v *Bowles* (1906) 93 LT 801.

124 (1680) 2 Show KB 133.

125 (1815) 3 M & S 382.

126 (Ibid., at 395.

127 (1789) 3 TR 393.

128 (1848) 5 CB 920 at 929.

129 (1789) 3 TR 393 at 394, emphasis added.

Thursby v *Plant*[130] shows the effect of the Grantees of Reversions Act in creating the relation last described. The question in the case was whether the plaintiff's action of covenant for non-payment of rent had been laid in the wrong county. The covenant on which the action was based was contained in a lease by the plaintiff's predecessor in title of land in Lincolnshire. However, the action was laid in London, where the lease had been made. A series of decisions[131] had established that had the plaintiff brought an action of debt for the rent owed to him, the action would have been local, that is to say, the plaintiff would have had to lay the action in the county where the land was situated, as the plaintiff was not party to the contract and the action was not therefore based on privity of contract.[132] In *Thursby* v *Plant*, the defendant argued that the same was the case in an action of covenant. In reaching its decision that the action had not been mislaid,[133] the court held, firstly, that the plaintiff's right to bring the action arose by reason of the Act and, secondly, that the statute put the plaintiff in exactly the same position so far as the covenant was concerned as the lessor had been. The statement in Saunders' report[134] that the Act transferred the privity of contract was repeated in later decisions.[135]

Elsewhere, it is said that the effect of the Act was to put grantees of the reversion in the same situation and give them the same remedy against lessees as the heirs at law of the lessor had before the statute.[136]

Future breaches

The English and Irish enactments enabled grantees of the reversion to sue on covenants in the lease. Where the tenant breached his or her obligation after the grant of the reversion, the grantee could now bring an action on the covenant. The position of the grantor after the grant remained to be considered. It appears from *Bickford* v *Parson*[137] that where the Grantees of Reversions Act did not apply, the grantor could bring an action on the promises made to him by the tenant, notwithstanding the grant of the reversion, on the basis that the privity of contract enjoyed by the grantor as covenantee remained.[138] If the

130 (1669) 1 Lev 259; 2 Keb 492; 1 Sid 401; 1 Wm Saund 230 & 237; sub nom. *Thursby* v *Plank* 2 Keb 448; sub nom. *Nurstie* v *Hall* 1 Vent 10.

131 *Buskin* v *Edmunds* (1595) Cro Eliz 636; *Trahearne* v *Cleabrooke* (1619) Jones W 43; sub nom. *Trea* v *Cleabrooke* 2 Rolle 382; sub nom. *Treherne* v *Cleybrooke* Hutton 68; *Smith* v *Wayt* (no date) Latch 197; *Bord* v *Culmore* (1625) Cro Car 183; see also *Keyly* v *Bulkley* (1667) 2 Keb 260; *Thrale* v *Cornwall* (1747) 1 Wils KB 165. The problem of actions having been mislaid was eventually solved by statute: see *Mayor etc of London* v *Cole* (1798) 7 TR 583. The relevant Irish legislation is the Arrest of Judgment Act (Ireland) 1665.

132 Had the action been by the lessor rather than his successor, no such difficulty would have arisen, the privity of contract enabling the lessor to bring an action where he chose: see *Wey* v *Rally* (1704) 6 Mod 194; sub nom. *Wey* v *Yalley* Holt KB 705; *Stevenson* v *Lambard* (1802) 2 East 575.

133 Saunders' report records that a writ of error was brought against the decision and the judges in the Exchequer Chamber were divided: no decision was necessary, however, as the parties settled the action. In *Creswick* v *Saunders* (1682) 2 Show KB 200, the court purports to follow *Thursby* v *Plant* but reaches a decision contrary to it.

134 1 Wm Saund 237 at 241.

135 See *Barker* v *Damer* (1690) Carthew 182; 1 Salk 80; sub nom. *Barker* v *Dormer* 1 Show KB 191. The report of the case at 3 Mod 336 has the court of the view that the statute *did not* transfer the privity of contract. For other statements that it did, see *Midgley* v *Lovelace* (1693) Carthew 289; Holt KB 74; sub nom. *Midgleys* v *Lovelace* 12 Mod 45; *Isherwood* v *Oldknow* (1815) 3 M & S 382; *Mayor etc of Swansea* v *Thomas* (1882) LR 10 QBD 48.

136 *Webb* v *Russell* (1789) 3 TR 393.

137 (1848) 5 CB 920.

138 Ibid. at 932 per Maule J: "As to the plaintiff being entitled to maintain this action, notwithstanding that he may have parted with his interest, by assigning the reversion, I do not think that there can be any doubt. The demise not being by deed, the right to sue is not transferred by the assignee of the reversion by force of the statute 32 H. 8, c. 34. If not transferred, how is it extinguished?"

effect of the Act was to *transfer* the privity of contract, it would seem to follow that the grantor would have no power to sue for breaches of covenant following the grant. In *Beely* v *Parry*,[139] however, the argument was made that the provisions of the Act operated to allow a grantee of the reversion to sue on covenants in the lease, but did not operate by passing the covenants themselves, with the result that the grantor remained able after the grant to sue for breach of covenant, albeit that it was accepted that the tenant could not be liable twice. The court was able to dispose of the case without determining whether the argument was valid. The argument was made again, this time on the effect of the Statute of Reversions, in *Conran* v *Pedder*,[140] but this case too was decided on a different point. The effect of the English provisions on the grantor's position was, however, determined in *Harper* v *Burgh*,[141] where the question was whether the tenant could defend an action of covenant for rent brought by the grantee of the reversion by relying on a release of the covenant by the grantor made after the reversion had been transferred. The court held that he could not, the covenant having run with the reversion.

Past breaches

For breaches that had taken place *before* the grant of the reversion, the question whether the effect of the Statute of Reversions was to pass the right to sue to the grantee of the reversion or left the grantor able to sue is one of some difficulty. While Luxmoore J in *Snowdon* v *Ecclesiastical Commissioners for England*[142] considered that it

> ha[d] been settled long ago that the grantee of a reversion ha[d] no action against the lessee, whether for arrears of rent due at the date of the grant or for breaches of covenant (although those covenants run with the land), committed before that date . . .

Diplock LJ in *Re King (deceased)*[143] described the law as to the rights of assignors and assignees with respect to breaches of covenant committed by tenants before the date of the assignment in respect of leases to which the Grantees of Reversions Act applied as "confused and uncertain". A review of the authorities makes it difficult to disagree with the latter view. *Lewes* v *Ridge*[144] is an early authority that the grantee of land benefited by a covenant could not sue for breaches of the covenant which took place before the grant. The case was followed in *Canham* v *Rust*[145] and in *Wedd* v *Porter*,[146] but the cases do not answer the question, since in none of them was the Act applicable. The Act was applicable in *Mascal's Case*,[147] in which a tenant sought to defend an action brought by the grantee of the reversion on a repairing covenant on the basis that the dilapidations had occurred prior to the grant. Again, however, the case does not answer the question, since the court found that the breach consisted in not effecting the repairs *after notice* to the tenant, and accordingly had taken place in the grantee's time, the grantee having given notice and repairs not having been effected thereafter.

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139 (1684) 3 Lev 154.

140 (1852) 2 ICLR 200.

141 (1678) 2 Lev 206; sub nom. *Harper* v *Bird* Jones T 102.

142 [1935] Ch 181 at 186.

143 *Re King (deceased)* [1963] 1 All ER 781 at 797.

144 (1601) Cro Eliz 863.

145 (1818) 8 Taunt 227.

146 [1916] 2 KB 91. Note, however, the comment of Upjohn LJ in *Re King (deceased)* [1963] 1 All ER 781 at 794 that *Wedd* v *Porter* was "rather difficult on the question of the respective rights of assignor and assignee of a leasehold reversion".

147 (1587) 1 Leon 63; Moore KB 242.

In *Flight* v *Bentley*,[148] the question arose in a suit in Chancery whether following an assignment of a reversion in July the assignee was able to sue for rent which had fallen due at Midsummer previously. The report records that Shadwell V-C consulted some of the judges of the Courts of Law, whose opinion it was that the assignee was unable to sue for the antecedent rent, the reason being that it "had been severed from the reversion and was a mere chose in action". Upjohn LJ protested against this reasoning, in *Re King (deceased)*,[149] saying that rather than the right to sue being severed from the covenant, it remained part of it. *Flight* v *Bentley* was considered by Upjohn LJ to be not very satisfactory, but was seen as no longer representing the law, because of later statutory provisions.[150] The same view was taken in *London and County (A&D) Ltd* v *Wilfred Sportsman Ltd*.[151] Lord Denning MR, on the other hand, in *Re King (deceased)* thought the case still good law notwithstanding the later legislation. In his view, there was a distinction between breaches which caused damage exclusively to the person who owned the reversion at the time, and breaches which caused damage not only to that person but to a grantee of the reversion from him. For breaches falling into the first category, only the original reversioner could sue; for breaches falling into the latter category an action lay only for the grantee of the reversion. Failure to pay rent was an example of a breach falling into the first category, so explaining the decision in *Flight* v *Bentley*. Breaches of repairing covenants and covenants to reinstate were examples of breaches which caused damage to both reversioner at the time and any grantee, and accordingly fell into the latter category.

Finally, so far as an action for damages is concerned, in *Johnston* v *Churchwardens etc of the Parish of St Peter, Hereford*,[152] the court considered the appropriate means of dealing with breaches before the grant of the reversion to be that the grantor should sue.[153] If because of the breach he had received less in consideration from the grantee than he would otherwise have done, the grantor would be entitled to the monies recovered for himself. If he had received full value, the grantor would sue effectively as trustee for the grantee.

A breach of covenant might give rise not only to an action for damages, but, if the lease contained a right for the landlord to re-enter for breach of covenant, the breach could lead to forfeiture of the lease. However, just as a new landlord was unable to bring an action for damages for a breach of covenant which took place before the transfer of the reversion, so too was the new landlord unable to exercise a right of re-entry for such a breach.[154] The situation differed for the lessee, however, in that while the lessee remained liable to be sued for damages by the person who was landlord at the time of the breach,[155]

148 (1835) 7 Sim 149.

149 [1963] 1 All ER 781 at 792.

150 Conveyancing and Law of Property Act 1881, s. 10; Law of Property Act 1925, s. 141.

151 [1971] Ch 764.

152 (1836) 4 Ad & E 520.

153 In *Midgley* v *Lovelace* (1693) Carthew 289; Holt KB 74; sub nom. *Midgleys* v *Lovelace* 12 Mod 45, grantees of a reversion were able to sue in an action of covenant for rent notwithstanding that they had by the time the action was brought in turn transferred the reversion to someone else. *Anon* Skin 367 seems to be the same case.

154 See *Cohen* v *Tannar* [1900] 2 QB 609. Contrast *Rickett* v *Green* [1910] 1 KB 253, where a successor in title to a lessor was able to recover possession based on half a year's rent being due, although part of the rent was due before the transfer of the reversion. The inability of a new landlord to exercise a right of re-entry for a breach which took place before the transfer of the reversion was not remedied by s. 6 of the Real Property Act 1845: *Hunt* v *Bishop* (1853) 8 Ex 675; *Hunt* v *Remnant* (1854) 9 Ex 635.

155 See *Dale* v *Hatley Chase Corpn* [1920] 2 KB 282 at 297 per Scrutton LJ: "It appears to be clear law that where a reversioner has assigned his reversion he cannot claim any rent accruing due after completion of the assignment . . . but that in the absence of special agreement he can claim rent which accrued due before the assignment."

the transfer of the reversion meant that that person was no longer able to exercise any right of re-entry the lease contained.[156] Eventually, Parliament addressed the position of the new landlord, enacting provisions enabling the new landlord to exercise a right of re-entry where the breach had taken place before the transfer of the reversion, so long as the breach had not been waived.[157]

LIMITATIONS

While the courts were liberal in their application of the Grantees of Reversions Act, there were a number of limitations on the operation of the statute which meant that a grantee of the reversion did not simply step into the shoes of the original landlord.

Requirement that lease be by deed

To begin with, if the legislation was to apply, the tenancy must have been created by deed.[158] Both the Grantees of Reversions Act and the Statute of Reversions refer to indentures of lease. If the tenancy had been created orally, or by an instrument in writing but not under seal, a grantee of the reversion could not look to the legislation for assistance to enforce promises by the tenant to the original landlord, and without the legislation the grantee was unable to enforce such promises. The weakness of the grantee's position can be seen in *Standen* v *Chrismas*,[159] where the grantee of a reversion brought an action of *assumpsit* against a tenant for breach of a promise made by the tenant to keep the property in repair. The action failed. As Lord Denman CJ put it, "it was objected, that stat. 32 H. 8, c. 34, applies only to cases of demise by deed, and that the assignee of the reversion cannot sue in assumpsit on the contract made by the assignor. We are entirely of this opinion".[160]

Ways around the problem of enforcement of obligations made by tenants where the tenancy had not been created by deed might, however, be found. First, the doctrine of *Walsh* v *Lonsdale*[161] might assist a grantee of the reversion if no lease under seal existed, but there was an agreement which was enforceable in Equity. In *Manchester Brewery Co* v *Coombs*,[162] successors in title to a landlord sought to enforce a solus tie in a lease which had been executed by the tenant, but not by the landlord. The action was successful, one ground for the decision being that specific performance would have been available to the plaintiffs to require the defendant to take a lease.[163] Secondly, the court might be able to find a *new* tenancy had been created, between the grantee of the reversion and the tenant, so that there was privity of contract between the parties and the problem addressed by the statute did not exist. This was an alternative ground for the decision in *Manchester Brewery Co* v *Coombs*,

156 *Fenn d Matthews* v *Smart* (1810) 12 East 443; *Doe d Marriott* v *Edwards* (1834) 5 B & Ad 1065; M Pawlowski, *The Forfeiture of Leases* (London: Sweet & Maxwell, 1993), p. 61.

157 Conveyancing and Law of Property Act 1911, s. 2.

158 *Buckworth* v *Simpson* (1835) 5 Tyr 344; the report at 2 CM & R 834 does not mention the point; *Cardwell* v *Lewis* (1836) 2 M & W 111; *Standen* v *Chrismas* (1847) 10 QB 135; *Bickford* v *Parson* (1848) 5 CB 920; *Rickett* v *Green* [1910] 1 KB 253; *Wedd* v *Porter* [1916] 2 KB 91; *Cole* v *Kelly* [1920] 2 KB 106.

159 (1847) 10 QB 135.

160 Ibid. at 141.

161 (1882) LR 21 Ch D 9.

162 [1901] 2 Ch 608.

163 Per Farwell J at 618: "the plaintiffs, being clearly entitled in this Court against the defendant to specific performance of the agreement under which the defendant has been for years and still is in possession of the land, can sue him on the covenants in the same manner as they could have done if [the original landlord] had already executed the original agreement". See also *Rickett* v *Green* [1910] 1 KB 253; *Purchase* v *Lichfield Brewery Co* [1915] 1 KB 184; *Blane* v *Francis* [1917] 1 KB 252.

and can be seen in a series of cases beginning with *Buckworth* v *Simpson*.[164] In it, an action of *assumpsit* was brought following the creation of a yearly tenancy by the plaintiff's guardians, the plaintiff being at that time a minor. The defendants were the executors of the tenant. The action was not based on the tenancy created by the guardians, but on a new tenancy, alleged to have arisen following the death of the tenant, between the plaintiff (now of age) and the executors. The court held that a new contract between the plaintiff and the executors could be implied, as there had been continuance of occupation and forbearance on the part of the plaintiff to serve a notice to quit. In *Cornish* v *Stubbs*,[165] *Buckworth* v *Simpson* was taken by Willes J as authority for the proposition that:

> stipulations pass to successors in the case of yearly tenancies also, when rent has been paid either by the successor of the tenant to the landlord, or by the tenant to the successor of the landlord, and received without objection – that a jury, in fact, may infer from such payment, and from the fact of notice to quit not being given, a consent to go on, on the same terms as before and a conventional law is thus made equivalent to that of Henry VIII in the case of leases under seal.[166]

In consequence, in *Cornish* v *Stubbs*, a successor in title to the landlord was held bound to give effect to a term that the tenant should have a reasonable time to clear his goods from the property after notice was given.[167]

Collateral covenants

A further limitation on the application of the Act was that it did not enable all the covenants in a lease to be enforced by a grantee of the reversion. Even if the lease had been made by deed, the Act did not put the grantee of the reversion in the same position as the original landlord so far as enforcing covenants by the tenant was concerned. The courts held that the Act enabled the grantee to sue only on covenants which touched and concerned the land.[168] For covenants which did not, the grantee had no cause of action.

Attornment

Finally, the Act did not enable a grantee of the reversion to enforce covenants if the tenant had not attorned to the grantee. In *Mallory's Case*,[169] the court held that the absence of attornment would prevent a new landlord from relying on a condition for re-entry in a lease.[170] In this regard the Act had made no difference: in speaking of a grantee of the

164 (1835) 2 CM & R 834; 5 Tyr 344.

165 (1870) LR 5 CP 334.

166 Ibid. at 339.

167 For the argument based on *Buckworth* v *Simpson* to be effective, it was essential that there be some acknowledgment or act between the landlord's successor and the tenant, from which such an agreement to go on on the same basis as between the original landlord and tenant should be capable of being inferred. If there were none, as where the landlord's successor did not acknowledge the tenant, the argument would not work: *Elliott* v *Johnson* (1866) LR 2 QB 120; *Smith* v *Eggington* (1874) LR 9 CP 145. Equally, if it was not possible for the landlord to terminate the original tenancy, no new tenancy could arise in its place, suggesting the argument would be unlikely to succeed in cases where the tenancy was for a fixed term: see *Brydges* v *Lewis* (1842) 3 QB 603; *The Marquis Camden* v *Batterbury* (1860) 7 CB (NS) 864; cf. *Standen* v *Chrismas* (1847) 10 QB 135.

168 *Spencer's Case* (1583) 5 Co Rep 16a; *Anon* (1584) Moore KB 159; *Vernon* v *Smith* (1821) 5 B & Ald 1; *Sampson* v *Easterby* (1829) 9 B & C 505; *Sparrow* v *Cooper* (1833) Hay & Jon 404; *Woodall* v *Clifton* [1905] 2 Ch 257. See also *Isteed* v *Stoneley* (1580) 1 And 82.

169 (1601) 5 Co Rep 111b; sub nom. *Pain* v *Malory* Cro Eliz 832.

170 See also *Anon* (no date) 4 Leon 34.

reversion the Act meant a complete grantee, or a grantee who had all the ceremonies and incidents required by the law. Eventually, the need for attornment was abolished.[171]

Liability of the new landlord

Hitherto we have been considering the ability of the new landlord to step into the shoes of the original landlord so far as the benefit of the lease is concerned. We need also to consider the other side of the coin, namely whether the burdens undertaken by the original landlord pass to the grantee of the reversion.

We have seen that the prevalent view was that, prior to the Grantees of Reversions Act or the Statute of Reversions, a grantee of the reversion was unable to sue on the covenants of the tenant contained in the lease. The same view was taken of the ability of the tenant to enforce against a grantee of the reversion covenants made by the original landlord.[172] Section 2 of the Statute of Reversions made provision for grantees of the reversion to be bound by such covenants. It provided that:

> all farmors, leassees and grantees of lordships, mannors, lands, tenements, rents, parsonages, tiths, portions, or any other hereditaments, for tearm of years, life or lives, their executors, administrators and assignes, shall and may have like action, advantage and remedy against all and every person and persons, and bodies politique, their heires, successors and assignes, which have or shall have any gift or grant of the King's Majesty, or of any other person or persons, of the reversion of the same mannors, lands, tenements, and other hereditaments, so letten, or any parcell thereof, for any condition, covenant or agreement contained or expressed in the indentures of their lease or leases, as the same leasses, or any of them, might and should have had against the said leassors and grantors, their heires or successors (all benefit and advantages of recoveries in value, by reason of any warranty in deed or law, by voucher or otherwise, onely excepted).

Not surprisingly, in considering the comparable provisions of the Grantees of Reversions Act, the courts applied similar rules to the original landlord who had granted the reversion as they applied to the original tenant after the assignment of the term. Thus, while the Act rendered the grantee of the reversion liable, such liability extended only to those covenants which touched and concerned the land.[173]

Severance of the reversion

Matters were more complicated if the situation was that the grantor did not transfer all the land which had been demised to the lessee, but merely part of it: where in other words the grantee acquired the reversion in part only of the land demised. The case might arise where the landlord themself remained owner of the remainder of the land not transferred to the grantee, or alternatively, where the landlord divested themself of all the land demised by the lease by conveying part of it to one grantee and part to another. Either way, the question is: what was the effect of a transfer of part of the land which was subject to the lease? The situation is usually referred to as severance of the reversion.[174] The view that the result of a transfer by the landlord of part of the land demised would be that there

171 Below, p. 285.

172 *Eccles* v *Mills* [1898] AC 360; *Muller* v *Trafford* [1901] 2 Ch 54; *Re Hunter's Lease* [1942] Ch 124.

173 *Woodall* v *Clifton* [1905] 2 Ch 257; *Re Hunter's Lease* [1942] Ch 124.

174 The term is ambiguous, however, as it is used also to describe the situation, already considered, where the landlord transfers to the grantee a different estate in all the land demised by the lease, for example, where he is an owner in fee simple subject to the lease, and then makes a lease of the reversion.

would exist two tenancies,[175] instead of the original one, was rejected by the Court of Appeal in *Jelly* v *Buckman*.[176] That being so, what was the position of the grantee of part of the land demised by the lease?

With regard to the effect of the transfer on the rent payable under the lease, an argument was advanced in *Collins* v *Harding*[177] that the result was that the rent ceased to be payable. This was rejected, Coke referring to the "great inconvenience" that would ensue were such the case, and describing an opinion to the contrary as *nihil valet*.[178] Rather, in such circumstances, the rent was apportionable, according to the respective values of the parts created by the transfer, and an action of debt would lie for each of the apportioned parts for the party entitled to it.[179] Other remedies as a result of non-payment of the rent, notably an action of covenant and termination of the lease pursuant to a condition allowing the lessor to re-enter, raise other issues.

To begin with, there was a question whether a grantee of part of the land demised by the lease was someone to whom the Grantees of Reversions Act applied, so as to be able to rely on the covenants in the lease. The question received an affirmative answer in *Twynam* v *Pickard*,[180] both in principle and by analogy with cases in which the courts had allowed a landlord to sue an assignee of part of the land demised by the lease for breach of covenant,[181] and vice versa.[182] Accordingly, in *Twynam* v *Pickard*, a grantee of part of the land demised by the lease was able to recover in an action of covenant against the lessee for failure to repair that part of the demised land which the plaintiff had acquired. The decision was relied on in *Mayor etc of Swansea* v *Thomas*,[183] in which a lessor successfully brought an action on a covenant by the lessee to pay rent, after the grant by the lessor of part of the land demised by the lease.

Twynam v *Pickard* shows also, however, that the situation was different when we come to consider the effect of a transfer of part of the land demised by the lease on the ability to rely on a condition for re-entry; and that while the Grantees of Reversions Act enabled a grantee of the reversion in part of the land to sue in an action of covenant, "that part [of the statute] . . . which applied to conditions which in their very nature are entire, is necessarily confined to the assignees of the reversion of the whole of the premises."[184] Until the statutory provisions mentioned below were enacted, the position was that such a transfer would have the effect of extinguishing the condition. In *Winter's Case*,[185] three manors had been demised at various rents, with a condition for re-entry in the event of

175 Or presumably as many as the number of separate parcels of land as had been created by the transfer.

176 [1973] 3 All ER 853. The point at issue was whether the plaintiff had lost the protection of the Rent Acts as a result of the transfer of part of the land demised to him. For similar difficulties in connection with other statutory provisions protecting tenants, see *William Skelton & Sons Ltd* v *Harrison & Pinder Ltd* [1975] 1 All ER 182; *Nevill Long & Co (Boards) Ltd* v *Firmenich & Co* (1984) 47 P & CR 59; *Persey* v *Bazley* (1983) 47 P & CR 519.

177 (1597) Moore KB 544; Cro Eliz 606 & 622; sub nom. *Collins and Harding's Case* 13 Co Rep 57.

178 13 Co Rep 57.

179 *West* v *Lassells* (1601) Cro Eliz 851; *Bac Abr* (n. 26 above), vol. VII, p. 61. On apportionment following a transfer of part of the land demised, see also *Bliss* v *Collins* (1822) 5 B & Ald 876; *Mayor etc of Swansea* v *Thomas* (1882) LR 10 QBD 48; *Mitchell* v *Mosley* [1914] 1 Ch 438; *Barnsmere Pty Ltd* v *Corpn of the Society of the Missionaries of the Sacred Heart* (unreported 17 July 1990, Tadgell J, Victoria SC).

180 (1818) 2 B & Ald 105.

181 *Congham* v *King* (1631) Cro Car 222.

182 *Palmer* v *Edwards* (1783) 1 Doug 187.

183 (1882) LR 10 QBD 48.

184 (1818) 2 B & Ald 105 at 109 per Bayley J. See also *Pain* v *Malory* (1601) Cro Eliz 832; sub nom. *Mallory's Case* 5 Co Rep 111b.

185 (1572) 3 Dyer 308b; sub nom. *Lee and Arnold's Case* 4 Leon 27.

non-payment. The lessor subsequently sold the reversion in one of the manors, and later sold the reversion in the other two, to someone who re-entered following non-payment of rent. The entry was held unlawful as, following the severance of the reversion, the condition was no longer extant. There were, however, exceptional cases, in which the transfer of part of the reversion would not extinguish the condition, as where the Crown was the transferor.[186] In *Dumpor's Case*,[187] the distinction was drawn between, on the one hand, cases where the reversion was severed by act of the parties (in which cases the condition would be extinguished) and, on the other, cases where severance was effected either by act in law or by act and wrong of the lessee (in which cases the condition would survive). *Moodie* v *Garnon*[188] and *Piggott* v *Middlesex CC*[189] are examples of survival of a condition following severance by act in law: the former involving succession of different parties to separate parcels of the land;[190] the latter involving a transfer as the result of compulsory purchase by a local authority. For Eve J in the latter case, the question of what was meant by an act in law was whether the transfer of part was voluntary or involuntary. While the transfer to the authority had been effected by a conveyance by the plaintiff, this was seen by Eve J as merely a ministerial act rather than a voluntary act, with the result that the condition survived and could be relied on notwithstanding the transfer.

Parliament addressed some of the issues raised above at the end of the period under consideration here. Section 3 of the Law of Property Amendment Act 1859 provides as follows:

> Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

It will be apparent that, while the section enables the grantee from the landlord of part of the land demised by a lease to rely on a condition in the lease, it does so only where there has been a legal apportionment of the rent. This was said by Romer LJ in *Smith* v *Kinsey*[191] to mean where the tenant had recognised the severance or the division of his tenancy.[192] The requirement of a legal apportionment, in order that conditions would be enforceable after severance of the reversion, was later abandoned for leases made after 1881.[193]

Whom to sue

We have reached the position that at common law the grantee of a reversion could, in common with the heir of a deceased landlord, bring an action of debt for rent due to the

186 *Knight's Case* (1588) 5 Co Rep 54b; Moore KB 199; 1 And 173.

187 (1603) 4 Co Rep 119b.

188 (1615) 1 Rolle 330; sub nom. *Moodie* v *Garnance* 3 Bulst 153.

189 [1909] 1 Ch 134.

190 See also *Ewer* v *Moyle* (1599) Cro Eliz 771.

191 [1936] 3 All ER 73 at 76.

192 In the absence of the tenant's acceptance of the apportionment, the apportionment would be made by a jury. A purchaser of a severed part of the reversion was not safe in accepting an apportionment made by the landlord, as the purchaser ran the risk that the tenant could later seek an apportionment by a jury. See *Bliss* v *Collins* (1819) 4 Madd 229; (1820) 1 Jac & W 426; (1822) 5 B & Ald 876.

193 Conveyancing and Law of Property Act 1881, s. 12.

grantee, or could distrain for it. Equally, if there was a covenant for payment of the rent, both the heir, at common law, and the grantee, by virtue of the Statute of Reversions, could bring an action of covenant or exercise a right of re-entry. The question now to be considered is against whom such action could be brought. The question arises, of course, only if there has been an assignment of the term by the lessee. In such a case, the plaintiff might have a choice of defendant:[194] the original lessee or the assignee in whom the term had become vested.

The original lessee

To understand the liability of an original lessee to a grantee of the reversion, after the lessee had assigned the term, we need first to understand the situation where there had been no transfer of the reversion, and the plaintiff was the original lessor.

So far as an action of debt was concerned, the law allowed the lessor to recover against the original lessee, notwithstanding an assignment of the lease by the latter, so long as the lessor had not adopted the assignee of the term as his or her tenant.[195] Unless and until that occurred, the lessor could bring an action of debt against the original lessee. The basis of the action was the privity of contract between the parties. So long as that continued, an action would lie by the lessor against the lessee.[196] It was considered unjust to the lessor that the lessee should rid themself of liability to the lessor by his or her own act of assigning the lease.[197] The same concern did not exist if the act relied on as bringing the lessee's liability to an end was an act of the lessor. Thus, if after the assignment the lessor accepted the assignee as his or her tenant, there could be no injustice to the lessor in saying the lessee's liability was at an end. If, for example, after assignment of the term the lessor accepted payment of rent from the assignee, the lessee's liability would come to an end, and any later failure by the assignee to pay the rent would give rise to an action of debt only against the assignee, not the lessee.[198] The position was conveniently summarised by Pigot CB in *Shine* v *Dillon*:[199]

> The incidents of a parol demise, so far as relates to the action of debt for rent, are precisely the same as those of a demise by deed. One of those incidents is, that an action of debt for the rent lies at the suit of the lessor against the lessee, although the lessee has assigned over all his interest in the leasehold, provided the lessor has not accepted the assignee as his tenant. Such action is so maintained against the lessee, not upon the privity of estate, but upon the privity of contract involved in the original demise of the lessor to the lessee, the lessee, by the contract of demise, contracting to render a specified rent for the lands. That

194 *Devereux* v *Barlow* (1669) 2 Wm Saund 181.

195 *Walker's Case* (1587) 3 Co Rep 22a; sub nom. *Walker* v *Harris* Moore KB 351. See also *Rushden's Case* (1532) 1 Dyer 4b. *Walker's Case* is reported to have been denied to be good law in *Marrow* v *Turpin* (1599) Cro Eliz 715; Moore KB 600; 2 And 133, though the editor's note to Croke's report suggests the report may be open to doubt.

196 See *Overton* v *Sydal* (1595) Cro Eliz 555 at 556 per Gawdy J: "the first lessee was chargeable, as well by reason of the possession as also for the privity of contract; and therefore, although he assigns over his term, yet, by reason of the privity of contract, he shall always be chargeable to the lessor for the rent, as well for that due afterwards as before"; sub nom. *Overton* v *Sydall* Popham 120; Gouldsb 120.

197 *Walker's Case* (n. 195 above)*; Humble* v *Glover* (1594) Cro Eliz 328; Gouldsb 182; sub nom. *Humble* v *Oliver* Popham 55; *Anon* 1 Brownl 56 appears to be the same case. Cf. *Wadham* v *Marlowe* (1784) 8 East 315 per Lord Mansfield CJ: "A lessee cannot by his own act, without the assent of the lessor, destroy the tenancy; and therefore, until such assent is given, the lessor may avow upon the lessee as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land."

198 See *March* v *Brace* (1613) 2 Bulst 151; *Ashurst* v *Mingay* (1680) 2 Show KB 132; Jones T 144.

199 (1867) IR 1 CL 277.

> privity of contract continues in law, notwithstanding the assignment of the lessee, until his assignee has been accepted as tenant by the lessor. When such acceptance takes place the privity of contract between the lessor and lessee is destroyed, so far as relates to an action of debt, but that action may be maintained by the lessor against the assignee upon the privity of estate created between them by the assignment.

Shine v *Dillon* shows also that the same principles applied where the action was one of debt for reasonable satisfaction for use and occupation rather than for rent.

Where the plaintiff was not the lessor, but a grantee of the reversion, the privity of contract which enabled the lessor to bring an action of debt against the original lessee after the lessee had assigned the lease was absent. Accordingly, the courts held that an action of debt would not lie for a grantee of the reversion against the lessee after the lessee had assigned the lease, though it would of course lie against the assignee.[200]

As in the case of an action of debt, an original lessee who assigned the lease remained liable to the lessor in an action of covenant.[201] The lessor's position in this form of action was stronger, however, than in an action of debt, since in an action of covenant the acceptance of rent from the assignee did not bring the liability of the original lessee to an end.[202] A grantee of the reversion would likewise be able to bring an action of covenant against the lessee after the assignment,[203] since the effect of the Statute of Reversions was to put the grantee in the same position as the lessor in this respect. Nor would it matter that the assignment of the term preceded the grant of the reversion.[204] If, however, the tenancy had not been created by deed, the grantee would not be able to rely on the statute, and without it would fail.[205]

If the covenant on which the grantee wished to bring an action was not an express covenant, but merely a covenant implied by law, the liability of the lessee for breaches taking place after he or she has assigned the lease appears to have been different. In *Brett* v *Cumberland*,[206] an action by the grantee of the reversion was brought against the executor of the lessee on a repairing covenant in the lease. The defendant pleaded an assignment of the lease by the lessee, and relied on the acceptance of rent following the assignment as precluding an action against him. The defence failed,[207] the court holding that the covenant was a covenant *en fait*, or an express covenant. The court went on, however, to say

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200 *Anon* 1 Brownl 56. The date in the report appears to be wrong, as the case seems to be *Humble* v *Glover* (1594) Cro Eliz 328; Gouldsb 182; sub nom. *Humble* v *Oliver* Popham 55.

201 Similarly, a landlord might bring *assumpsit* against the tenant on a promise to pay rent in a yearly tenancy: *Boot* v *Wilson* (1807) 8 East 111.

202 *Anon* (no date) Brook NC 18; *Fisher* v *Ameers* (1611) 1 Brownl 20; *Barnard* v *Goodscall* (1612) Cro Jac 309; *Bacheloure* v *Gage* (1630) Jones W 233; sub nom. *Bachelour* v *Gage* Cro Car 188; *Norton* v *Acklane* (1640) Cro Car 579; *Arthur* v *Vanderplank* (1734) Kel W 167; *Ludford* v *Barber* (1786) 1 TR 90; *Auriol* v *Mills* (1790) 4 TR 94.

203 *Matures* v *Westwood* (1598) Cro Eliz 600 & 617; Gouldsb 175; sub nom. *Mathuris* v *Westoray* Moore KB 527; *Brett* v *Cumberland* (1616–1618) Cro Jac 521; sub nom. *Brett & Cumberland* 2 Rolle 63; sub nom. *Sir John Bret and Cumberland's Case* Godb 276; sub nom. *Bret v Cumberland* Popham 136; Cro Jac 400; *Ashurst* v *Mingay* (1680) 2 Show KB 133; Jones T 144; *Edwards* v *Morgan* (1684) 3 Lev 229 & 233; *Parker* v *Webb* (no date) Holt KB 75; 3 Salk 5; *Jodderell* v *Cowell* (1736) Cas t Hard 343.

204 *Arlesford Trading Co Ltd* v *Servansingh* [1971] 3 All ER 113.

205 *Alcock* v *Moorhouse* (1882) LR 9 QBD 366.

206 (1616–1618) Cro Jac 521; 1 Rolle 359; sub nom. *Brett & Cumberland* 2 Rolle 63; sub nom. *Bret and Cumberland's Case* Godb 276; sub nom. *Bret v Cumberland* Popham 136; Cro Jac 400.

207 Judgment for the plaintiff is recorded in the reports by Croke and Rolle. Popham's report indicates the case was adjourned. Godbolt's report says judgment was given for the plaintiff, but later says the case was adjourned.

> otherwise it is of a covenant in land [*sic*], which is only created by the law; or of a rent, which is created by reason of the contract, and is by reason of the profits of the land, wherein none is longer chargeable with them, than the privity of the estate continue with them.

This difference between express covenants and implied covenants can also be seen elsewhere.[208] The reference to rent suggests that a covenant to pay rent may be different to other covenants. Such a view derives some support from *Whitway* v *Pinsent*[209] in which it is said that:

> if a lessee for years assigns over his term the lessor having notice thereof, and he accept the rent from the assignee, he cannot demand the rent of the lessee afterwards, yet he may sue other covenants contained in the lease against him, as for reparations or the like.

The real difference, however, appears to be between an express covenant to pay rent and a covenant implied from the words "Yielding and Paying" in the lease. In the former case, the lessee would remain liable after assignment; in the latter, the lessee would not.[210]

Executors and administrators

In considering the ability of a grantee of the reversion to recover from the executors or administrators of a deceased lessee, we need again to begin with the simpler case where the reversion remains in the original lessor. Again, we need also to distinguish between the forms of action.

In *Walker's Case*,[211] the court was of the view that, while an action of debt would lie in favour of the lessor against the lessee for rent accruing after an assignment by the lessee, the situation was different where the lessee died and it was his executors or administrators who were the defendants: the death was seen as determining the privity of contract which was sufficient to support the action against the lessee.[212] The same conclusion, that debt would not lie against executors or administrators after assignment of the lease, was reached in *Marrow* v *Turpin*,[213] and appears to be supported by *Overton* v *Sydall*.[214] There are certainly statements in the latter to this effect.[215] It was later pointed out, however, that the cases are

208 *Bacheloure* v *Gage* (1630) Jones W 223: "il est difference enter covenant en fait, & covenant en ley, car si fuit covenant en ley en apres assignment, & acceptance null action [gist?] vers le premier lessee, mes si covenant en fait autrement est, car la sur le dit covenant en fait, action tout fois gist vers le premier lessee"; sub nom. *Bachelour* v *Gage* Cro Car 188; see also the references to the covenant being express in *Edwards* v *Morgan* (1684) 3 Lev 229 & 233; *Parker* v *Webb* (no date) Holt KB 75; 3 Salk 5; *Arthur* v *Vanderplank* (1734) Kel W 168; *Joddrell* v *Cowell* (1736) Cas t Hard 343; *Ludford* v *Barber* (1786) 1 TR 90; *Auriol* v *Mills* (1790) 4 TR 94.

209 (1651) Sty 300.

210 *Anon* (1670) 1 Sid 447. Note, however, the description of the report as "a very short and incorrect note" in *Wadham* v *Marlowe* (1784) 8 East 315.

211 (1587) 3 Co Rep 22a.

212 See also *Bayliffs of Ipswich* v *Martin* (1616) 3 Bulst 211; sub nom. *Bailiffs and Commonalty of Ipswich* v *Martin* Cro Jac 411; sub nom. *Bailiffe de Ipswich* v *Martin* 1 Rolle 404.

213 (1599) Cro Eliz 715; Moore KB 600; 2 And 132.

214 (1595) Cro Eliz 555; Popham 120; Gouldsb 120.

215 (1595) Cro Eliz 555 at 556, per Gawdy J (Fenner J agreeing, Popham J dissenting): "the executor here is not chargeable by the contract, but by the privity in law, viz. that he hath the term; which being removed, the action against him faileth". Again, per Fenner J, "this charge is by reason he hath the term, and not by reason of the contract: for no doubt, if the testator himself had assigned over his term, although he himself had been chargeable for the rent during his life; yet when he dies, his executors are not chargeable for the rent due after his death".

not so straightforward.[216] In the former, there was a plea that the lessor had accepted rent from the assignee, so the conclusion was explicable on the basis that adoption of the assignee brought the original lessee's liability in debt to an end. In the latter, the action was not brought by the original lessor, something *Walker's Case* fails to point out. By the time *Coghil* v *Freelove*[217] was heard, the courts had moved to the position that

> it is now held, and with great reason, that the *privity of contract* of the testator is not determined by his death, but that his executor shall be charged with all his contracts so long as he has assets, and therefore such executor shall not discharge himself by making of an assignment, but shall still be liable for what rent shall incur after he has assigned his interest; nay, if the testator himself had assigned the term in his lifetime, yet the executor shall be charged in the *detinet*, so long as he has assets.[218]

The concluding words of the extract just quoted indicate another matter which troubled the courts in actions of debt brought against executors or administrators. Whether in such actions the writ should allege *debet*, or *detinet*, or *debet et detinet* against the defendant, was an issue for the courts on a number of occasions.[219] Eventually it became clear that executors or administrators might be sued as representatives of the deceased lessee or, if they had gone into possession, as assignees of the term.[220] In the former case, they would be liable *de bonis testatoris*; in the latter, *de bonis propriis*.

In actions of covenant too, executors and administrators could be sued either as representatives of the deceased or as assignees. If the action was on a covenant to pay rent, an assignment by the defendant before the rent accrued would preclude an action against him or her as assignee, but not as representative of the deceased lessee, for as the lessee could have been sued on the covenant to pay after the assignment, so could his or her executor or administrator.[221] Again, as in actions of debt, whether the plaintiff would be awarded judgment *de bonis testatoris* or *de bonis propriis* would be important in the plaintiff seeking execution to meet the liability.[222]

Assignees

We have seen already that the land demised was seen as debtor so far as the rent reserved by the lease is concerned, and that the lessor or a grantee of the reversion had a remedy by

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216 See *Iremonger* v *Newsam* (1627) Noy 97; Latch 260; *Heliar* v *Casebrooke* (1665) 1 Keb 923; sub nom. *Heliar* v *Caseborough* 1 Keb 839; sub nom. *Helier* v *Casebert* 1 Lev 127; sub nom. *Hellier* v *Casbard* 1 Sid 240 & 266; *Coghill* v *Freelove* (1690) 2 Vent 209; sub nom. *Coghil* v *Freelove* 3 Mod 325.

217 (1690) 3 Mod 325; sub nom. *Coghill* v *Freelove* 2 Vent 209.

218 3 Mod 326.

219 See *Overton* v *Sydall* (1595) Cro Eliz 555; Popham 120; Gouldsb 120; *Hargrave's Case* (1599) 3 Co Rep 31a; sub nom. *Body* v *Hargrave* Cro Eliz 711; sub nom. *Boddy* v *Hargrave* Moore KB 566; *Moule & Moodie* (1619) Palmer 116; *Caly* v *Joslin* (1647) Aleyn 34; *Royston* v *Cordrye* (1647) Aleyn 42; *Cormel* v *Lisset* (1649) 2 Lev 80; *Jevens* v *Harridge* (1666) 1 Wm Saund 1; *Boulton* v *Canon* (1673) 1 Freem 336; sub nom. *Bolton* v *Cannon* 1 Freem 393; 1 Ventr 271; sub nom. *Boulton and Camam* 3 Keb 189; sub nom. *Boulton and Cannam* 3 Keb 445 & 466; sub nom. *Bolton v Canham* Pollex 125; *Coghil* v *Freelove* (1690) 3 Mod 325; sub nom. *Coghill* v *Freelove* 2 Vent 209; *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12.

220 *Buck* v *Barnard* (1692) 1 Show KB 348; Holt KB 75; *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12.

221 *Jenkins* v *Hermitage* (1674) 1 Freem 377; sub nom. *Jenkins* v *Armitage* 3 Keb 367; *Tilney* v *Norris* (1698) 1 Raym Ld 553; Carthew 519; sub nom. *Tilny* v *Norris* 1 Salk 309.

222 *Castilion* v *Smith* (1619) Hutton 35; 1 Brownl 24; Hobart 283; *Collins* v *Thoroughgood* (no date) Hetley 171; sub nom. *Collins* v *Throughgood* Hobart 188; *Bridgeman* v *Lightfeet* (1623) 2 Rolle 415; sub nom. *Bridgman* v *Lightfoot* Cro Jac 671; sub nom. *Lightfoot* v *Bridgeman* Benloe 134; *Tilney* v *Norris* (1698) Carthew 519; Raym Ld 553; sub nom. *Tilny* v *Norris* 1 Salk 309.

an action of debt or by distraint for the rent. An action of debt for rent against an assignee of the lease, as the person in whom the term is vested, therefore presented no difficulties. The question whether such assignee was liable on the covenants entered into by the lessee was a different matter. The law could have taken the view that the assignee of the term should take the benefit of the lease and the burdens along with it, but it did not. Something like the view appears in *The Dean & Chapter of Windsor's Case*,[223] where the court considered that "in respect the lessee hath taken upon him to bear the charges of the reparations, the yearly rent was the less, which goes to the benefit of the assignee, & *qui sentit commodum sentiri debet & onus*". A more restrictive view prevailed, however, so that an assignee was held to be bound to perform only those covenants which "touched and concerned the land", an expression which served to distinguish some covenants from others, known as "collateral covenants", which would not bind an assignee. Whether a covenant touched and concerned the land, or was merely collateral, was a question which troubled the courts on many occasions. In *Spencer's Case*,[224] in which the distinction was drawn, a further refinement exists, between covenants relating to things *in esse* and things not *in esse*: in the former, assignees of the lease would be bound by the covenant though they were not mentioned; in the latter, they would not, unless the covenant referred to them.[225]

Assuming, however, that the covenant was one which satisfied the requirements of *Spencer's Case*, the assignee was bound to perform the obligation, so long as he of she retained the lessee's estate. If the assignee, in turn, assigned to someone else, he or she would not be liable for any subsequent breaches of covenant, and this notwithstanding that no notice of the assignment by the original assignee was given to the lessor.[226] The difference between the position of an original lessee and that of an assignee became established: the latter's liability depending on privity of estate, the former's differing by reason of the privity of contract which existed as well.

The principles in *Spencer's Case* remained the law in England until recently. In Ireland, however, measures were enacted which raise the question to what extent those principles continued to apply here. Section 6 of the Distress for Rent Act (Ireland) 1712 provided that:

> All and every person and persons who shall take any assignment of all the residue of any term for years, or life, or lives, their executors or administrators shall be liable to all the covenants whereunto the lessees, their executors and administrators, were liable by, or by virtue of the said leases.

The terms of the section seem to make assignees liable to the same extent as were the lessees. If that is what was intended, the section marks a radical departure from *Spencer's Case*. There is, unfortunately, little discussion of the section in the authorities. The provision was relied on by the court in *Earl of Clare* v *Gildea*[227] as enabling a lessor of an incorporeal hereditament to sue an assignee of the term for rent, but the case offers little assistance on the purpose and extent of the section. If the view of Gibson J in *Lyle* v *Smith*[228] is correct, however, the section was intended merely to get over the difficulties as to the venue for

223 (1595) 5 Co Rep 24a at 24b. A similar view can be found in *Buckley* v *Pirk* (1710) 1 Salk 316; 10 Mod 12. See also *Bally* v *Wells* (1769) 3 Wils KB 25; Wilm 341.

224 (1583) 5 Co Rep 16a.

225 See J S Carr, "Covenants running with the land: the *in esse* requirement" (1976) 28 *Baylor LR* 109.

226 *Pitcher* v *Tovey* (1692) 1 Show KB 340; 4 Mod 71; 12 Mod 23; 1 Salk 81; sub nom. *Richards* v *Turvy* Holt KB 73.

227 (1831) 2 Hud & Br 635.

228 [1909] 2 IR 58.

actions.[229] The provision itself was repealed by Deasy's Act, which contains terms still governing the liability of assignees. These provisions did attract attention on the effect they had on the distinctions made in *Spencer's Case*.

The original and new landlords

The Grantees of Reversions Act and the Statute of Reversions made the new landlord liable on those covenants undertaken by the original landlord which touched and concerned the land. Not surprisingly, just as the original tenant remained liable after assignment on express covenants he or she had entered into, so the original landlord was held to remain liable after the grant of the reversion on express covenants he or she had made.[230] In *Stuart* v *Joy*,[231] Cozens Hardy LJ explained that the statement in *Thursby* v *Plant* that the Grantees of Reversions Act transferred the privity of contract meant only that the assignee of the reversion was liable in the same way as at common law the assignee of the term was liable.[232] Correspondingly, the position of the lessor with respect to covenants running with the reversion was said to be precisely similar to the position of the lessee with respect to covenants running with the lease.[233]

Reform

Abolition of requirement of attornment

While restrictions on the ability of tenants to transmit their interests to a third party are common, restrictions on the ability of landlords to transfer their interests to a third party are not. As noted recently by Lord Nicholls, "[t]enants rarely, if ever, have a right to give or withhold consent to dispositions by their landlord".[234] Purchasers today of property occupied by tenants do not seek consent to the transaction from the tenants. Sales of the landlord's interest in a building in multiple occupation would be impracticable if not impossible if consent by the various tenants were needed to effect such sales. Rather, the sale takes place, and the tenants become aware that they have a new landlord when notice is received. The ability of the new landlord to recover the rent and enforce the tenant's covenants do not depend on the tenant's consent to the transfer which has taken place. The ability of the tenant to enforce covenants entered into by the landlord against the new owner is likewise independent of any consent to the transfer taking place.

In the early days, however, the situation was different. Where a transfer of the landlord's interest *inter vivos* took place,[235] the new landlord was unable to enforce the obligations of the tenant unless the latter attorned to the new landlord. The idea was that a tenant could not be compelled to perform services to someone other than that tenant's own lord.[236]

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229 [1909] 2 IR 58 at 75: "the statute of 11 Anne, c. 2, s. 4 [sic] (Irish) gives no assistance; its object was in Ireland, by transferring privity of contract, to get rid of the absurd anomaly . . . that a lessor's action against an assignee, not being within the statute of Charles 1, and resting therefore on privity of estate, was local and not transitory. The Act was an amendment of the Act of Charles 1, and should receive the construction impressed on that enactment."

230 See e.g. *Wright* v *Dean* [1948] Ch 686 (original landlord liable in damages where lessee unable to enforce covenant for renewal against grantee of reversion).

231 [1904] 1 KB 362.

232 Ibid. at 367.

233 Ibid. at 368.

234 *London Diocesan Fund* v *Phithwa* [2006] 1 All ER 127.

235 Attornment was not required where the new landlord was heir or devisee of the original landlord: above p. 254.

236 See *Blackstone's Commentaries* 18th edn (1809), vol. II, p. 288. See further, F W Maitland, "The mystery of seisin" (1896) 2 *LQR* 481 at 490–2.

Attornment signified the acceptance by the tenant of the new party as the person to whom the tenant's service would be owed. The precise effect if the tenant did not attorn[237] depended on the form in which the transfer by the original landlord had been effected.[238]

The problems caused by the need for attornment were alleviated by a number of statutory provisions. The first was the Statute of Uses, for, in the case of assurances operating under it, the grantee was said to be in by operation of law and attornment was unnecessary.[239] Early in the eighteenth century, attornment became unnecessary in other cases as well. Section 9 of Administration of Justice Act (Ireland) 1707 provided that:

> all grants or conveyances made . . . by fine or otherwise, of any manors, or rents, or of the reversion or remainder of any messuages or lands, shall be good and effectual to all intents and purposes, without any attornment of the tenants of any such manors, or of the lands out of which such rents shall be issuing, or of the tenants upon whose particular estates any such reversions or remainders shall and may be expectant or depending, as if their attornment had been had and made.

The effect of the legislation was to put the grantee of a reversion in the same position as if the tenant had attorned,[240] so the grantee could, for example, serve notice to quit without the tenant having attorned to the grantee.[241]

Having become unnecessary, attornment was later made ineffective. Section 7 of the Landlord and Tenant Act (Ireland) 1741 provided that attornment was

> absolutely null and void to all intents and purposes whatsoever; and the possession of their respective landlords or landlord, lessor or lessors, shall not be deemed or construed to be by any ways changed, altered, or affected by any such attornment or attornments.

The mischief leading to s. 7 was stated to be the practice of tenants attorning to strangers who thereupon claimed title to the lands demised, thereby putting the true owners at risk. The remedy provided was to render such attornment ineffective. There was a saving, however, for cases where attornment took place pursuant to a judgment of the court, or with the consent of the landlord.[242]

Viewing the situation from the point of the tenant, attornment served a useful purpose, in that it meant that the tenant knew he had a new landlord. Once the grant of the reversion became, as a result of the legislation, effective without attornment, the danger existed that the tenant might continue to pay rent to the original landlord after the latter had transferred the reversion, and the right to the rent, to the new landlord. For the protection of the tenant, therefore, s. 10 of the Administration of Justice Act (Ireland) 1707 provided that a tenant would have a defence to an action by the new landlord for rent, if the tenant had paid the rent to the original landlord and had not received notice of the transfer of the reversion. Such, in any case, was already the rule before the statute.[243] So the question in

237 Not surprisingly, the law was reluctant to allow tenants to refuse to attorn and thereby stultify transfers by their landlords. Various writs were available to compel tenants to attorn: see *Shep Touch* (n. 87 above), 254, 264. Legislation also provided relief: see Attornments Act (Ireland) 1542.

238 See *Birch* v *Wright* (1786) 1 TR 378; *Conran* v *Pedder* (1852) 2 ICLR 200; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

239 See Co Litt 309b & 321b; *Birch* v *Wright* (1786) 1 TR 378; *Conran* v *Pedder* (1852) 2 ICLR 200; *Scaltock* v *Harrison* (1875) LR 1 CPD 106.

240 See *Williams* v *Hayward* (1859) 1 El & El 1040; *Wedd* v *Porter* [1916] 2 KB 91.

241 *Wordsley Brewery Co* v *Halford* (1903) 90 LT 89.

242 Landlord and Tenant Act (Ireland) 1741, s. 8.

243 *Watts* v *Ognell* (1607) Cro Jac 192.

some cases was whether the lessee had or had not had notice of the transfer of the reversion.[244] That the provisions of the statute as to notice were concerned solely with protecting tenants who had paid the rent to the wrong person is evident from *Conran* v *Pedder*.[245] This was an action of covenant for rent brought by a landlord. In answer to the defendant's defence that the landlord had conveyed the reversion before the rent for which the action was brought had accrued, the landlord relied on the absence of notice to the tenant of the grant as showing the tenant was still obliged to pay the rent to him. The court dismissed the action, on the ground that the grant was effective and complete without notice, and that the provisions of the statute as to notice were intended merely to protect tenants in the circumstances mentioned.[246]

That the provisions as to notice were intended to protect tenants who had paid rent to the wrong person, but did not protect them in other circumstances, is apparent from *Scaltock* v *Harrison*.[247] Here, the grantee of a reversion successfully brought an ejectment as a result of breach of covenant by the tenant to repair. The tenant's defence, that notice of the grant of the reversion had not been given, was rejected on the ground that the tenant was bound under the covenant to repair, and the identity of the landlord did not matter. In contrast, in cases of rent, the tenant needed to know to whom the rent should be paid, to avoid the risk of paying the wrong person and having to pay again. The result was, therefore, that a new landlord would be able to succeed in an action against the tenant for breach of covenant, despite the absence of notice that the reversion had been transferred to the plaintiff, unless the action was for failure to pay rent.[248]

Apportionment of rent

We have seen already that there was no apportionment of rent as regards time at common law.[249] Where a landlord died between the days on which rent was due, the landlord's heir would be entitled to the full gale when it later became payable. The situation was similar where there was a grant of the reversion *inter vivos*. Where the grant took place otherwise than on a date on which rent was payable, the grantee would be entitled to receive on the next day rent fell due the full amount then payable, no matter that part of it was payable for a time when the grantor was landlord.[250]

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244 *Lumley* v *Hodgson* (1812) 16 East 99; *Cook* v *Guerra* (1872) LR 7 CP 132.

245 (1852) 2 ICLR 200.

246 The effect of notice was discussed also in a series of cases in which mortgagees sought to establish their entitlement to rent reserved under leases made by their mortgagors: see *Moss* v *Gallimore* (1779) 1 Doug 279; *Keech* v *Hall* (1778) 1 Doug 21; *Pope* v *Biggs* (1829) 9 B & C 245; *Rogers* v *Humphreys* (1835) 4 Ad & E 299; *Waddilove* v *Barrett* (1836) 2 Bing (NC) 538; *Evans* v *Elliot* (1838) 9 Ad & E 342; *Brown* v *Storey* (1840) 1 M & G 117; *Wyse* v *Myers* (1854) 4 ICLR 101; *Laffan* v *Maguire* (1879) 4 LR Ir 412. Cf. *De Nicholls* v *Saunders* (1870) LR 5 CP 589. Where the lease preceded the mortgage, the position was straightforward: the mortgagee was grantee of the reversion and was entitled as such to the rent. Notice ensured that the tenant should thereafter pay the rent to the mortgagee. Difficulties existed for the mortgagee, however, where the lease was made by the mortgagor after the mortgage. Here the giving of notice did not confer any right to the rent on the mortgagee, but if the notice was acted on by the lessee paying the rent to the mortgagee, this might afford evidence of a new tenancy between the mortgagee and tenant, sufficient to allow the former to recover in an action for use and occupation: *Wyse* v *Myers* (1854) 4 ICLR 101. See also *Brook* v *Biggs* (1836) 2 Bing (NC) 572; *Partington* v *Woodcock* (1837) 6 Ad & E 690; *Cook* v *Moylan* (1847) 1 Ex 67; *Trent* v *Hunt* (1853) 9 Ex 14.

247 (1875) LR 1 CPD 106.

248 Cf. *Hingen* v *Payn* (1618) Cro Jac 475; sub nom. *Ingin and Payn's Case* Godb 272; *Anon* Popham 136 which seems to be the same case: grantee of reversion successful in an action on a bond entered into by the tenant to secure performance of the tenant's obligations, including an obligation to give up possession at the end of the term; tenant's defence, that notice of the transfer of the reversion was not given, rejected.

249 Above, p. 262.

250 *Flinn* v *Calow* (1840) 1 M & G 589.

The situation changed with the Apportionment Act (Ireland) 1783. This dealt with cases where leases had been made by tenants for life who died between gale days, and with cases of leases for life where the life dropped between gale days. The Act provided that the landlord or the landlord's executors or administrators could recover a proportionate part of the rent for the period up to the death. More extensive provisions as to apportionment of rent were enacted fifty years later: s. 2 of the Apportionment Act 1834 provided that on the termination by any means of the interest of a landlord, there was to be an apportionment as between the landlord and the landlord's successor. The legislation did not enable the landlord to recover the apportioned part of the rent directly from the tenant; the rent falling due afterwards remained payable to the grantee, but the landlord was entitled to recover the apportioned part from the tenant. The provisions of the section did not, however, apply where the parties had stipulated that there would be no apportionment.[251]

The provisions of the 1783 Act and those of the 1834 legislation continued until 1860 when they were replaced by measures in Deasy's Act.

Abolition of the forms of action

A much more radical reform took place toward the end of the period we are considering. Much of the law we have been examining is dependent on the forms of action in which the cases coming before the courts were brought. Thus, apparently contradictory statements or results can be explained because, for example, the action was one of debt in one case and of covenant in another. Nowhere is this more apparent than in the cases in which actions were brought against original lessees after assignment of the lease. Acceptance of the assignee by the lessor had the effect of bringing the lessee's liability to an end so far as an action of debt was concerned, but not so far as action of covenant was concerned. Towards the end of the period we are looking at, Parliament initiated reforms which would lead to the demise of these forms of action and their replacement by a procedure which would distinguish between causes of action and the means by which actions would be brought. We have mentioned already the abolition of most of the real actions effected by the Real Property Limitation Act 1833. The previous year had seen in England legislation which had provided for simplification of the means of initiating actions.[252] It did not, however, abolish the need for the form of action to be identified in the process. This took place later, in the Common Law Procedure Acts,[253] and was completed in the Judicature Act 1873. A similar process took place in Ireland. Section 5 of the Common Law Procedure Act (Ireland) 1853 provided that:

> The special Forms of Personal Actions heretofore used shall not be necessary, and it shall be sufficient in the Summons and Plaint hereinafter mentioned to state a Cause or Ground of Action good in Substance, according to the Provisions of this Act, without framing the Statement in any particular Form, as formerly used or known, such as of Assumpsit, Account, Debt, Covenant, Detinue, Trespass, Trespass on the Case, Trover, or Replevin.

One matter we have met already which presented difficulties in the case of purchasers of reversions was also dealt with. In place of the complexities of the action being local or transitory, it was now provided by s. 62 that the action could be laid in any county which the plaintiff should think proper.

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251 S. 3. For consideration of the Acts of 1783 and 1834, see *Swan* v *Bookey* (1855) 4 ICLR 582; *Kennan* v *Brennan* (1857) 7 ICLR 268. See also *Oldershaw* v *Holt* (1840) 12 Ad & E 590; *Browne* v *Amyot* (1844) 3 Hare 173; E O Walford, "Apportionment of rent" (1951) 15 *Conv* (NS) 17.

252 Uniformity of Process Act 1832.

253 Common Law Procedure Acts 1852, 1854, 1860.

The Landlord and Tenant Law Amendment Act (Ireland) 1860

The end of the period we have been considering comes with the enactment of Deasy's Act. This measure put in place the statutory provisions which continue to govern the position of a grantee of the reversion, and which are considered in the second part of this examination of the law. For the moment, we can note that Deasy's Act repealed a number of the provisions examined in this part. The provisions for apportionment of rent were replaced. A more significant casualty was the Statute of Reversions: the extent to which the decisions on it were relevant after 1860 was a question which the courts would have to address. Matters were not helped by the enactment of the Conveyancing and Law of Property Act 1881, leading to the situation that Ireland enjoys two sets of statutory provisions dealing with the position of a new landlord.

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Reconstituting sentencing policy in the Republic of Ireland

Dr Liz Campbell

School of Law, University of Aberdeen

Introduction

The latter part of the twentieth century heralded an exponential increase in crime rates in the Republic of Ireland[1] and a concomitant burgeoning of political and popular dissatisfaction with the apparent inability of the criminal justice system to prosecute successfully and punish adequately those responsible for such criminality. To this end, alterations to all aspects of the criminal process have been implemented so as to augment the powers of the Irish state, from investigation and pre-trial procedure,[2] during the trial itself,[3] through to the post-trial setting. This article focuses on a number of statutory changes in the last context (post-trial), developments which signify a drift away from customary norms of flexibility, proportionality and judicial discretion. However, despite statutory incursions, the interpretation of these measures by the Irish judiciary, based on the existing constitutional framework, offsets the punitive and pragmatic drive of the legislature and may mitigate the potentially detrimental effects on the individual offender. Whether a gap exists between the judicial dicta in the superior courts and the application of the law in practice will be explored, as this may undermine the perspective of the courts as rights-enforcers in the face of legislative adversity.

The traditional model of sentencing in Ireland

Traditionally, there have been few formal constraints on judicial discretion in sentencing in Ireland,[4] and the system in place is described as one of the most unstructured in common law jurisdictions.[5] Sentencing decisions generally are based on a "disjointed 'instinctive

1 While an average of 10.3 homicides were committed per year in the 1950s, this had risen to 60 in 2006. An Garda Síochána, *Annual Report of An Garda Síochána 2006* (Dublin: Stationery Office, 2007), p. 20. For a compilation of Irish crime statistics see I O'Donnell, E O'Sullivan and D Healy (eds) *Crime and Punishment in Ireland, 1922 to 2003: A statistical sourcebook* (Dublin: Institute of Public Administration, 2005).

2 For example, police officers may issue their own warrants in certain instances; inferences may now be drawn from silence; silence may be penalised; and lengthy detention periods have been sanctioned for a range of serious offences.

3 Bail may now be refused on preventative grounds and non-jury trials are held if the Director of Public Prosecutions believes that the interests of justice so require.

4 T O'Malley, "Resisting the temptation of elegance: sentencing discretion reaffirmed" (1994) 4 *Irish Criminal Law Journal* 1, 3.

5 T O'Malley, *Sentencing Law and Practice* (Dublin: Round Hall Sweet & Maxwell, 2000), p. 8.

synthesis' approach",[6] in which all aspects of the offending behaviour and the offender's circumstances are considered.[7] There are no sentencing guidelines,[8] and indeed such a possibility in the context of rape trials was rejected in *People (DPP)* v *Tiernan*.[9] Benefits and disadvantages accrue from such a discretionary system: while it allows the individual circumstances of each case to be considered, potential exists for disparity between sentences, given that little firm guidance on the circumstances in which a particular sentence is warranted exists.[10] Nevertheless, some general precepts have been developed: each sentence must be formulated with the individual facts of the case in mind and must be proportionate to the gravity of the crime and the circumstances of the perpetrator. In *State (Healy)* v *Donoghue*, Henchy J emphasised that a convicted offender must receive "a sentence appropriate to his degree of guilt and his relevant personal circumstances".[11] Although the word proportionality is not mentioned explicitly, subsequent judgments have interpreted this dictum as if it is[12] and the principle of proportionality has been described as "a well-established tenet of Irish constitutional law".[13]

Legislative alterations to post-conviction policy

Significant amendments to sentencing policy and practice in Ireland have been heralded by the introduction of presumptive sentences, prosecution "appeals" against unduly lenient sentences, and a range of post-conviction orders which relate to confiscation of property and monitoring of persons. The effect of such changes is to undo conventional approaches to sentencing by limiting the discretion of judges, and to shift subtly, yet undeniably, the focus from the convicted individual to the needs of the state. However, the reception of the courts to such tactics and the constitutional framework in place has tempered the potentially dramatic consequences of these changes.

Presumptive sentences

A presumptive minimum sentence was first introduced in Ireland by the Criminal Justice Act 1999 for drug-possession with intent to supply. While a mandatory life sentence for murder was already on the statute book,[14] presumptive sentences were unprecedented. Section 4 of the 1999 Act provides that any person convicted of possessing drugs with a value of at least €13,000 with intent to supply shall receive a term of imprisonment for life or less, with ten years the minimum time to be served unless there are exceptional and specific circumstances which would make this unjust. The "exceptional circumstances" caveat permits the exercise

6 S Kilcommins, I O'Donnell, E O'Sullivan and B Vaughan, *Crime, Punishment and the Search for Order in Ireland* (Dublin: Institute of Public Administration, 2004), p. 145.

7 *R* v *Williscroft* [1975] VR 292 at 300.

8 See United States Sentencing Commission, *Guidelines Manual* (November 2006), §3E1.1. Moreover, in England and Wales the Sentencing Guidelines Council may issue guidelines under s. 170 of the Criminal Justice Act 2003.

9 *People (DPP)* v *Tiernan* [1988] IR 250.

10 T O'Malley, "Principled discretion: towards the development of a sentencing canon" (2001) 7:3 *Bar Review* 135.

11 *State (Healy)* v *Donoghue* [1976] IR 325 at 353.

12 T O'Malley, *Sentencing Law and Practice* 2nd edn (Dublin: Thomson Round Hall, 2006). See, e.g. *Cox* v *Ireland* [1992] 2 IR 503 at 524; *People (DPP)* v *M* [1994] 2 ILRM 541 at 547; *DPP* v *WC* [1994] 1 ILRM 321 at 325; *People (DPP)* v *McCormack* [2000] 4 IR 356 at 359.

13 *Rock* v *Ireland* [1997] 3 IR 484 at 500.

14 Criminal Justice Act 1990, s. 2.

of the court's discretion in certain instances, thereby insulating the provisions from constitutional challenge on the basis that the sentence imposed was disproportionate.[15]

The prescribed maximum and minimum sentences are "clear and definite guidance"[16] which should only be departed from for good reason,[17] and the "very draconian penalties" were seen to reflect the legislature's view on the gravity of such offences.[18] It has become apparent that the exceptional circumstances caveat has been applied in the majority of cases,[19] where factors such as the accused's minor role as a courier,[20] poor health,[21] psychiatric history,[22] limited intellectual capacity, the effect of remand imprisonment in a foreign country, co-operation with the police,[23] and successful progress in a drug rehabilitation programme[24] have been taken into account.[25] Nevertheless, the courts have not declined to impose a sentence above the minimum where the circumstances and severity of the offence, including the sophistication of drug dealing,[26] the amount and value of the drugs,[27] previous criminal career, and failure to cooperate with the police,[28] necessitated such a response. Notwithstanding this, the popular and political perception is that the ten-year sentence in the Criminal Justice Act 1999 is circumvented frequently by overly lenient judges[29] who are criticised for failing to act "in the spirit of the legislation".[30]

Since the 1999 Act, the presumptive sentence, a "revolutionary alteration superimposed on the conventional principles of sentencing",[31] has transfixed the Irish legislature as an apposite means of dealing with serious criminality. The Criminal Justice Act 2006 provides, inter alia, that the offender need not know the value of the drugs;[32] it extends the presumptive minimum sentence to cover drugs importation[33] and firearms offences,[34] and imposes a mandatory minimum sentence of ten years for a second drug offence.[35] In addition, the Criminal Justice Act 2007 introduces a type of "mandatory" sentence for

15 O'Malley, *Sentencing Law and Practice* (2000), p. 102.

16 *People (DPP)* v *Botha* [2004] 2 IR 375 at 384.

17 *People (DPP)* v *Heffernan*, unreported, Court of Criminal Appeal, 10 October 2002 per Hardiman J.

18 *DPP* v *Henry*, unreported, Court of Criminal Appeal, 15 May 2002.

19 Research carried out for the Department of Justice on drug supply trials from November 1999 to May 2001 indicates that, of the 55 cases studied, the presumptive minimum sentence was imposed in only three instances. P McEvoy, *Research for the Department of Justice on the Criteria applied by the Courts in Sentencing under s. 15A of the Misuse of Drugs Act 1977 (as amended)* (15 February 2005), p. 8.

20 *Botha* [2004] 2 IR 375.

21 Ibid. Also *People (DPP)* v *Vardacardis*, unreported, Court of Criminal Appeal, 20 January 2003.

22 *People (DPP)* v *Benjamin*, unreported, Court of Criminal Appeal, 14 January 2002.

23 *People (DPP)* v *Alexiou* [2003] 3 IR 513 at 523.

24 *People (DPP)* v *McGinty*, unreported, Court of Criminal Appeal, 3 April 2006.

25 Indeed, suspended sentences have been imposed, such as in *Alexiou* [2003] 3 IR 513 and *McGinty*, unreported, Court of Criminal Appeal, 3 April 2006.

26 *People (DPP)* v *Byrne* [2003] 4 IR 423.

27 *DPP* v *Long*, unreported, Court of Criminal Appeal, 7 April 2006.

28 *People (DPP)* v *Ducque*, unreported, Court of Criminal Appeal, 15 July 2005; *People (DPP)* v *McDonald*, unreported, Dublin Circuit Criminal Court, 8 June 2005.

29 "Mandatory drug offence terms rarely imposed", *Irish Times*, 7 March 2006, p. 6.

30 *Dáil Debates*, 28 November 2006, vol. 628, col. 905 per Mr Kelleher.

31 *DPP* v *Dermody*, unreported, Court of Criminal Appeal, 21 December 2006.

32 S. 82(3).

33 S. 86.

34 Criminal Justice Act 2006, ss. 42, 57–60. The exceptional circumstances caveat also applies.

35 S. 4(d).

second offences such as murder, false imprisonment,[36] firearms offences,[37] aggravated burglary,[38] and drug trafficking.[39] Nevertheless, subs. (3), which was inserted as the 2007 Bill progressed through the Irish legislature, states that such a sentence shall not be imposed where it would be disproportionate in all the circumstances of the case. This may safeguard the "two strikes" provision in the 2007 Act from challenge on the ground that it limits unduly the constitutional right to proportionality in sentencing,[40] a challenge which, if successful, would render the provision invalid.[41] This encapsulates the tension between the legislature's urge to limit proportionality and judicial discretion and the constitutional framework which compromises and mitigates this aim.

Prosecution referral of sentence

Further encroachment on courts' sentencing remit is evinced in the ability of the Director of Public Prosecutions (DPP) to refer unduly lenient sentences for review to the Court of Criminal Appeal under s. 2 of the Criminal Justice Act 1993. This measure, modelled on s. 36 of the Criminal Justice Act 1988 in England and Wales,[42] was prompted by a number of controversial cases in which the sentence handed down was deemed by political and popular opinion to be inconsistent with the gravity of the offence.[43]

As the court in *People (DPP)* v *Egan* emphasised, the DPP's power "trenches upon the general right of a convicted person to presume that the sentence he receives from the trial judge is final unless he appeals it himself";[44] thus certain criteria delineated by the courts limit this power. The DPP bears the onus of proof to demonstrate that the sentence is unduly lenient,[45] and considerable weight should be given to the reasons of the trial judge for imposing the sentence, given that the judge "receives the evidence at first hand".[46] The

36 Non-Fatal Offences Against the Person Act 1997, s. 15.

37 Firearms Acts 1925–1964.

38 Criminal Justice (Theft and Fraud Offences) Act 2001, s. 13.

39 Criminal Justice Act 1994, s. 3(1). The precursor for such a punitive measure, which impacts considerably on judicial discretion and may disregard the individual characteristics of the accused, is evident in "three strikes" provisions in American states which impose an automatic life sentence on persons convicted of a third felony. California's "three strikes" laws were upheld in *Ewing* v *California* (2003) 538 US 11, where a 5:4 majority of the Supreme Court found that a sentence of 25 years to life for the felony theft of golf clubs did not violate the US Constitution's Eighth Amendment prohibition of cruel and unusual punishment.

40 Before the Irish President signed the Bill into law on 9 May 2007, she convened a meeting of the Council of State to determine if the Bill should be referred to the Supreme Court for consideration but decided not to do so. Art. 26 of the Constitution allows a Bill to be referred to the Supreme Court to determine its compatibility with the Constitution, and, according to the terms of Art. 34.3, approval by the Supreme Court insulates that provision from future challenge. See "President McAleese signs Criminal Justice Bill into law", *Irish Times*, 10 May 2007, p. 1.

41 Art. 15.4.2.

42 S. 36 provides that if it appears to the Attorney General that the sentence of a person in a proceeding in the Crown Court is unduly lenient, and the offence is triable only on indictment, he or she may refer the case to the Court of Appeal for review of the sentence. The Court of Appeal may quash the sentence and pass such sentence as it deems appropriate.

43 The first of these cases was *People (DPP)* v *WC* [1994] 1 ILRM 321, which involved a nine-year suspended sentence for a guilty plea to a rape charge. The victim renounced her anonymity to express her belief that the sentence imposed was too lenient. See T O'Malley, "Prosecution appeals against sentence" (1993) *Irish Law Times* 121.

44 *People (DPP)* v *Egan* [2001] 2 ILRM 299 at 308, following *People (DPP)* v *Connolly*, unreported, Court of Criminal Appeal, 25 November 1996.

45 *People (DPP)* v *Byrne* [1995] 1 ILRM 279 at 287.

46 Ibid. at 287. See T O'Malley, "The first prosecution appeal against sentence" (1994) 4 *Irish Criminal Law Journal* 192.

intervention of the appeal court is warranted only if there is "a clear divergence by the court of trial from the norm . . . caused by an obvious error in principle".[47] Though the strengthening of the prosecution's power evinces a perceptible shift in the traditional balance between the state and the accused and betrays the desire of the legislature to limit judicial autonomy, the strict rules in place offset the effects on this provision on judicial discretion. Moreover, although referral appears to bear repercussions for the constitutional right against double jeopardy,[48] this line of argument was rejected by the Supreme Court in *People (DPP)* v *Heeney*,[49] following (although not citing) the majority of the US Supreme Court in *United States* v *DiFrancesco*.[50]

Ancillary post-conviction orders

A number of legislative provisions allow for post-conviction orders to be imposed, concerning property forfeiture and the monitoring of prisoners upon release.

Property may be confiscated after an individual has been convicted of certain crimes, according to the terms of the Criminal Justice Act 1994. Section 4 (as amended) requires a court to consider imposing a confiscation order where the offender has been convicted on indictment for a drug-trafficking offence and, if the court determines on the balance of probabilities that the offender has benefited from drug trafficking, it must make a confiscation order requiring the offender to pay the value of the proceeds of the criminality.[51] There is a statutory presumption that any property received by the respondent in the six years prior to conviction constitutes the proceeds of drug trafficking.[52] Similarly, s. 9 provides that a confiscation order may be made requiring a convicted person who has benefited from an offence other than drug trafficking to pay the value of the property so obtained. This is not a mandatory order, but may be imposed by the court upon application by the DPP.

A post-conviction requirement for sexual offenders in particular is contained in Pt 2 of the Sex Offenders Act 2001, which imposes a duty on a convicted sex offender to notify the Gardaí of name, address and any change thereof.[53] Akin to this, Pt 9 of the Criminal Justice Act 2006 requires police notification for persons convicted and imprisoned for drug trafficking. Such an offender must inform the police within seven days of conviction of any names or nicknames and home address,[54] after release must inform them of matters such

47 *People (DPP)* v *McCormack* [2000] 4 IR 356 at 359.

48 Art. 38.1 of the Irish Constitution.

49 *People (DPP)* v *Heeney* [2001] 1 IR 736, at 739–40.

50 *United States* v *DiFrancesco* (1980) 449 US 117.

51 In *People (DPP)* v *Gilligan*, unreported, Special Criminal Court, 22 March 2002, O'Donovan J stated that such a determination involved five matters: the cost to the plaintiff of purchasing drugs; the amount of drugs involved in the plaintiff's drug-trafficking activities; the expense of the shipment, sale and distribution of such drugs; the consideration received by the plaintiff when disposing of those drugs; and the net profit accruing to the plaintiff as a result of his drug-trafficking activities. Although the Supreme Court later held that the Special Criminal Court did not have jurisdiction to impose confiscation orders in *Gilligan* v *Special Criminal Court*, unreported, Supreme Court, 21 December 2005, para. 6.3, it is useful to see the factors that were considered by the trial court.

52 Criminal Justice Act 1994, s. 5(4)(ii). The Irish Law Reform Commission recommended the adoption of such a presumption. Law Reform Commission, *Report on the Confiscation of the Proceeds of Crime* (LRC 35-1991), p. 75. A similar provision in s. 3(2) of the Proceeds of Crime (Scotland) Act 1995 was ultimately found to be ECHR-compliant in *McIntosh, Petitioner* (2001) SC (PC) 89, while, in *R* v *Benjafield* [2003] 1 AC 1099, the House of Lords held that statutory assumptions in s. 72AA of the Criminal Justice Act 1988 and s. 4(3) of the Drug Trafficking Act 1994 were not disproportionate so as to breach Convention rights.

53 A register of convicted sex offenders was first introduced in the United States in the early 1990s. The Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act 1994 required all states in the US to implement a sex offenders' register.

54 Criminal Justice Act 2006, s. 92(1).

any change of address,[55] and of any intention to leave the state.[56] A comparable development is the inclusion of monitoring orders in s. 26(2) of the Criminal Justice Act 2007, for persons convicted of certain offences, including murder, false imprisonment,[57] firearms offences,[58] drug trafficking,[59] and organised crime offences.[60] The order, which lasts for at most seven years, requires the individual to notify in writing a police inspector of his or her address and any proposed absence from there for more than seven days. Failure to comply with either provision is an offence.[61]

These post-conviction ancillary orders potentially affect the right to proportionality in sentencing, by the imposition of an order supplementary to a term of imprisonment. However, when confiscation was challenged in *Gilligan* v *Special Criminal Court* on the basis that it constituted a de facto penalty imposed after a criminal procedure,[62] this argument was rejected by the High Court, where McCracken J stressed that the relevant section does not purport to create a criminal charge, nor does it require the court to find that the person committed any offence other than that for which he or she was convicted. The making of an order did not involve the imposition of a punishment[63] but rather sought to recover the value of the benefits gained through drug trafficking.[64] McCracken J stressed that the amount to be recovered is limited to the amount of benefit received by the defendant and also by the defendant's means, so that the defendant cannot be ordered to make a payment without the means to do so, in contrast to financial penalties imposed for criminal offences which are absolute, irrespective of the defendant's resources. Moreover, the payment of the amount benefited from drug trafficking does not absolve the individual from liability for the offence. Thus, the courts found that the confiscation order did not engage or offend the right to proportionality.

As regards the constraining of the court's discretion, s. 4 of the Criminal Justice Act 1994 (as amended) imposes a mandatory requirement on the court to consider a confiscation order for drug-trafficking offences and so seems to impinge on judicial choice. As initially enacted, s. 4 required the court to consider a confiscation order only where the DPP entered an application expressing suspicion that the accused had benefited from the sale and supply of drugs. The subsequent amendment by the 1999 Act has not been challenged nor would it be found to impinge unjustifiably on judicial independence in sentencing, following *Deaton* v *Attorney General* which permits mandatory sentences but limits any choice in determining sentence from a selection to the judiciary.[65]

Whether notification requirements affect the right to proportionality adversely is also unlikely, given extant constitutional jurisprudence. The constitutionality of Pt 2 of the 2001 Act was unsuccessfully challenged in *Enright* v *Ireland*, where Geoghegan J stressed that the registration requirement does not constitute a penalty[66] and is a proportionate measure to

55 S. 92.

56 S. 92(3) and (4).

57 Non-Fatal Offences Against the Person Act 1997, s. 15.

58 Firearms Acts 1925–1964.

59 Criminal Justice Act 1994, s. 3.

60 Criminal Justice Act 2006, ss. 71–3.

61 S. 94 and s. 25(16).

62 *Gilligan* v *Special Criminal Court*, unreported, High Court, 8 November 2002.

63 *Murphy* v *GM* [2001] 4 IR 113; *Gilligan* v *Criminal Assets Bureau* [1998] 3 IR 185.

64 *Gilligan*, unreported, High Court, 8 November 2002.

65 *Deaton* v *Attorney General* [1963] IR 170 at 182.

66 *Enright* v *Ireland* [2003] 2 IR 321 at 337. A comparable decision was reached in the context of the ECHR in *Ibbotson* v *UK* (1999) 27 EHRR (CD) 332.

protect the rights of other citizens.[67] The notification requirements in Pt 9 of the 2006 Act and Pt 2 of the Sex Offenders Act 2001 are comparable, and indeed, as Garland notes, governments are on a "war footing" with respect to drug trafficking and sex offending,[68] explaining why similar approaches are adopted in both contexts. Therefore, it seems that the imposition of notification requirements under the 2006 legislation similarly is not an additional punishment for the accused, nor does it constitute a disproportionate response to the issue of drug trafficking, given that the effects on the rights of the individual in question are minor.

Explaining the changes

Various theoretical insights are relevant in assessing these post-conviction amendments, and in unpicking the often divergent motivations of the legislature and the judiciary in Ireland. Essentially, the Irish legislature seems to be driven by a risk averse and punitive logic, which sees crime control as not only an overarching aim of but as the superior value in the criminal justice system. Conversely, while the courts sometimes acquiesce in the objectives of Parliament, in general they are motivated by contrasting norms which favour process and individual liberty over consequentialist demands of crime control.

The classic work of Herbert Packer on two models of the criminal process, the criminal control model and the due process model, is valuable in conceptualising the ideological stimuli of the judicial and legislative arms of the Irish state.[69] Whereas the former is an instrumental model which focuses on the effective control of crime, the latter emphasises the potential for abuse in the criminal justice process and therefore advocates a series of rights which protect the individual against the state. Although the due process model recognises the need for crime control, it elevates the protection of the individual so as to ensure that rights are not displaced by the desire to tackle crime[70] and, in contrast, the crime control model favours the suppression of crime and the protection of the public.[71]

Packer argued that the validating authority of the crime control model is proximately administrative and ultimately legislative whereas the due process model's validating authority is judicial.[72] And, indeed, in Ireland the crime control model represents the ideological basis for contemporary political discourse on crime, whereas due process norms provide the impetus for judicial rejection of some such tactics. The prevailing attitude in the political sphere is that the Irish justice system is unjustifiably entrenched in the due process paradigm, and pays scant regard to the imperatives of crime control. The former Minister for Justice noted "that the balance has shifted too far in favour of the accused"[73] – a sentiment echoed by senior police figures[74] – which is seen to warrant the "rebalancing" of the system.[75]

67 *Enright* [2003] 2 IR 321 at 343.

68 D Garland, *The Culture of Control: Crime and social order in contemporary society* (Oxford: OUP, 2001), p. 172.

69 H Packer, *The Limits of the Criminal Sanction* (California: Stanford University Press, 1968). See E Campbell, "Decline of due process in the Irish justice system: beyond the culture of control?" (2006) 6 *Hibernian LJ* 125.

70 Packer, *The Limits of the Criminal Sanction* (n. 69 above), p. 164.

71 Ibid., p. 158.

72 Ibid., p. 173.

73 *Dáil Debates*, 15 February 2005, vol. 597, col. 1276 per Minister for Justice, Mr McDowell.

74 President of the Association of Garda Sergeants and Inspectors, "Submission to the Joint Committee on Justice, Equality, Defence, and Women's Rights", 8 December 2003; "Garda chief warns on court 'imbalance'", *Irish Times*, 23 March 2005, p. 4.

75 Department of Justice, Equality and Law Reform, "Rebalancing Criminal Justice – Remarks by Tanaiste in Limerick" (speech), 20 October 2006; Balance in the Criminal Law Review Group (BCLRG), *Final Report of the Balance in the Criminal Law Review Group* (Dublin: Stationery Office, 15 March 2007), p. 3; and *Dáil Debates*, 15 February 2005, vol. 597, col. 1276 per Minister for Justice.

In addition to the imperative of crime control, recent legislative developments at the post-trial stage of the criminal process belie the influence of the new penology – described by Feeley and Simon as an emerging paradigm with revised discourses, objectives and techniques[76] – which focuses on probability and risk and regards offenders as aggregates rather than individuals.[77] The focus is less on the responsibility, culpability and treatment of offenders, but rather on managerial techniques to identify, categorise and organise groups according to dangerousness and risk.[78] The influence of the new penology is particularly evident in the scheme of presumptive sentences in which the legislature seeks to subsume individual characteristics to the classification of offenders into groups.[79] Moreover, like the sex offenders' register which was conceived as a "tool for risk management"[80] and a means of control,[81] the notification requirements in the 2006 Act focus on the control of released drug traffickers, rather than on rehabilitation or reform. Such an approach evinces a growing belief that particular *types* of criminal are not capable of reform, but rather retain the potential to commit further criminal behaviour and so should be continuously surveyed. Nevertheless, the approval by the courts of these tactics established their compliance with domestic human rights norms and set them beyond constitutional challenge in future.

Building on the notion of a "new penology", Garland characterised certain criminal justice measures as "adaptive responses" of the state to a perceived crisis in crime control.[82] While he proffered examples in the US and UK, including improved caseload management, systematic information-gathering, the development of a managerialist ethos and an increased stress on incapacitation, the post-conviction orders imposed in Ireland also fit into this schema, given that they provide the state with a supplementary means of dealing with criminality beyond the confines of the traditional criminal justice realm. Indeed, the judiciary has not displayed the same circumspection towards such orders, as in the context of presumptive sentences and prosecution sentence referrals, and has acquiesced in this approach to combating serious crime.

In addition to conceptualising these measures in an "adaptive" sense, they can be seen to possess a more straightforward instrumental worth. Presumptive sentences are of instrumental value in terms of incapacitation, given that they may seek to remove offenders from society for a longer period than is normally imposed by the courts. Moreover, it was argued (rather optimistically, it must be added) that the presumptive sentence in the Criminal Justice Act 1999 would "eradicate" the illegal drugs trade,[83] while the presumptive sentence for firearms offences in the 2006 Act would provide a "substantial deterrent".[84] Furthermore, the Minister for Justice in 2005 expressed his belief that the presumptive sentence for drug possession has a benefit in terms of guilty pleas and the co-operation received by the Garda Síochána from the offender in the hope of having the sentence

76 M Feeley and J Simon, "The new penology: notes on the emerging strategy of corrections and its implications" (1992) 30 *Criminology* 449; and M Feeley and J Simon, "Actuarial justice: the emerging criminal law" in D Nelken (ed.), *The Futures of Criminology* (London: Sage, 1994), p. 185.

77 Feeley and Simon, "The new penology" (n. 76 above), pp. 449–50.

78 Ibid., p. 452.

79 Ibid., p. 461.

80 C White, "Controlling sex offenders: raising critical questions about the Sex Offenders Bill 2000" (2001) *Irish Journal of Family Law* 8, 11.

81 S Walsh, "Doing justice: recent developments in sentencing and rehabilitation of sex offenders" (2002) 12 *Irish Criminal Law Journal* 6.

82 Garland, *The Culture of Control* (n. 69 above), p. 113.

83 *Dáil Debates*, 21 April 1999, vol. 503, col. 838 per Minister for Justice, Mr O'Donoghue.

84 Department of Justice, Equality and Law Reform, "Minister announces 7% decrease in provisional headline crime figures" (press release), 26 October 2004.

reduced.[85] Notification requirements and monitoring orders also fulfil practical purposes. By monitoring certain groups of offenders, the state seeks to prevent the commission of crime, or if this is not possible, to ease its task in investigation by ensuring that the police are furnished with sufficient information to track the movements of ex-convicts.

Presumptive sentences and post-conviction orders serve a symbolic end, indicating society's view of particular offences. As Garland notes, the symbolic, expressive and communicative aspects of penal sanctions seem to have become more significant in recent years, and "[t]he emotional temperature of policy-making has shifted from cool to hot".[86] As sentencing involves a public statement about an offender and an offence,[87] expressive sanctions may relieve tension and serve as a cathartic and gratifying moment of unity in the face of crime.[88] Indeed, the "unequivocal" message that the original presumptive sentence in the 1999 Act would send to criminals was emphasised in Parliament,[89] as was its capacity to demonstrate society's abhorrence of the trafficking of drugs.[90] By prescribing a minimum sentence, the legislature expresses its disapprobation of those crimes regarded as most pernicious to society.

Similarly, the enactment of a sex offender register may be viewed as a political response to mollify a fearful public, given that prior to the Bill's passing the Department of Justice conceded that the police in effect already maintained a register of all persons convicted of sexual offences.[91] The additional obligation posed on sex offenders to inform the Gardaí of a change of address is of dubious effect in preventing the perpetration of a crime. Nevertheless, the efficacy of the legislation was not questioned, politicians seemed convinced of its importance,[92] and so this statute was enacted to alleviate the fears of the public vis-à-vis predatory sex offenders. A measure such as a register is designed to reassure the public in a decisive manner, regardless of its substantive effectiveness.

The introduction of presumptive sentences and post-conviction orders demonstrates a growing emphasis on the crime rather than on the particular offender. This focus on the crime holds the potential to result in an abstract generalised judgment, which leads to bias for more punitive sentences on protective, symbolic and condemnatory grounds.[93] There is a drift away from seeing proportionality as central to sentencing and an entrenchment of scepticism towards the judiciary, encapsulated in the ability of the prosecution to refer unduly lenient sentences to an appellate court. However, various legal and attitudinal factors in place safeguard the freedom of choice of the courts in sentencing, and temper the punitive consequences for the offender.

85 Minister for Justice, "Criminal Justice Bill 2004: ministerial presentation to the Joint Committee on Justice, Equality, Defence and Women's Rights", 7 September 2005.

86 Garland, *The Culture of Control* (n. 69 above), pp. 10–11.

87 A Ashworth, *Sentencing and Public Policy* (London: Weidenfeld & Nicolson, 1983), p. 111.

88 D Garland, "The culture of high crime societies: some preconditions of recent 'law and order' policies" (2000) 40 *British Journal of Criminology* 347, 350.

89 *Dáil Debates*, 21 April 1999, vol. 503, col. 837 per Minister for Justice, Mr O'Donoghue. Also *Dáil Debates*, 1 July 1998, vol. 493, col. 883 per Minister for Justice, Mr O'Donoghue.

90 *Dáil Debates*, 21 April 1999, vol. 503, col. 787 per Minister for Justice, Mr O'Donoghue.

91 Department of Justice, Equality and Law Reform, *The Law on Sexual Offences: A discussion paper* (Dublin: Stationery Office, 1998), p. 79.

92 *Dáil Debates*, 20 Nov 2001, vol. 544, col. 836; also 3 Oct 2001, vol. 541, col. 226.

93 F Zimring, G Hawkins and S Kamin, *Punishment and Democracy: Three strikes and you're out in California* (New York: OUP, 2000), pp. 199–200.

The judicial bulwark

The constitutional structure in place in Ireland, coupled with the underlying ideology of judicial decisions, has mitigated the effects of legislative incursions on conventional approaches to sentencing. In contrast to Parliament, which seems increasingly propelled by crime control as a normative value, the High Court has stated that "the primary purpose [of the Constitution] in the field of fundamental rights is to protect them from unjust laws enacted by the legislature",[94] and by interpreting the Constitution in a way that may be characterised as rights-enforcing, the courts are pitted against more results-oriented and consequentialist politicians. This is exemplified by the comment of Denham J in the Supreme Court that "the applicant's right to due process is a right inherent in the concept of justice, which is at the core of the Constitution".[95]

Under the Irish Constitution, any legislative measure that is found to conflict with the Constitution is invalidated,[96] in contrast to the scheme in the UK where the Human Rights Act 1998 permits the courts to make merely a declaration of incompatibility.[97] Any sentencing provision which could impact on the constitutional right to proportionality runs the risk of being deemed invalid, and this is the reason for the inclusion of the "exceptional circumstances" provision in the Criminal Justice Acts 1999–2007. Therefore, while the motivating aims of the legislature (including deterrence, the conveyance of disapproval and the incapacitation of criminals) in devising such provisions have the potential to undermine the determining principle of proportionality in sentencing, the exceptional circumstances caveat has permitted the courts to circumvent the punitive intention of the legislature to a certain extent and to withstand the drift towards a crime control model of criminal justice, by ensuring that the rights and personal circumstances of the offender are adequately considered.

In addition to the concept of proportionality in sentencing, the broader notion of independence counteracts the attempts of the legislature to intervene in judicial matters. Independence in all aspects of the courts' duties is constitutionally enshrined,[98] and has been described as the most significant aspect of the separation of powers in Ireland.[99]

While the dynamic between the judiciary and the legislature is a vital element of democracy, recent years have seen increased criticism of the courts by politicians, such as when the Minister for Justice stressed to the judiciary that the exceptional and specific sentencing derogation should only be used in a "minority of cases", that the judiciary should be influenced by the "political consensus" that "[d]rugs have such a dramatic effect on the quality of life in our society, [that] a prisoner-focused sentencing policy . . . is mistaken when it goes too far",[100] that "the judicial arm of the State as well must play its part in the suppression of gangland violence".[101] Further evidence of diminishing legislative deference to the courts lies in the action of the Government Deputy Chief Whip

94 *PH* v *Murphy* [1987] IR 621.

95 *People (DPP)* v *Gilligan*, unreported, Supreme Court, 23 November 2005.

96 However, a presumption of constitutionality applies in the interpretation of legislation by the courts, and an Act will be seen as valid if it is possible to construe it in accordance with the Constitution (see *Pigs Marketing Board* v *Donnelly* [1939] IR 413; *Buckley* v *Attorney General* [1950] IR 67; *East Donegal Co-Operative Livestock Mart Ltd* v *Attorney General* [1970] IR 317).

97 S. 4.

98 Art. 35.

99 D Gwynn Morgan, *Constitutional Law of Ireland: The law of the executive, legislature, and judicature* (Dublin: Round Hall Press, 1985), p. 188.

100 *Dáil Debates*, 24 May 2006, vol. 620, col. 502 per Minister for Justice, Mr McDowell.

101 See "McDowell criticises bail law application", *Irish Times*, 15 December 2006, p. 8.

in writing to the President of the High Court about the high proportion of drug dealers "escaping" the ten-year sentence.[102]

In response, the Court of Criminal Appeal, in *DPP* v *Dermody*,[103] claimed it paid such political commentary "no attention whatever" and that the sentence has been "reasonably successful in its operation".[104] Nevertheless, the associated coolness between the judiciary and the Minister for Justice culminated in a boycott of a Christmas party held by the Department of Justice by the vast majority of senior judges,[105] indicating their distaste for political intervention in what are construed as strictly judicial issues. Although criticism of the court, or "even emphatic disagreement", has been seen as crucial in society given the right to freedom of expression,[106] this increasing political intervention cannot amount to anything more than posturing, given the constitutional rules in place.

In addition to the courts' opposition to a model of justice which favours crime control at the expense of due process, the Constitution and ingrained judicial ideologies prelude the adoption of risk-focused penologies which view offenders as aggregates. The significant number of cases in which the presumptive minimum sentence has not been imposed underlines the power of the courts to withstand actuarial rationales, by drawing on the constitutional standard of proportionality. Whereas Feeley and Simon lament the capitulation of the US courts in the actuarial approach,[107] the Irish courts seem to withstand the managerial and risk-oriented approach of the legislature.[108]

While the judiciary seems to temper the punitive legislative trend at the post-trial stage of the criminal process, in fact, there is a predilection for the use of imprisonment, in particular on behalf of the lower level courts. The numbers of prisoners on remand has been "increasing steadily":[109] while there were 322 prisoners on remand on a given day in 2000, the number in 2001 was 458, while the increase continued to 488 on a particular day in 2003 and 519 in 2006.[110] Furthermore, the number of committals to prison has risen from 10,658 committals in 2005 to 12,157 in 2006, and a considerable cohort of these comprises short sentences. In 2005, from a total of 5088 sentences, 1962 were sentences of less than three months and a further 1020 between three and six months; while, in 2006, a total of 5802 sentences included 2253 sentences of less than three months and 1220 between three and six months.[111] This substantiates O'Donnell's claim that there is "a strong orientation towards custody among Irish judges".[112] This preference for

102 "Courts pulled up for 'low' drug jail terms", *Irish Independent*, 13 November 2006.

103 *DPP* v *Dermody*, unreported, Court of Criminal Appeal, 21 December 2006.

104 See McEvoy, *Research for the Department of Justice* (n. 19 above), p. 11.

105 See "Judges boycott McDowell reception over bail comments", I*rish Times*, 22 December 2006, p. 1.

106 *State (DPP)* v *Walsh* [1981] IR 412 at 421.

107 Feeley and Simon claim that US courts have used actuarial justice in preventative detention cases (*Salerno* v *US* (1987) 481 US 739) and have sanctioned the use of profiles as a basis for detaining people. Feeley and Simon, "Actuarial justice" (n. 76 above), p. 180.

108 Feeley and Simon, "Actuarial justice" (n. 76 above), p. 180.

109 Irish Prison Service, *Report 1999 and 2000* (Dublin: Irish Prison Service, 2000), p. 10.

110 Irish Prison Service, *Annual Report 2003* (Dublin: Irish Prison Service, 2004), p. 20; Irish Prison Service, *Annual Report 2006* (Dublin: Irish Prison Service, 2007) p. 16.

111 Irish Prison Service, *Annual Report 2005* (Dublin: Irish Prison Service, 2006), p. 12; Irish Prison Service, *Annual Report 2006* (n. 110 above), p. 14.

112 I O'Donnell, "Imprisonment and penal policy in Ireland" (2004) 43 *Howard Journal* 253, 257.

imprisonment is further evidenced in the fact that almost as many individuals are imprisoned each year as are supervised in the community.[113]

Thus, characterising the judiciary as an impenetrable safeguard against legislative incursions on norms of proportionality and restraint in the imposition of punishment is unduly simplistic and neglects the punitive inclinations of some courts.

Conclusion

Alterations in the realm of sentencing in Ireland, and more generally at the post-conviction stage of the criminal process, are indicative of the shift in focus away from the interests of the individual towards the crime control-oriented needs of the state. Risk management and the control of offenders, either by incapacitative sentences or through post-conviction orders, have increased in significance. In addition, the expressive element of tactics such as presumptive minimum sentences must not be overlooked, given their ability to convey the disapprobation of policy makers and society in general. Moreover, the ability of the DPP to appeal unduly lenient sentences enhances the capabilities of the state and shifts the balance in its favour, while the imposition of confiscation orders exemplifies the adoption of novel and adaptive tactics by the state in a bid to undercut the profits accrued as a result of criminal behaviour.

Notwithstanding these considerable developments in the post-trial context, various factors ensure that the measures introduced by the legislature remain circumscribed. The judiciary's strident protection of its independence, coupled with its reluctance to provide sentencing guidelines, has allowed the flexible structure of sentencing in Ireland to be retained, thereby mitigating the more punitive tendencies of the legislature. This capacity of the judiciary to counterbalance the trend towards a crime control model of criminal justice is evident from the widespread application of the exceptional circumstances caveat to presumptive sentences. Similarly, whilst the DPP may request a review of unduly lenient sentences, the courts require the satisfaction of strict criteria before an appeal is entertained. Thus, the legislature's predilection for more punitive measures is tempered by the courts and by the enduring strength of the traditional structures and principles in place.

Increasing legislative intervention is evident in the post-trial realm, which impinges on the usual discretion accorded to judges. The growing desire of the legislature to intervene in the traditional role of the judiciary seems to be founded on a broader distrust of the judiciary, given its apparent "failure" to apply presumptive sentences,[114] and the perception that the courts are unduly lenient,[115] a perception which is demonstrably ill-founded given the sustained levels of imprisonment. However, it is evident that "potentially grave damage" could be caused to the administration of justice unless the public expectation that sentences be "coherent, rational and consistent" is met.[116] One possible means of ensuring more

113 See Comptroller and Auditor General, *The Probation and Welfare Service: Report on value for money examination* (Dublin: Government of Ireland, 2004), p. 21 and M Seymour, *Alternatives to Custody in Ireland* (Dublin: Business in the Community and the Irish Penal Reform Trust, 2006), p. 6.

114 The Minister for Justice claimed that "the people of Ireland are strongly of the view that these penalties [for drugs offences] are appropriate". Department of Justice, Equality and Law Reform, "Address by An Tanaiste to the Annual Delegate Conference of the Association of Garda Sergeants and Inspectors" (Press Release), 2 April 2007.

115 A recent police survey concluded that 82 per cent believed that the criminal justice system's treatment of offenders is too lenient, up from 74 per cent in 2002. P Kennedy and C Browne, *Garda Public Attitudes Survey 2006* (Tipperary: Garda Research Unit, 2006), p. 51. A figure of 81 per cent was also recorded in an *Irish Independent*/IMS poll of 2002. See "Crime battle is lost", *Irish Independent*, 6 May 2002.

116 *Dáil Debates*, 22 March 2007, vol. 34, col. 383 per Minister for Justice, Mr McDowell.

consistency and thereby increasing public confidence[117] without impinging unjustifiably on judicial discretion would be to devise sentencing guidelines: as a system of objective guidance for sentencing judges;[118] or by the development of "guideline judgments" by the superior courts where a number of appeals concerning the same offence would be heard together and the judgment would indicate the approximate mid-point on the scale of severity and the factors that warrant movement from this point.[119] Moreover, as Tonry has suggested, guidelines aim to achieve consistent treatment of comparable offenders and are scaled to offence severity, and therefore may in fact assist in proportionality in sentencing.[120] The imposition of sentencing guidelines rather than presumptive sentences represents an apposite way of reconciling the conflicting demands of both legislative and judicial restraint in the post-trial stage of the criminal justice system.

117 A Ashworth and M Hough, "Sentencing and the climate of opinion" (1996) *Criminal Law Review* 776, 781; Law Reform Commission, *Consultation Paper on Sentencing* (Dublin: Law Reform Commission, 1993), pp. 61–2.

118 Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* (Dublin: Courts Service, 2003), p. 20.

119 BCLRG, *Final Report* (n. 75 above), p. 227.

120 M Tonry, "Parochialism in US sentencing policy" (1999) 45 *Crime and Delinquency* 48, 59.

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The nun, the rape charge and the miscarriage of justice: the case of Nora Wall

Dr Catherine O'Sullivan

Centre for Criminal Justice and Human Rights, Faculty of Law, UCC, Ireland

1 Introduction

In 1999, Nora Wall, a former nun, was convicted of the rape and sexual assault of a 10-year old girl. The crimes for which she was convicted were alleged to have occurred in 1987–88 when Wall worked in a childcare institution (St Michael's Child Care Centre, County Waterford) run by the Sisters of Mercy. She was alleged to have held the complainant's ankles while her co-accused Paul (also known as Pablo) McCabe raped the child. She received a life sentence for the rape charge and five years' imprisonment for the sexual assault. Wall was the first woman in the history of the Irish state to be convicted of rape,[1] the first person ever to be given a life sentence for the crime,[2] and the state's first convicted female sex offender.[3] Her co-accused was sentenced to 12-years' imprisonment.

Between the determination of her guilt (10 June 1999) and the imposition of sentence (23 July 1999), it transpired that the complainant, Regina Walsh, had previously made a number of false rape allegations. On appeal, a mere four days after Wall was sentenced, the guilty verdict was overturned when it was revealed that a corroborative witness, Patricia Phelan, had testified at trial despite prior instruction by the Director of Public Prosecutions (DPP) to exclude her testimony on the grounds of unreliability. Phelan had claimed to have seen both of the alleged rapes.[4] It was also revealed that Phelan had previously made a rape allegation which was thrown out by the High Court due to lapse in time, but that the judge who heard her testimony at this hearing also questioned her credibility. In November 1999, the DPP stated that both accused were "fully and ungrudgingly" entitled to be presumed

1 By virtue of the Offences Against the Person Act 1861.

2 N Murray, "Nun the first person to get life for rape", *Irish Examiner,* 24 July 1999, p. 1.

3 C O'Keefe, "Rapist nun has jail protection", *Irish Sun*, 26 July 1999, p. 14.

4 T MacRuairi, "I saw man raping child twice: claim", *Irish Independent*, 4 June 1999. Wall and McCabe were originally charged with two counts of rape, along with various sexual assault charges. Walsh claimed that McCabe raped her when she was ten and again on the occasion of her twelfth birthday. However, they were acquitted of the second rape charge, probably because McCabe had a solid alibi for the dates in question – he was in jail – and because of inconsistency between Walsh's testimony and Phelan's. Walsh claimed that there was a two-year gap between both alleged rapes. Phelan testified that both rapes occurred within months of each other. Phelan later admitted that she made up her testimony to avenge herself on Wall who, she claimed, had physically abused her when she lived in the home. This was noted in the judgment handed down by the Court of Criminal Appeal on 16 December 2005; *DPP* v *Wall* [2005] IECCA 140, available at www.courts.ie.

innocent of all charges.[5] In December 2005, Wall successfully obtained a certificate permitting her to sue the state for a miscarriage of justice. This application was not contested by the DPP. Indeed, senior counsel for the DPP stated that a certificate should be issued.

In this paper I will examine the print media response to Wall, a (temporarily) convicted female sex offender, and examine how and to what extent it fits within the dominant narratives used to represent female criminality and the implicit construction of appropriate/natural femininity that is entailed in these narratives. I will refer to coverage given to the case by the main national tabloid and broadsheet newspapers[6] over four time periods.[7] The aim of this article is to critique stereotypical assumptions about women that underlie discussions of female deviance. These assumptions are that real women are not violent, that real women are by nature maternal and nurturing, and that real women are heterosexual and sexually unadventurous. The sum of such discourse is that criminal women are aberrations. Accordingly, female criminality is explained in the negative – how the female offender fails as a real woman. The Wall case offers a unique opportunity to examine these narratives because she fell foul of them (through her conviction for the unfeminine crimes of rape and sexual assault) and was later used to reinforce them (through the example of her appropriately feminine response once she was exonerated). In the second section of this paper, I will examine the representation of Wall as "monster" in the various newspapers up to the point of her exoneration. In the third section, I will critique her re-appraisal as "martyr", and the implicit reaffirmation of appropriately feminine ways of behaving.[8] In the final section, I will discuss the significance of the Wall case from a feminist perspective and why it is necessary to have feminist analysis in cases involving alleged female sexual abusers. I will tentatively conclude that although feminists are attuned to deconstructing the narratives of (in)appropriate femininity where an accused female offender is either castigated for her failure to adhere to dominant feminine norms or where she is given an inappropriately reduced sentence because of those norms, we are not as vigilant in cases such as Wall's where an accused female offender is found to be not guilty (albeit in a tortuous fashion in the Wall case) and those norms are subtly bolstered. As long as these narratives go unchallenged, in whatever forum or context they appear, real women will continue to find themselves entangled in and measured against the constraints of "true" femininity.

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5 This admission was issued by senior counsel Mr Vaughan Buckley: "Wall, McCabe 'entitled to be presumed innocent'", *Irish Times*, 23 November 1999, p. 4.

6 I use the word broadsheet here to cover those newspapers that engage in more in-depth coverage of the news. In recent years a number of the traditional broadsheet newspapers have converted to the tabloid (i.e. smaller page) format but have not altered their content. The daily papers I reviewed were the *Irish Times*, the *Irish Examiner*, the *Irish Independent* (broadsheets), the *Irish Star*, the *Irish Sun*, and the *Irish Mirror* (tabloids). I also examined seven national Sunday newspapers: the *Sunday Independent*, the *Sunday Tribune*, the *Sunday Business Post* (broadsheets), the *Sunday World*, the *Ireland on Sunday*, the *Sunday Mirror*, and the *News of the World* (tabloids).

7 The first stage was the months of June and July 1999. This period included the six-day trial (which started on 2 June), the verdict (issued on 10 June), the sentence (rendered on 23 July), the request for leave to appeal (the same day), and Wall's release (27 July). The second stage, November 1999, was the period during which the DPP considered whether or not to pursue any further charges against Wall or McCabe. The third stage consisted of the months of January and February 2004. During this time period, Wall decided to apply for a certificate declaring a miscarriage of justice which would allow her to seek damages against the state pursuant to s. 9(1)(a)(ii) of the Criminal Procedure Act 1993. Wall decided to proceed with this application on 4 February 2004. The final stage, November and December 2005, focuses on the Court of Criminal Appeal's decision to grant her that certificate. The decision was issued on 1 December but the judgment was not released until 16 December.

8 I should note at this point that I am not specifically interested in the religious connotations of martyrs, although religious imagery was referenced in discussion of the Wall case, but I use the term in a broader sense of appropriately feminine self-sacrifice.

2 The representation of Wall as a monster

The rape and sexual abuse of minors is generally regarded as one of the most serious crimes a person can commit in our society. It is therefore no surprise to see the (usually male) perpetrators of such offences represented as monsters in the media. The "monstrification" of Wall, however, raised some interesting questions. First, in what ways, if any, was the monstrification of Wall as a sex offender different to the generalised monstrification of ordinary female offenders? Second, why did Wall's monstrosity serve to diminish the culpability of her co-accused? In order to answer these questions I will briefly summarise the findings of feminist criminological literature in which the representation of female criminality by science, law and society has been examined. I will then determine if and how these findings apply to the Wall case.

Since the inception of criminology as a science, age-old stereotypes about appropriate femininity have underlain the various theories developed to explicate female criminality. In the late nineteenth and early twentieth centuries, scientific criminology located the problem of male and female (if considered at all) criminality in biology. The three seminal texts on female criminality – Cesare Lombroso and William Ferrero's *The Female Offender*,[9] William Thomas's *The Unadjusted Girl*[10] and Otto Pollak's *The Criminality of Women*[11] – all postulated simplistic monocausal theories of female criminality. Lombroso and Fererro argued, despite their inability to find the same atavistic markers of criminality that Lombroso had "found" on the male criminal body, that female criminality was biological in origin. They concluded that the female born-criminal was masculine, sexual, and prone to passions/hormones.[12] Thomas and Pollak moved away from the simplistic biologism of Lombroso and Ferrero's work, but they both still saw the causes of female criminality as being firmly located in female sexuality. According to Thomas, both men and women operate on a series of desires and wishes, but women's greater need for love, coupled with their inferior sense of morality, predisposes girls to use their sexuality to deceive and manipulate men in order to attain the other desires.[13] Pollak argued that women committed as many offences as men did but that the chivalry of criminal justice personnel and women's greater deviousness protected them. However, he also argued that women's faculty for criminality was sexually based. He believed that because women assumed the passive role in sexual intercourse, and because they could conceal sexual arousal, they were naturally more deceitful and were in fact criminal masterminds.[14] One of the foundational concerns at the inception of feminist

9 C Lombroso and W Ferrero, *The Female Offender* (New York: D Appleton, 1895).

10 W Thomas, *The Unadjusted Girl* (Boston: Little Brown & Co, 1923).

11 O Pollak, *The Criminality of Women* (Philadelphia: Philadelphia University Press, 1950).

12 As Brown noted in a re-appraisal of Lombroso and Ferrero's work, the female born-criminal was clearly identified as a rarity by the authors: B Brown, "Reassessing the critique of biologism" in L Gelsthorpe and A Morris (eds), *Feminist Perspectives in Criminology* (Milton Keynes: Open University Press, 1990), p. 41. However, accurate though Brown's observations are, what was said of a tiny minority of female offenders became the template for how female offenders would be constructed in future criminological discourse. See F Heidensohn, *Women and Crime* 2nd edn (Basingstoke: Macmillan 1996), p. 114.

13 Thomas identified four wishes. These are the wish for new experience, for security, for response and for recognition.

14 Despite his sexist findings, feminist authors have noted that his work was an important contribution to the understanding that social factors impact on women's criminality. He noted that women's natural deceitfulness was exacerbated by society's abhorrence of menstruation that forced them to conceal it, and by being forced to conceal their natural aggressiveness from an early age. He did not expand upon this insight. For a further discussion of this, read: H Botrich, *Fallen Women: Female crime and criminal justice in Canada* (Scarborough, Ontario: Int. Thomson Publishing, 1997), pp. 59–61; B Brown, "Women and crime: the dark figures of criminology" in N Naffine, (ed.), *Gender, Crime and Feminism* (Adlershot: Dartmouth, 1995), p. 382; and Brown, "Reassessing" (n. 12 above).

criminology in the 1970s, and the various feminist criminologies that followed in the 1980s, was that female criminality was constructed as overly sexualised/masculinised/hormonal/insane behaviour and the attendant inference was that criminal women were aberrations from an essentialist conception of "real" women.[15] If female offenders were not "real" women, they were non-women masking themselves in the female form – they were monsters. Accordingly, while the crime of paedophilia makes men monsters, law-breaking in and of itself can be sufficient to warrant the attaching of that label to women.

Although it is unusual for a woman to be accused of being a sex offender,[16] the ways in which the press tried to explicate Wall's deviance were not. The same markers that are used to explain non-sexual female criminality – specifically excessive/aberrant sexuality and masculinity – were used to explain Wall's alleged sexual deviance. Indeed, the nature of the crimes Wall was accused of – sex crimes – meant that it was very easy to represent her criminality in a sexualised and masculinised way. Because crime is primarily a male endeavour (as borne out by statistics), it has been argued that it is therefore implicitly gendered male. For this reason, the female offender must be, by default, male/masculinised. In her study of the images used to explain ordinary female criminality in British newspapers, Alison Naylor found that if the female offender's crime was not represented as being the result of her inferred masculinity, then it was presented as being the result of her defective femininity. Accordingly, her criminality is either caused by her duplicitous feminine wiles (bad) or her fragile hormonally overrun female body (mad).[17] If ordinary female criminality is masculinised, then a female offender who engages in the quintessential male offences of rape and sexual assault must be doubly so. This is not to say that female sexual offenders do not exist,[18] but that their statistical rarity makes those that do seem more aberrant. Therefore, despite the *Irish Independent*'s confidence in an article that appeared on 12 June 1999 that we now know that female sex offenders exist, it is clear that this equality in recognition did not translate into equality of column inches. The media was not interested

15 S Edwards, *Women on Trial* (Manchester: Manchester University Press, 1984); C Smart, *Women, Crime and Criminology: A feminist critique* (London: Routledge & Kegan Paul, 1976).

16 See n. 18 below and accompanying text.

17 Her madness may also be represented as one of passion or love – emotionality is an acceptable female failing: B Naylor, "Women's crime and media coverage: making explanations" in R E Dobash, R P Dobash and L Noaks (eds), *Gender and Crime* (Cardiff: Wales University Press, 1995), p. 77 at p. 81. Linked to the conception of the female body as being predisposed to madness is the notion of the female mind being predisposed to surrender to a superior (male) intellect, the Pygmalion frame: D Cameron and E Frazer, *The Lust to Kill: A feminist investigation of sexual murder* (Cambridge: Polity Press, 1987), pp. 145–6; C Bell and M Fox, "Telling stories of women who kill" (1996) 5 *SLS* 471 at 473.

18 Estimates as to the prevalence of female child molesters vary considerably. American researchers David Finkelhor and Diana Russell reviewed the American Humane Association and the National Incidence of Studies results on sexual abuse victims. They found that approximately 24 per cent of sexually abused males and 13 per cent of sexually abused females had been assaulted by women, acting either alone or with a partner: R Matthews, J K Matthews and K Speltz, "Female sexual offenders" in M Hunter (ed.), *The Sexually Abused Male: Prevalence, impact, and treatment*, vol. 1 (Lexington MA: Lexington Books, 1990), p. 275 at p. 276. One literature review estimated that in cases where a sexually abusive mother is the sole offender, she is responsible for 5 per cent of female abuse, and for 12 per cent of male abuse: J Hislop, *Female Child Molesters* (PhD Thesis, California School of Professional Psychology, 1994/Ann Arbor, Mich:UMI Dissertation Services, 1997), p. 35. Both in Canada and the UK it is estimated that women are responsible for or are involved in 10 per cent of the child sexual abuse cases: H Harrison, "Female abusers – what children and young people have told ChildLine" in M Elliott (ed.), *Female Sexual Abuse of Children: The ultimate taboo*, (Harlow: Longman, 1993), p. 98; K Jennings, "Female child molesters: a review of the literature" in ibid., p. 242.

in McCabe at all. Wall was the story.[19] Nor did this recognition of the reality of female sex offenders translate into equality of opprobrium. Female sex offenders are regarded as worse than their male counterparts, especially where children are the victims, because such offenders are seen to have offended not only against society but also against their innate maternal nature. Wall was therefore worse than McCabe because, although aberrant, male sexual predators are still within the bounds of the masculine, albeit atavistic/animalistic masculinity. Femininity cannot similarly accommodate female sexual predators.[20] The implication is that male sexual violence is almost a given; the real aberration – the person whose actions were unexpected and most in need of explanation – was Wall. This was made abundantly clear both in the cultural anxiety that the apparent exposure of a female sex offender revealed, an anxiety which culminated in the extremely unusual sentence she received, and in the deep sense of relief that followed her exoneration. The clear sub-text was that "real" women do not commit such crimes.

The gender of Wall's alleged victim also served to masculinise her by bringing her sexual orientation into question. The press was quick to label Wall a lesbian; the *Irish Star* jumped at the chance to use the word "lesbian" in a headline – "I'm no lesbian – rape charge ex-nun"[21] – when a Garda witness provided a summary of the questions they asked Wall during the course of their investigation. As a traditional marker of female deviance, lesbian sexuality is implicitly marked as aberrant, and it is a short step from aberrant sexuality to monstrous sexuality. At the most basic level, Wall's monstrous sexuality was "proved" by the allegations themselves – the sexual molestation of a child is regarded as "monstrous" whatever your sexual orientation. However, once Wall was convicted of the crimes, her monstrification was confirmed through the publication of a number of unsubstantiated allegations detailing an apparently voracious sexuality. In the second of a series of exclusive interviews given by Walsh to Barry O'Kelly of the *Irish Star* in the interim period between the rendering of the guilty verdict and the imposition of sentence, Walsh claimed to have seen Wall engage in sex with men and women, in *ménages à trois*, and claimed that Wall had a long-term sexual relationship with a 16-year old girl in her care.[22] The *Irish Times* published an article with a similar claim entitled "I discovered Sr Dominic in bed with another nun . . .".[23] The source of the claim was a former resident of St Michael's. The man in question did not accuse Wall of sexually abusing him. He claimed that she invited him to

19 Apart from the examples I will discuss below, one of the most bizarre instances of this tunnel vision was to be found in an article published in the *Ireland on Sunday*. The article discussed the need for more videotaping facilities in garda stations to protect both suspects and the police. The case was mentioned as an example of where a videotape of the confession would have been useful. In particular, the admitted failure of the garda who took McCabe's statement to take written notes during the interview. Significantly though, while McCabe was the person relevant to the article, a photo of Wall and not McCabe accompanied it: F Ryan, "Sex, notes and a lack of videotape", *Ireland on Sunday*, 13 June 1999, p. 8.

20 Keitner notes that in cases of men sentenced to death in Florida for aggravated child abuse, their behaviour is portrayed as abhorrent and unacceptable, but is not marked as sex-inappropriate or deviant: C Keitner, "Victim or vamp? Images of violent women in the criminal justice system" (2002) 11 *CJGL* 38 at n. 37.

21 T MacRuairi, *Irish Star*, 5 June 1999, p. 14.

22 B O'Kelly, "I saw nun who raped me have sex with men and even women", *Irish Star*, 15 June 1999, p. 10.

23 C Dooley, "'I discovered Sr Dominic in bed with another nun'", *Irish Times*, 24 July 1999, p. 7.

join her and the other nun.[24] Wall's newly "proved" aberrant and monstrous sexuality permitted the publication of the most criticised story printed in the aftermath of the guilty verdict.[25] The story is effectively contained in the headline: "Rape nun's abuse pact with Smyth". Father Brendan Smyth was a serial sexual abuser who sexually abused hundreds of boys and girls over a period of thirty-six years. He was moved from parish to parish and from country to country (Ireland, Northern Ireland and the USA) by his Order even though there were repeated complaints made against him. The process by which he was convicted of seventeen counts of sexual abuse in Northern Ireland and seventy-four counts in Ireland brought down a Government.[26] The *Sunday World* article was explicit in its accusation – she "secretly provided children for sick paedophile priest Father Brendan Smyth".[27] Now, not only had Wall sexually abused girls in her care and been an aider and abettor in an individual case of rape, but she had also been involved in procuring victims for the most infamous sex offender in Ireland. Wall's monstifrication, through a process of accumulated claims, was complete. Further evidence of this process of monstrification by accumulation is to be found in the *Irish Mirror*. The day following the guilty verdict, the *Irish Mirror* reported that both accused were acquitted of the second charge of rape.[28] This important detail was omitted from an article published the day after. Wall regressed from being acquitted of the second rape to "coldly watch[ing] a second rape".[29] This phrase was prefaced with the word "alleged" but that hardly captures the fact that both accused were acquitted of that charge. With a sleight of the editorial/writer's pen, Wall's acquittal on this charge is erased.

Wall was also masculinised in another more subtle way by the media coverage. She was cast as the dominant party in the alleged abuse partnership. This was facilitated by Walsh's testimony both during the trial and in the first interview Walsh gave to O'Kelly in the *Irish Star*, graphically entitled "I was raped by Sister Anti-Christ". In this interview, Walsh opined:

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24 The alleged incident occurred when he was no longer resident in St Michael's but had returned for a friend's funeral. He did, however, state that she regularly beat him and other children at the home. What is interesting about this story, apart from the fact that the Irish paper of record is engaging in sensationalistic journalism, is that the *Irish Times* was one of the few papers to refer to Wall by her given name throughout its coverage of the case once it was no longer necessary to protect the anonymity of the alleged victim. Even in this article, the paper is clear to refer to Wall as "Wall, then Sr Dominic". The choice to call her Sr Dominic in the headline therefore is quite telling. The image of two nuns in a bed is certainly far more titillating than the image of the now quite matronly looking "Wall, then Sr Dominic" in bed with another woman. It could be argued that the headline was simply a direct quote from the former resident, but as will be discussed later, how and when a paper chooses to use a direct quote in a headline can indicate other agendas. See n. 51 below and accompanying text.

25 Wall won €175,000 in damages when she sued the *Sunday World* for libel: R Dwyer, "Innocent religious should not be victims of a rush to judgement", *Irish Examiner*, 3 December 2005, p. 16.

26 In April 1993 the Royal Ulster Constabulary wanted him extradited to Northern Ireland to face charges there. They submitted a request to the Attorney General, Harry Whelehan, which was ignored for seven months. When it was finally processed, Smyth voluntarily surrendered himself to the Northern Irish authorities in January 1994. He was convicted of seventeen counts of sexual abuse. Three years later he was sentenced to 12-years' imprisonment after he pleaded guilty to seventy-four counts of child sexual abuse in Dublin. The issue came to a head when Whelehan's nomination as President of the High Court was provisionally accepted. The junior coalition partner, Labour, had originally opposed Whelehan's appointment. When Ulster television aired a documentary in October 1994 about the delay in having the Smyth extradition request processed, and suggested it was because Smyth was a religious, this gave Labour the opportunity to withdraw from its alliance with Fianna Fail and the Government collapsed. Whelehan resigned from his post as President of the High Court.

27 The source of this allegation is a man who claimed to have been sexually abused at the home, but he does not identify his alleged abuser.

28 R Weitz, "Nun and vagrant found guilty of child rape", *Irish Mirror*, 11 June 1999, p. 2. Note that this was one of the few headlines to acknowledge that there were two accused.

29 L Kelleher, "Evil rape nun hid her crimes behind smiling face of trust", *Irish Mirror,* 12 June 1999, p. 18.

"I think she manipulated him. He had a drink problem. She was very devious. She was icy cold, evil to the bone."[30] Her dominance was also indicated by the comparative lack of attention paid to McCabe by the press. On the rare occasion that an article focused on him, such as an article that appeared in the *Sunday World*, her greater evil and dominance were still emphasised. Therefore, even though the newspapers noted that McCabe was, to quote the *Sunday World*, "already a convicted pervert when Wall . . . welcomed him to the childcare centre",[31] he was still described as the "sick sidekick" of the "evil nun". Indeed, the overriding impression one obtained of McCabe from the limited media coverage given to him was that he was almost a pitiable figure. This was so despite the fact that McCabe had an extensive prior record, including one conviction for sexual assault.[32]

Not only was Wall the focus of media attention, but that attention also manifested itself in sexist ways. There was a marked difference in how the two accused were described. When he was described at all, McCabe was described by his actions and reactions. Wall was described in terms of her (lack of) emotion and her dress. Examples of the contrasting approaches taken to both co-accused were to be found in both the tabloid press and in the broadsheets. The following description appeared in the *Irish Independent*:

> The deeply tanned 50-year-old homeless man seemed unable to focus, by turns reading, sleeping, staring agitatedly around him and sometimes even coming into court drunk.
>
> Nora Wall by contrast was the picture of middleclass propriety. In conservative skirts and cardigans with her neat haircut, emotion rarely flickered across her face as the unthinkable evidence mounted up against her.[33]

The same differential emphasis in description is to be found in the *Irish Mirror*:

> Wall, dressed in a wine cardigan and cream blouse, was led out of the Court . . . behind Pablo McCabe.
>
> The homeless man, who suffers from schizophrenia, epilepsy and Parkinson's disease, hobbled out to start his 12-year sentence.[34]

It should be noted that both of these samples were printed once the accused could be named and photographed, so the need for such colour commentary, if it ever existed, no longer did.[35] Various feminist theorists have noted that the media tends to pay inordinate attention to what female offenders look like, what they wear, and whether or not they show

30 B O'Kelly, "'I was raped by Sister Anti-Christ'", *Irish Star*, 12 June 1999, pp. 1 & 4.

31 J McElgunn and D Lane, "Secret sex past of rape nun's pal", *Sunday World*, 13 June 1999, p. 2.

32 Prior to the time the alleged incidents were supposed to have occurred, McCabe had been convicted of indecent exposure and sexual assault. The *Irish Times* reported that it took ten minutes to read out his prior record on the day he was sentenced: "Former nun and male helper jailed for rape", *Irish Times*, 24 July 1999, p. 7. Moreover, following the quashing of his conviction for the rape of Regina Walsh, McCabe was convicted of the sexual assault of an adult woman in 2000 and received a three-month suspended sentence.

33 "Sister of no mercy", *Irish Independent*, 12 June 1999, p. 29.

34 L Kelleher, "Life for evil nun who held down girl, 10, while she was raped in her convent bed", *Irish Mirror*, 24 July 1999, p. 4.

35 During the trial, the press were not permitted to identify either offender in order to protect the anonymity of the alleged victim. It is arguable that during this period the press would have relied on descriptions of clothes, etc. in order to make the coverage interesting for their readers. There was, however, one amusing instance where a tabloid gamely tried to spice things up. The *Sunday World* claimed to have an exclusive and published photos of Wall and McCabe on 6 June but obscured their faces with black panels. D Lane, "The nun and her friend at the centre of child rape trial", *Sunday World*, 6 June 1999, p. 4.

their emotions.[36] One of the most interesting insights derived from feminist legal and criminological research into the representation of female offenders has been that traditional attempts to understand female criminality have been primarily attempts to distinguish good women from bad/non-women. The fear that women were not what they seemed was both the sub-text of Pollak's chivalry thesis and the reason for Lombroso's anxiety over the lack of atavistic markers on female criminals. As Alison Young notes, the goal of Lombroso's work was "to render the female offender visible, and thus containable . . .". However, his use of language betrays his fear that she is unknowable: "the female offender is described as 'seem[ing] almost' normal. Normality is a simulation, for a female offender can only ever achieve the appearance of it (her 'real' nature underlies and belies her normality)."[37] This anxiety was also evident in some of the reporting on the case, as demonstrated by this headline from the *Irish Mirror*: "Evil rape nun hid her crimes behind smiling face of trust".[38]

The press's determination to demonstrate how Wall failed to be, despite seeming to be, a good/real woman also explains the focus on her lack of remorse – her want of appropriate feminine feeling – both during and after the trial and sentencing. Various newspapers described her demeanour during the trial as "stony-faced".[39] Yet Wall was in a double-bind. She could not show remorse for an offence she claimed not to have committed and even if she had shown remorse, she was by no means guaranteed a favourable reception from the press. It has been found that in order to demonstrate her conformity to female norms, and therefore possibly be afforded a lenient sentence, a female defendant is required to be vocal in her remorse. However, her use of tears/remorse can easily backfire. She must not be seen as attempting to blackmail the judge (and/or jury). It is a careful balancing act.[40] Not only is her use of tears seen as potentially manipulative (one of the frames identified by Naylor), it can also carry the taint of evil. Naylor writes, "[n]o one likes having been conned, or having their emotions manipulated, but when it has been done by a woman, manipulating our chivalric impulses, it is especially evil".[41] There is an additional level of suspicion where female offenders are concerned because, historically, women have been associated with deceitfulness, and the performative aspect of femininity has long been acknowledged and feared.[42] Accordingly Wall was castigated both for successfully appearing to be a model citizen – "Evil rape nun hid her crimes behind smiling face of trust"[43] – and for failing to be appropriately femininely remorseful.

Interestingly, following the formal decision of the DPP not to pursue any further charges, her lack of emotion during the trial was referenced in a way which subtly criticised

36 This focus on external markers of femininity is not confined to the media. Various legal commentators have found that trials involving women often turn into character assessments, with the degree of the offender's performance of appropriate femininity being a deciding influence in determining her guilt and/or innocence. See M Fox, "Feminist perspectives on theories of punishment" in D Nicolson and L Bibbings (eds), *Feminist Perspectives on Criminal Law* (London: Cavendish, 2000), p. 49; C Keenan, "The same old story: examining women's involvement in the initial stages of the criminal justice system", in ibid., p. 29; D Nicolson, "Criminal law and feminism" in ibid., p. 1.

37 A Young, *Imagining Crime: Textual outlaws and criminal conversations* (London: Sage, 1996), p. 29.

38 Kelleher, "Evil rape nun" (n. 29 above).

39 See, e.g. C Cleary and R Costello, "Wall is first woman prisoner on protection", *Sunday Tribune*, 25 July 1999, p. 3; and McElgunn and Lane, "Secret sex past" (n. 31 above).

40 A Worrall, *Offending Women: Female lawbreakers and the criminal justice system* (London: Routledge, 1990), p. 61.

41 Naylor, "Women's crime" (n. 17 above), p. 91.

42 M Haskell, *From Reverence to Rape: The treatment of women in the movies* 2nd edn (Chicago: University of Chicago Press, 1987).

43 Headline of an article written by Kelleher (n. 29 above).

her: "[d]ressed in a green skirt and brightly coloured cardigan, she looked happier and more relaxed than the impassive figure we'd seen during the trial".[44] This imputation of blame on Wall for failing to give vent to her emotions during the trial has arisen in other cases where a woman has been wrongfully convicted. As Adrian Howe noted in the context of the Lindy Chamberlain case, when Chamberlain finally expressed her emotions in interviews following her release from jail, it "helped return her to the fold of normalcy".[45] It also, as Howe noted, "gave the media an out: she was, they said, 'her own worst enemy'".[46] Yet throughout the various condemnations of Wall for not putting her emotions on display, there was no appreciation of Wall's individuality (the fact that Wall preferred to keep her emotions in check)[47] or that women's supposed emotionality might simply be, at best, a generalisation. This inability to comprehend such alternatives was confirmed by reporting on Wall's reaction the day her sentence was quashed. The *Irish Sun* seemed confused that Wall "showed no emotion when set free".[48] The *Irish Star*, however, reassured us that she was smiling as she left the court.[49]

An additional aspect of this focus on Wall's lack of remorse was the palpable sense of distaste evident at Wall's audacity to deny the charges during her trial. Worse still, she portrayed her accuser as a liar and a fantasist. The distaste was not explicit, but it did not require much reading between the lines to decipher it. During the trial, neither accused could be named to protect the anonymity of the victim.[50] Accordingly, reporting of the proceedings was quite staid and apparently objective. Yet it was clear, even before Wall was found guilty, that the press believed Walsh and Phelan. Reading through the various media reports it became apparent that when and how direct quotes are used in headlines can convey a lot about the presumptive truthfulness of the speaker. The headline in the *Irish Independent* on 10 June 1999 was illustrative: "Nun on sex charge 'could not believe' allegations". On one level the newspaper is using quotation marks to enclose Wall's own words. On another, the implication is that those words are untrustworthy and for that reason need to be enclosed/separated from the truth with quotation marks. This is clear from previous headlines which were drawn from the testimony of the as-yet-unnamed Walsh and Phelan: "Mercy nun held girl by ankles for rapist, jury told"[51] or "I saw man raping twice: claim".[52] No quotation marks enclose these statements – they are self-evidently true. Following the guilty verdict, Wall's continued claims that she was innocent were seen as particularly damning. The *Irish Independent* was clear about this:

> [e]ven when the verdict was read out late last night, Sr Dominic didn't show any signs of remorse for her evil crime – nor did she blanch at labelling her victim a

44 A Sheehan, "Nora Wall departs with a remarkable lack of bitterness", *Irish Independent*, 23 November 1999, p. 7.

45 A Howe, "Chamberlain revisited: the case against the media" in N Naffine (ed.), *Gender, Crime and Feminism* (Aldershot: Dartmouth, 1975), p. 177 at p. 180.

46 Ibid.

47 As noted by former residents of St Michael's who had shared the same house as Walsh: "'That's just her way of controlling herself,' explains Helen. 'People can be like that,' Kathleen points out. 'She went through so much up there [in St Michael's] that I think by the time these allegations had come out it just collapsed on her.'": *Ireland on Sunday*, 1 August 1999, p. 5.

48 R Taylor and M McEntyre, "'Rape nun' walks free", *Irish Sun*, 28 July 1999, p. 2.

49 B O'Kelly, "Rape case nun walks", *Irish Star*, 28 July 1999, p. 1.

50 The victim's name was only released because she voluntarily gave interviews to the *Irish Star*. On the unexpected importance of these interviews, please see part 3, p. 317 below.

51 "Mercy nun held girl by ankles for rapist, jury told", *Irish Independent*, 3 June 1999.

52 MacRuairi, "I saw man raping child twice" (n. 4 above).

> disruptive child. "Wherever there was trouble she was sure to be there," she told the jury . . . Against bald-face denials and blackening of her character, the victim was fortunate to have a corroborating witness to the horrific abuse she suffered.[53]

The final interview Walsh gave to O' Kelly was published on 23 July 1999, the day Wall was to be sentenced. In this interview, Walsh said that the most difficult part of the case for her was when Wall denied the abuse: "It was hard seeing her lying. I had to go up there on the stand and there were people making a judgment on me."[54] The *Sunday World* castigated Wall for calling Walsh a liar saying it "further traumatised the now 21-year old".[55] Yet Walsh herself admitted under cross-examination on 5 June 1999 that she was frequently reprimanded for making up stories.[56] The words of a priest who wrote an article after Wall's conviction was quashed are apt here: "not everyone who denies an allegation is 'in denial'".[57]

Not only do the findings of feminist criminologists explain some of the images that were used to represent Wall, they also suggest why she received such an unusually severe sentence. She was, as previously noted, the first person ever to receive the maximum sentence for the offence of rape in Ireland. In a commentary article that appeared in the *Irish Independent*, respected Irish law lecturer Tom O'Malley wrote:

> Irish courts very rarely impose a life sentence for any offence other than murder in which case they have no option. A great many serious cases of serial child sexual abuse have come before the courts in recent years. Most have attracted heavy determinate sentences, usually in the bracket of eight to 12 years, sometimes higher. The presence of more than one offender, as alleged in the Wall case, is certainly an aggravating factor, especially when the child is a victim. Nevertheless, a life sentence would not have been expected in a case like this.[58]

The reason the trial judge gave for imposing the maximum was: "[t]here are some cases so gross and so appalling that the courts must not resist imposing the maximum sentence".[59] This may well be true, but the question remains why Wall's co-accused did not receive the same sentence. There is a significant symbolic difference between a life sentence and a 12-year sentence. Especially as McCabe was the person who was alleged to have performed the physical act of rape, had a prior record, and he had, as Mr Justice Carney noted, no mitigating circumstances in his favour either. The disparity in sentencing was justified by Justice Carney in the following terms: "'This was a gang rape,' he said. 'The leader of the gang was the only person in the world who was charged with the protection of Regina Walsh. I don't think I need to say more than that.'"[60]

The press agreed that no further explanation was necessary. In fact, press reaction to her sentence, from the tabloids especially, was jubilant. The front page of the *Irish Star* comprised a photo of Wall with the headline, "Life". In a sidebar were photos of McCabe

53 "Tears of relief as jury finds victim was no liar", *Irish Independent*, 11 June 1999.

54 B O'Kelly, "I hope evil nun gets a long jail term", *Irish Star*, 23 July 1999, p. 8.

55 McElgunn and Lane, "Secret sex past" (n. 31 above).

56 However, she was adamant that the stories she made up to impress people were never "outlandish": MacRuairi, "I saw man raping child twice" (n. 4 above).

57 Father Doran, "Balancing our response to child abuse", *Sunday Tribune*, 1 August 1999, p. 11.

58 T O'Malley, "Disclosure is crucial issue in any case", *Irish Independent*, 28 July 1999, p. 10.

59 Cleary and Costello, "Wall is first woman prisoner on protection" (n. 39 above).

60 "Former nun and male helper jailed for rape", *Irish Times*, 24 July 1999, p. 1. It is worth pointing out that in a case involving two male accused who subjected a young woman to a 90-minute gang rape heard in June 1999, Justice Carney imposed a seven-year sentence on each offender. This was noted by Keane in a brief review of a number of trial-level sentencing decisions: C Keane, "Sentence is harshest ever for sexual crime", *Irish Examiner*, 24 July 1999, p. 7.

and Walsh. *The Irish Sun*'s front page headline was not as concise but was equally triumphant: "Evil beyond words – Rape fiend nun locked up for life".[61] The broadsheets were also untroubled by the significant disparity in sentencing. In the editorial page of the *Irish Examiner*, the following assessment of the sentence was given:

> … Sister Dominic's crime was more than rape. It was also a gross betrayal of her responsibility to protect the child placed in her care.
>
> In the circumstances Mr Justice Paul Carney was not only justified but morally obliged to impose the maximum sentence.[62]

Yet, once Wall's sentence was quashed, a few journalists began to question why Wall received life while McCabe did not. Breda O'Brien wrote:

> A strange kind of double standard exists in relation to offences committed by women. They are seen to be much more horrendous than similar acts perpetrated by men.
>
> This view is not very flattering to men. It is as if to say that a man holding a child by the ankles while another rapes her is explicable, but a women doing so is not. Yet the net result of this alleged moral superiority of women is that if a woman is convicted, she will be treated far more harshly.[63]

Emily O'Reilly came to a similar conclusion. She contrasted the sentence meted out to Ivor Payne, a former priest, who was sentenced to six years for the sexual abuse of nine young altar boys over a long period of time, with the life sentence imposed on Wall for her supposed rape of one child.[64] Both writers had grasped a fundamental point made by feminist criminologists where female offenders are concerned – that women are often punished not just for the commission of the crime but also because they are women. It should be noted that feminist research has found that differential treatment is not based exclusively on gender. While it has been found that some female offenders do receive lenient treatment from the criminal justice system by virtue of their gender, it is only those women who otherwise adhere to the dominant norms of femininity that benefit. Women who do not fit into the prescribed frames of femininity, whether by virtue of their class, race, sexuality or lifestyle, are not recipients of the so-called chivalry, first criticised by Pollak.[65] Although O'Malley specifically noted that feminist research has found that "women who are convicted of violent or sexual offences are often punished as role breakers rather than rule breakers", he rushed to add that there was no suggestion that this is what Justice Carney had done. Yet there has to be some sense that this is precisely what he did, consciously or unconsciously, especially as O'Malley also noted how unusually severe the sentence was.[66]

The nature of the alleged role-breaking in Wall's case was especially significant in the press reaction to her alleged criminality. Wall was charged with and convicted of aiding and abetting in the rape of a child, as well as sexually molesting her (and others, if the

61 C O'Keefe, "Evil beyond words", *Irish Sun*, 24 July 1999, p. 1.

62 Editor, "Investigation into nun's case is justified", *Irish Examiner*, 24 July 1999, p. 10.

63 B O'Brien, "Facing up to questions posed by Wall case", *Sunday Business Post*, 1 August 1999, p. 28.

64 E O'Reilly, "Recent cases shake our faith in justice system", *Sunday Business Post*, 1 August 1999, p. 28. Payne's sentence was originally even more lenient. He was sentenced to six-years but the trial judge suspended four years of the sentence provided he receive treatment for his paedophilia. The DPP appealed the leniency of this sentence and the day Wall's sentence was quashed, his original six-year sentence was reinstated. See J Maddock, "Sex abuse priest's prison term increased on appeal", *Irish Independent*, 28 July 1999.

65 For a review of various studies undertaken in this area, see P Carlen, "Against the politics of sex discrimination: for the politics of difference and a women-wise approach to sentencing" in D Nicolson and L Bibbings (eds), *Feminist Perspectives on Criminal Law* (London: Cavendish, 2000), p. 71.

66 See n. 58 above and accompanying text.

unsubstantiated allegations were to be believed). Although female sexual offenders are a recognised category of offender, their limited statistical presence facilitates their representation as individual aberrations.[67] However, such has been the media attention given to these individual cases – for example Myra Hindley who facilitated the sexual abuse and murder of children by her partner – that few could argue never to have heard of a female involved in the sexual abuse of children. Consequently, I was somewhat taken aback when reading through the various newspaper articles to discover that a curious amnesia seemed to have set in.[68] Following Wall's exoneration, controversial *Irish Times* journalist Kevin Myers wrote: "[w]as her predicament not made worse by the heresies of the equality agenda, so that nobody dared say in public what many of us thought in private: that no woman could ever freely assist such as Pablo McCabe in the violation of a child?"[69] Other journalists were not so forgetful:

> She joins a very short but infamous list of deranged women including Myra Hindley and Rose West who have aided and abetted men, assisting them as they carried out brutal sexual abuse of children, though in the case of West and Hindley, the abuse ended in murder.[70]

The cultural reach and impact of Hindley in Britain and in Ireland has been immense. For Myers to claim that women cannot be involved in the commission of sexual offences against children is preposterous and facilitates the very "witch-hunts" he later castigates.[71] He may wish it to be true, but quite clearly it is not. The obvious question therefore becomes: why would Myers wish it to be true? Feminist criminologists have suggested a reason: that women, through their culturally ascribed roles as mothers and homemakers, are seen as sources of stability. Any rejection of this role – and any form of criminal activity is regarded as a clear rejection of this role – tends to be read in catastrophic terms. Individual deviance on the part of women portends societal collapse.[72] The rejection by a woman of that which most distinguishes her from men – her ability to bear children and the concomitant and supposedly innate ability to care for them[73] – is apocalyptic.

Wall's status as a nun at the time she was alleged to have committed the offences was also a factor in the social opprobrium heaped upon her. Although Wall left the Sisters of Mercy in 1994, the press insisted in referring to her by the name she took upon ordination, Sr Dominic. And, as a former nun accused of sexually abusing a child, Wall happened to be tried at a most unfortunate time. Up until the 1990s, the Catholic Church held a very

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67 See n. 18 above.

68 I have to admit though that I was not completely surprised. It has been noted in the context of female serial killers that each killer is represented as being an individual aberration, punished and then promptly forgotten, instead of being regarded as a member of a pre-existing and identifiable class of offender; C Skrapec, "The female serial killer: an evolving criminality" in H Birch (ed.), *Moving Targets: Women, murder and representation* (London: Virago, 1993), p. 241.

69 K Myers, "An Irishman's diary", *Irish Times*, 31 July 1999, p. 15. Unfortunately, while trying to challenge the witch-hunt he saw being perpetrated in the name of good in which Wall became the "lightning rod", he also exposed his own agenda, an indictment of what he considers to be the negative force of political correctness.

70 "Sister of no mercy" (n. 33 above). M Lehane noted that following her conviction "she became the 'face of evil' in a manner similar to Myra Hindley", *Irish Examiner*, 6 February 2004, p. 5.

71 See n. 87 below and accompanying text.

72 As noted by Heidensohn in her discussion of the divide between the public and private spheres: Heidensohn, *Women and Crime* (n. 12 above), p. 165. This fear was given literal form in the crime of *petit treason* – a woman who killed her husband was seen in effect to have committed a crime against society: C Fennell, "Woman as accused" in A Connelly (ed.), *Gender and the Law in Ireland* (Dublin: Oak Tree Press, 1993), p. 171 at p. 173.

73 Although Wall's decision to become a nun clearly precluded fulfilment of the first role (motherhood), her role as a carer of children had fulfilled the second (mothering).

privileged position in Irish society.[74] However, following a number of sex abuse scandals in which the hierarchy of the church was shown to have valued its own interests over those of the child victims, the Irish public became more suspicious of the clergy and members of religious orders. In addition to this generalised distrust of religious, Wall was tried shortly after the transmission of an extremely influential three-part media exposé on the extent of sexual and physical abuse within religious-run but state-funded institutions. *States of Fear* was aired on RTE 1, the national broadcaster, between April and May 1999.[75] Wall's trial took place in early June. Despite the earlier revelations of individual cases of religious abusers, it was the sheer scale and the seemingly systemic nature of the abuse – physical, sexual and emotional – exposed in the documentary series that led to an outcry by the Irish public.[76] In the ensuing hand-wringing that followed her exoneration, various broadsheet journalists expressed their concern that Wall had become the first *States of Fear* casualty, a martyr to our fears of clerical sexual abuse. I will discuss this development in the next section.

3 The transformation of Wall into a martyr

In order for Wall to make the leap from monster to martyr she had to meet two criteria. She had to be legally innocent and morally innocent. In order to prove her legal innocence,[77] it would have to be established that she had been unfairly victimised by those in power and that there had been abuse of the criminal justice process. The evidence laid forth by her defence at her sentencing hearing and by the prosecution at her appeal was more than

74 The reasons were historical. As the Catholic Church had been persecuted under British rule, an obvious way to assert an independent Irish identity following secession from the British Empire was to elevate the position and power of the Catholic Church. As Fletcher notes: "[t]he dominance of Roman Catholicism can be explained as a reaction to the experience of British colonization, under which the Irish were persecuted as Roman Catholics . . . Prior to Catholic emancipation in 1829, Irish Roman Catholics were . . . denied the right to vote or to be elected to Parliament, the right to hold property, or to attend school . . . Between the 1920s and 1960s, the young Irish nation state institutionalised Roman Catholicism as a marker of Irish national identity through such activities as the adoption of a Constitution in 1937 which privileged the role of the Roman Catholic Church and imposed a ban on divorce, and through its reliance on and support of the Church in its provision of health, welfare and education services.": R Fletcher, "'Pro-life' absolutes" (1998) 36 *OHLJ* 1 (footnotes omitted). The case which is widely credited with changing all of this is the exposure of serial sex offender Father Brendan Smyth. See n. 25 above and accompanying text.

75 The first two parts of the series focused on historical instances of abuse in orphanages, industrial schools and institutions for physically and mentally disabled people; the third looked at a case from the 1990s and how one Irish order, the Christian Brothers, were also responsible for abuse in Australia and Canada. J Waters, "Christian Brothers' brutality had its origins in colonialism", *Irish Times*, 15 June 1999, p. 18.

76 The series had huge political, legal and social ramifications. As a direct result of the programme, the Statute of Limitations (Amendment) Act 2000 was passed which changed limitation periods where a case of sexual abuse suffered as a child was being claimed. This was achieved by extending the definition of "disability" in s. 48 of the Statute of Limitations Act 1957 to include "psychological injury" occasioned as a result of sexual abuse which affected the person's ability to bring an action within the traditional limitation period of three years after the attainment of the age of majority. In its original form, following public outrage after the screening of *States of Fear*, the Bill was to extend the limitations period in cases involving sexual and physical abuse suffered as a child. However, given the varying degrees of physical abuse which could be alleged, it was decided at committee stage to omit non-sexual abuse from the scope of the Bill. The series also had the effect of putting increased pressure on the Government to develop a Sex Offenders Register, which it finally did with the passing of the Sex Offenders Act 2001, and to establish a Commission to Inquire into Child Abuse which was chaired by Ms Justice Laffoy. She resigned in September 2003 complaining of inadequate resources and lack of co-operation from the Government. The chair of the commission was given to Sean Ryan. An interim report was published at the close of Laffoy's tenure. The commission investigation is ongoing. Finally, in 2002, the Government controversially accepted 90 per cent responsibility for compensation claims, letting religious orders off the hook, as it were: J Murphy, "Opening the floodgates of scandal", *Village*, 26 January 2006.

77 I use the phrase "legal innocence" deliberately here. It is axiomatic that the criminal law is not concerned about innocence. This is demonstrated by the choices given to the jury – guilty or not guilty. Yet the DPP chose to declare that Wall should be presumed innocent of all charges. See n. 5 above.

sufficient proof of this. In order to pass the second hurdle – proof of moral innocence – Wall's worthiness had to be demonstrated. Although there were sufficient legal grounds to justify McCabe's acquittal,[78] he was not transformed into a martyr following the quashing of his conviction. This was partly because he had not been as persecuted by the media as Wall had been and partly because he, unlike Wall, had a significant prior criminal record. In this section, I will first detail the evidence that led to Wall's exoneration and what response it generated in the media. Then, I will discuss how the media established her moral innocence.

On the day Wall was due to be sentenced, her defence requested that the decision be stayed on the basis of non-disclosure of evidence and of the discovery of new information, but their petition was rejected by Justice Carney as being beyond the scope of his powers at the sentencing stage. The primary source of this new evidence was the series of interviews given by Walsh to the *Irish Star* in the month between the verdict and sentence. Of particular interest to the defence were Walsh's unsubstantiated abuse allegations against her ex-boyfriend and a rape allegation against an unidentified black man in Leicester Square.[79] This was in addition to allegations of abuse Walsh had made against her father, her brother, and an uncle in her victim impact report.[80] Walsh also mentioned in the victim impact report that she had undergone counselling at St Declan's Mental Hospital in Waterford in 1996 to help her to come to terms with the abuse. This counselling was after one of the four suicide attempts she detailed in her interviews with the *Irish Star*. During the sentencing hearing, the defence argued that her stay at St Declan's should have been disclosed to them as it may have had relevance to her mental state at the time she made the allegations. It was more relevant than they could have imagined. It subsequently transpired that Walsh did not actually fully remember the rape(s) at all. She had "flashbacks" when she was admitted into St Declan's and it was these newly recovered memories that prompted her to approach the Gardaí.[81]

The *Irish Star* interviews also led to the exposure of skeletons in Phelan's closet. After seeing Phelan's photo in the *Irish Star*, one man contacted Wall's family about a false rape charge she had made against him. The case against him was dismissed on grounds of delay, but Mr Justice McCracken of the High Court took the opportunity to express doubts as to Phelan's credibility. The defence argued that it was hard to imagine that the Gardaí had not known of this prior case because they occurred in neighbouring counties and around the same time.[82] In fact, there was an even stronger link between the two cases than this. One of the Gardaí who was involved in the Phelan rape charge case was also involved in the Wall investigation. He was a member of the team who investigated the Kilkenny case and he was present when Phelan gave the statement in 1997 in which she claimed to have witnessed the rapes.[83]

Additional concerns about Phelan's credibility were revealed by senior counsel for the DPP, Vaughan Buckley, on 27 July when he consented to the appeal request subject to the proviso that further action may be taken. The reason given for the consent was that Phelan

78 McCabe also had his own compelling reasons for acquittal. He was a schizophrenic who had not been taking his medication for a number of weeks prior to being arrested and questioned by the Gardaí. In addition, notes were not taken during the confession, as was required by Garda regulations, and there was no record kept of the questions put to him: S O'Driscoll, "Accused claimed nun saw sex with schoolgirl", *Irish Independent*, 9 June 1999; C Coulter, "Disturbing questions raised by conduct of rape trial", *Irish Times*, 28 July 1999, p. 4.

79 O'Kelly reported that Walsh had revealed to him that she was raped in London by an unidentified black man: O'Kelly, "I saw nun" (n. 22 above).

80 R O'Reilly, "Ex-nun gets life for rape", *Irish Independent*, 24 July 1999, p. 6.

81 *DPP* v *Wall* (n. 1 above), available at www.courts.ie.

82 "Former nun and male helper jailed for rape", *Irish Independent*, 24 July 1999, p. 7.

83 H McGee and G Brandon, "Stonewall" (2000) *McGill,* January, 16.

had been called as a witness despite prior instruction that she should not testify because her testimony was considered unreliable. Senior counsel for the DPP also acknowledged that facts which had come to light as a result of the *Irish Star* interviews, in particular the Leicester Square rape, could not definitively be said to be "not relevant".[84] Ironically, therefore, although the tabloid press set out to demonise Wall, they actually paved the way for her release and subsequent exoneration.

The main media response to these revelations was anxiety - the feeling that justice was occasioned in the case purely by chance. Donncha O'Connell, director of the Irish Council of Civil Liberties noted, "[t]he conviction was set aside only because of a fortuitous set of circumstances, essentially because of the decision of Regina Walsh to give a newspaper interview".[85] Myers worried in the *Irish Times* that but for Walsh's decision to give the interview, Wall and McCabe would be "in indefinite solitary confinement, the objects of universal obloquy throughout the land".[86] He was concerned that documentaries such as *States of Fear* had created a climate in which "[n]o priest or nun – as poor Nora Wall discovered – is given the benefit of the doubt any more. The accusation serves as a conviction, the allegation as a proof: the hallmark of the true witch-hunt."[87] He also noted that the *States of Fear* documentary series had aired shortly before the trial and wondered: "[m]ight the jury members not have been influenced by the harrowing tales they heard in those programmes? . . . Is it not possible that they have transferred their general indignation at sexual abuse by religious onto the single, unfortunate figure of Nora Wall?"[88]

Once there was sufficient legal evidence to cast doubt on the validity of the guilty verdict, the media was now faced with the task of rehabilitating her in the eyes of the public. I should, however, note that this rehabilitation was left mostly to the broadsheets as the tabloids effectively lost interest in the case once the DPP decided not to pursue any further charges.[89] It was acknowledged by the broadsheets that Wall had been treated very badly by the media. The editor of the *Irish Times* felt obliged to respond to criticism from a reader for the paper's decision to publish the unsubstantiated *ménage-à-trois* story. The reader noted that the article "added to the air of hysterical prurience that surrounded this whole sorry affair" in a letter to the editor.[90] The editor noted in response that the article in question was published after the guilty verdict and that the *Irish Times* tries to "get the balance right". In an article she wrote for the *Irish Catholic*, Wall utilised Christian imagery to convey her sense of persecution:

> [m]y way of the cross couldn't have been more painful, extreme or despising [sic]. Everything was there aplenty – cross, condemnations, nails, thorns, spears, sponge, towels, helpers, rejections, disowning, consolers, public stripping and

84 "Former nun, man have convictions quashed", *Irish Times*, 28 July 1999, p. 1.

85 H McGee, "When life ended after four days", *Sunday Tribune*, 1 August 1999, p. 11.

86 Myers, "An Irishman's diary" (n. 69 above).

87 Ibid.

88 Ibid.

89 Although both sets of newspapers reported on the trial itself, it was not until Wall could be named, photographed and demonised that tabloid interest in the case blossomed. It was during the period immediately after Wall was found guilty up until the point of her successful appeal that the tabloids published a number of unsubstantiated allegations about the level and extent of Wall's criminality. However, this flowering of interest was relatively short-lived. Of the seven tabloids I reviewed, six did not report on the third stage of the case. In other words, once Wall was released, and she was not re-charged, tabloid interest in the case virtually evaporated. The four stages are detailed in n. 7 above.

90 J Andrews, "Letter to the editor", *Irish Times*, 30 August 1999, p. 15.

> lashings by the media. Nailed to the cross – not on the hill of Calvary, but on every TV screen and newspaper.[91]

This imagery was picked up by a few writers,[92] but two specific themes emerge from the limited coverage of the two final stages of reporting. These are Wall's almost beatific grace upon victory and her position within a respectable family and community. Both serve to establish her martyrdom and to withdraw (appropriately feminine) women from the ranks of child sexual abusers.

The facet of the case which most fascinated media commentators was Wall's extraordinary embodiment of Christian forgiveness throughout the ten years of her ordeal.[93] Following the DPP's decision not to proceed with further charges, Wall's generosity is given prominence in a quotes of the week segment in the *Ireland on Sunday*. Her quote is first in the list and she says: "I'm not bitter and have no ill-feelings against [my accusers]."[94] The *Irish Mirror* also notes admiringly that "she is not bitter despite the three years of hell she has been put through".[95] After she successfully obtained the certificate allowing her to proceed with a miscarriage of justice claim, the *Irish Examiner* felt compelled to report that Wall embraced Phelan and that both women "burst into tears" even though this detail added nothing to the supposed subject matter of what was being reported – the granting of the certificate.[96] An entire article in the *Irish Independent* was devoted to Wall's remarkable magnanimity:

> The former Mercy sister extended her hand to the man who had presented the State's flawed case against her and said "thank you" for what had just happened in court.
>
> Denis Vaughan Buckley shook hands, looking taken aback at the unexpected gesture, so rare coming from the opposing side after such a serious criminal trial.
>
> But for the former nun who had just received her final vindication it was clearly important to make a gesture of conciliation, a tangible sign of her remarkable lack of bitterness over being wrongfully convicted of rape.[97]

In the same way that the guilty verdict permitted the publication of unsubstantiated and salacious allegations – "[p]ut two and two together and get any number you want"[98] – once Wall became a martyr, it became impermissible to treat her other than with kid gloves. Even the quite reasonable request by the DPP to postpone the retrial hearing until 22 November 1999 was castigated. Originally the DPP had been given leave to consider whether or not to pursue charges against either or both accused until 1 November 1999. However, due to a lack of stenographers, the transcript of the trial was not received by the DPP's office until after this hearing had concluded.[99] Quite sensibly the DPP wished to review the transcript

91 N Wall, "My quest for justice", *Irish Catholic*, 5 February 2004, p. 10.

92 Myers used the Calvary image prior to Wall referencing it; Myers, "An Irishman's Diary" (n. 69 above). Other journalists referred to the *Irish Catholic* article, e.g. M Lehane, "'I was nailed to the cross – not on the hill of Calvary, but on every TV screen and newspaper'", *Irish Examiner*, 6 February 2004, p. 5.

93 It took three years for her case to go to trial, and approximately another seven before she obtained the certificate from the Court of Criminal Appeal.

94 "Hear! Hear! The Week in Quotes", *Ireland on Sunday*, 21 November 1999, p. 33.

95 N Tallant, "Nun's rape charge nightmare", *Irish Mirror*, 18 November 1999, pp. 1 & 7, at p. 7.

96 M Brennan, "Former nun Nora Wall's rape conviction declared a miscarriage of justice", *Irish Examiner*, 2 December 2005, p. 12. It did, however, tally with the earlier obsession with Wall's lack of emotionality during earlier stages in the case. See n. 39 above and accompanying text.

97 Sheehan, "Nora Wall departs" (n. 44 above).

98 "Dangerous desire for condemnation", *Sunday Independent*, 4 December 2005.

99 C Coulter, "Transcript late in rape retrial case, says DPP", *Irish Times*, 3 November 1999, p. 5.

before making a final decision on whether to pursue further charges or not. But sense did not prevail. Fine Gael TD Jim Higgins was outraged: "[i]t adds to the appalling, cavalier manner in which this case has been handled by the State."[100]

Wall's moral innocence was further demonstrated by calling on friends and family to speak on her behalf after she was exonerated. While the media has drawn attention to the problem of child sexual abuse, the child sexual abuser has been presented almost exclusively as a predatory male stranger.[101] By focusing on this subset of child molesters (and excluding intra-familial abusers, abusers known to the child, and female sexual abusers), the child sex abuser is represented as Other and it becomes easy to separate or expel him from the community. His actions are decontextualised from a society that sexualises children and from a society in which he may have been sexually abused.[102] Instead, his aberrance is individualised and contained, thus preserving the status quo. The inverse of this tendency was evident in the Wall case once her innocence was assured. Wall's family and friends become very important in newspaper coverage from 28 July onwards.[103] Every newspaper quoted the reaction of her family and members of the local community to the quashing of her conviction. All declare their sense of joy that she has been released and their absolute confidence that she will be proved innocent. The *Sunday Independent* reported how "friends and colleagues scoff[ed] at the courtroom debacle".[104] Their "scoff[ing]" had not been newsworthy until now. Her brother-in-law was interviewed by the *Irish Examiner* following her release and he reaffirmed that the family were not just happy that she had been released. They would fight to prove her innocence.[105] The *Ireland on Sunday* reported that "[a] palpable sense of relief that she is free permeates through the close-knit community".[106] When she was formally exonerated in November, a local county councillor was reported as noting that "the final clearing of Nora's name and the restoration of her impeccable reputation is like the lifting of a huge cloud of depression from the entire valley [where she comes from]".[107] The effect of this coverage is to return Wall to the community from which she had been temporarily expelled. She becomes one of us again. This emphasis offers the reassurance that sex offenders are clearly not us, and certainly not from people like us. Several newspapers drew attention to the respectability of her origins: "Nora Wall was born . . . to a respectable and well-to-do farming family";[108] "Nora Wall hails from the moderately prosperous countryside . . . . It was the type of genteel, religious, rural

100 C Keane, "DPP finally gets copy of transcript of nun rape case", *Irish Examiner*, 2 November 1999.

101 P Jenkins, *Moral Panic: Changing concepts of the child molester in modern America* (New Haven: Yale University Press, 1998); N Websdale, "Predators: the social construction of 'stranger-danger' in Washington State as a form of patriarchal ideology" in J Ferrell and N Websdale (eds), *Making Trouble: Cultural constructions of crime, deviance, and control* (New York: Aldine de Gruyter, 1999), p. 91.

102 This is not to say that those who sexually abuse children should not be punished. It is one thing to acknowledge the offender's past experience of abuse as a means of understanding their current actions, it is quite another to use it as an excuse. As adults, survivors of sexual abuse have to take some responsibility for their interactions with children. It is also worth noting that the cycle of violence theory is too simplistic to explain fully the phenomenon of child sexual abuse, despite its commonsensical appeal. If the causality between being abused and abusing were so determinative, then there should be considerably more female molesters, as women and girls make up the majority of victims of sexual abuse. Jennings, "Female child molesters" (n. 18 above), p. 246.

103 A number of newspapers had noted that her family rejected the guilty verdict, but it was not until the appeal was quashed that her family assumed particular importance.

104 K Moore, "Ex-nun caught on a legal see-saw", *Sunday Independent*, 1 August 1999, p. 6.

105 J Murphy, "Family will fight to clear the name of rape-case nun", *Irish Examiner*, 30 July 1999, p. 9.

106 *Ireland on Sunday*, 1 August 1999, p. 5.

107 J Murphy, "Years of horror are at an end for Nora", *Irish Examiner*, 24 November 1999, p. 4.

108 H Kelly, "Certificate of miscarriage of justice expected soon", *Irish Catholic*, 5 February 2004, p. 11.

background from which many young women emerged to provide Ireland's nursing, caring and teaching nuns."[109] The message is clear – sexual abuse occurs only in non-respectable families. Wall's exoneration, therefore, worked to resolve two anxieties that her trial and conviction had generated. First, women do not commit these offences. Second, respectable people do not commit these offences.[110] Unfortunately, this resolution is a false one as neither of these comforting claims is accurate.

4 Conclusion

As the preceding discussion has shown, there was nothing extraordinary about the representation of Wall by the media. The images that were referenced to monstrify her were no different, apart from the degree of opprobrium attached to them, to the images that are used to monstrify ordinary female offenders. The means by which she became an exemplar of feminine forgiveness – the ultimate Madonna – also referenced stereotypes of appropriate femininity. However, while we may be grateful that justice was ultimately done in the Wall case, this does not mean that we should forget about the injustice that preceded it. The fact remains that the sentence she received was disproportionate, both when compared to the sentence her co-accused received and to sentences meted out to other accused clerical child molesters. It could be argued that the vindication of Wall, and her entitlement to receive compensation for the wrong done to her, means that we need not trouble ourselves with this disparity. But, if she had been guilty, would her life sentence have been justified? This question should trouble Irish feminists, but apart from some soul-searching by a few female journalists, the silence has been deafening.[111]

This silence may be partly due to a generalised feminist disquiet when faced with the reality of female sexual abusers. There are a number of reasons why feminists have been reluctant to acknowledge such offenders. There is a legitimate fear that any information gathered would be used as part of a feminist backlash. In addition, there are ideological and practical difficulties attached to recognising the reality of female sex offenders. Acceptance of the existence of female child molesters challenges deeply held feminist notions that men are abusers and women are their victims. To admit that women can also be aggressors potentially minimises not only the damage that child sexual abuse causes,[112] but also the offences of male sexual abusers.[113] On a practical level, it is feared that bringing the matter to the attention of the public would distract them from the fact that the vast majority of abusers are male.[114] For this reason, an attempt to hold a conference for social work professionals in 1992 in London on female sex offenders was decried as a betrayal of feminism.

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109 Moore, "Ex-nun" (n. 104 above).

110 Recall Myers' insistence that everyone knew in their hearts that a woman could not possibly commit such crimes. See n. 69 above and accompanying text.

111 See n. 119 below and accompanying text for similar comment by Birch in the context of violent female offenders.

112 Particularly when male victims of female abusers seem determined to minimise the harm done to them. In one study, college students and prisoners who had committed sex offences were asked about under-age sexual experiences with women. Among the sex-offender prison population, 66 per cent declared the experience to have been good, 6 per cent described it as bad, and 25 per cent reported mixed feelings. As Hislop notes, the fact that men who had gone on to commit sexual offences themselves found that the experience did not affect them negatively, demonstrates that men disavow the emotional damage of sexual abuse. Hislop, *Female Child Molesters* (n. 18 above), p. 45, referring to a study by S R Condy, D I Templer, R Brown and L Veaco, "Parameters of sexual contact of boys with women" (1987) 16 *ASB* 379.

113 See Hislop, *Female Child Molesters* (n. 18 above), p. 14.

114 V Young, "Women abusers – a feminist view" in M Elliott (ed.), *Female Sexual Abuse of Children: The ultimate taboo* (Harlow: Longman, 1993), p. 107 at p. 110.

However, female (and feminist) researchers have continued to bring the reality of female sexual offenders to light, even in the face of such anger.[115] It is only right that feminism be proactive in the analysis of female child molesters. As primary claims-makers on child abuse in general,[116] the feminist movement should also undertake the educative and advisory role on female child abusers.[117] A denial of female sexual abusers means that their victims – usually children – are denied adequate protection and/or support.[118] Accordingly, more feminists need to speak up. Helen Birch has commented on "the deafening silence from feminists"[119] on violent female offenders at the beginning of her article on Myra Hindley. Marie Fox, in her article on the representation of five British female killers, acknowledged this silence but suggested that it may simply reflect confusion on the part of feminists about how to represent such offenders. In order to offer a means out of this confusion, Fox turned to fictional literature in an attempt to reconceptualise violent female offenders.[120] Specifically she looked at fictional female killers who were not "nice" women as a means of attempting to move beyond the woman as victim narrative.[121]

The victim narrative is one that dominates in the context of female sexual abusers, particularly in cases where there is a male co-offender, unless the female offender is positioned as being entirely evil/worse than him (as happened in the Wall case). Even the terminology used to categorise such an offender – the male-coerced female offender – denies female agency.[122] The Wall case therefore provides a perfect opportunity for feminism to challenge the limiting either/or positioning of female sex offenders. If we find it distasteful to argue for the rights of properly accused female sexual offenders, then why not start with falsely accused offenders. The frequently stated journalistic belief that Wall was worse than

115 K Evert and I Bijkerk, *When You're Ready: A woman's healing from childhood physical and sexual abuse by her mother* (Rockville, MD: Launch Press, 1987); B Dolan, "My own story", *Time Magazine*, 7 October 1991, p. 47, cited in Hislop, *Female Child Molesters* (n. 18 above), p. 22.

116 Feminism is primarily responsible for the level of exposure that child physical and sexual abuse currently enjoys. It should, however, be noted that child sexual abuse has been discovered, forgotten, repressed, and re-discovered countless times. Jenkins offers a historical perspective on the construction of the sex offender in the United States and examines the various moral panics that arose in the periods 1890–1934, 1935–57, 1958–76, 1976–86, and the 1990s. Although Jenkins' analysis is United-States based, it can be applied to other jurisdictions. Jenkins himself notes that similar patterns can be discerned in those countries that are culturally influenced by the United States, such as Britain, Canada, Israel and Australia. See Jenkins, *Moral Panic* (n. 101 above), p. 231.

117 Young, "Women abusers" (n. 114 above), pp. 108–9.

118 Most self-help books for survivors of sexual abuse are written for those who were abused by men. Jennings, "Female child molesters" (n. 18 above), p. 242.

119 H Birch, "If looks could kill: Myra Hindley and the iconography of evil" in H Birch (ed.), *Moving Targets: Women, murder and representation* (London: Virago, 1993), p. 32 at p. 34.

120 M Fox, "Crime and punishment: representations of female killers in law and literature" in J Morison and C Bell (eds), *Tall Stories? Reading law and literature* (Aldershot: Dartmouth, 1996), p. 145.

121 Unfortunately, while the female anti-heroes she refers to (Andrea in Andrea Dworkin's *Mercy* and Bella in Helen Zahavi's *A Dirty Weekend*) are not "nice", their violence is represented very much as being a response to patriarchal society, and in this sense they are absolved of their violence (although they fight back, they are still victims).

122 This is all the more worrying because research has found that female co-offenders often go on to abuse independently of their initiatory partner, indicating that they have developed a taste for the abuse. The other main categories of female sex offender are the intergenerationally predisposed female offender, and female offenders who predominantly abuse males. This latter category is broken down into two sub-groups – the experimenter/exploiter and the teacher/lover. Matthews et al., "Female sex offenders" (n. 18 above). Even with these categories there is evidence of a desire to absolve the female offender of guilt. It was suggested that rejection by a husband may contribute to female incest, or that female abusers utilise male children or adolescents to take the place of an absent (either emotionally or physically) adult mate. See Hislop, *Female Child Molesters* (n. 18 above), p. 2.

McCabe had real punitive, albeit temporary, consequences for Wall. By challenging the limiting either/or characterisation of female sex offenders as it manifested itself in the Wall case, both explicitly when she was accused (the monster) and implicitly when she was exonerated (real women do not abuse children), we commence a dialogue on the issue.

The need for an alternative means of framing female sex offenders is great if we are to avoid injustices in future. In order to do this we must acknowledge the existence of female sexual abuse. This requires two steps. First, we need to deconstruct the language we use when we describe child molesters. The words we currently use – predators, hunters and violators – are active, aggressive, traditionally masculine words, and consequently not readily culturally applicable to women. Val Young writes that such language is part of the reason female sexual abuse is "inexpressible".[123] If female sexual offenders cannot be imagined linguistically, then it becomes difficult to imagine them at all.[124] Second, we must move beyond treating each discovered case of female sexual offending as an individual aberration and instead regard the offender as a member of a pre-existing and identifiable class of perpetrator.[125] This enables discussion to move beyond the simplistic us/Other dichotomy that is evident in representations of sexual offenders. However, there is a distinction between individualising each female sex offender as an aberration and looking at each female offender as an individual. The dual tendency to individualise (as a monster) and to generalise (with reference to cultural stereotypes of appropriate femininity) needs to be combated. Therefore, while there were certainly aspects of Wall's behaviour that were exemplary, it is she who should be praised, not her femininity. Similarly, when it was thought that she was a child rapist, it should have been she who was blamed, not her absence of femininity.[126] The continued focus on natural versus unnatural femininity is both reductive and unhelpful. As Judith Butler argues in the development of her theory on gender performance, "real" women simply do not exist because the intensity of the labour required to attain the "natural" gender challenges the supposed naturalness of the masculine/feminine dichotomy.[127] By failing to challenge how female offenders are represented, the images used to make sense of them retain their currency and truth-status. More importantly, the images we reference make it difficult to offer a nuanced appraisal of

123 Young, "Women abusers" (n. 114 above), p. 118. She suggests that a child-focused language be used instead to demonstrate that the issue is defined not from apologists' perspectives, but from the perspective of those affected by the abuse.

124 Because women are not expected to be molesters, cases of abuse are overlooked, ignored, or not taken seriously by authorities. Those cases that do come to official attention are those where the offender is particularly disturbed and tend to involve what have been described as "bizarre or violent sexually deviant acts": S Travin, K Cullen and B Protter, "Female sex offenders: severe victims and victimizers" (1990) 35 *JFS* 40.

125 See n. 68 above.

126 Indeed, the assumption that femininity equals non-criminality has been found to be rather simplistic. Harris, an ex-prisoner turned writer, found that women in prison are generally women who have desperately tried to conform to society's notion of femininity – women who stayed with abusive husbands because they were supposed to be loyal to them and women who stole to provide for families; J Harris, *Stranger in Two Worlds* (New York: Macmillan, 1986) and *They Always Call Us "Ladies": Stories from prison* (New York: Charles Scribner's Sons, 1988). Worrall came to a similar conclusion after interviewing fifteen female offenders and the magistrates, solicitors, psychiatrists and probation officers who deal with them. She writes, "[a]s can be seen from these accounts, many women are not seeking to break out of the ideologies that confine them to domesticity, sexual passivity, and sickness. Rather, they want to have the worst effects of those ideologies alleviated.": Worrall, *Offending Women* (n. 40 above), p. 160.

127 J Butler, *Gender Trouble: Feminism and the subversion of identity* (New York: Routledge, 1990), p. 89. Indeed, the designation of nature is not as simple as might first appear. Butler writes: "[s]ignificantly, being 'outside' the hegemonic order does not signify being 'in' a state of filthy and untidy nature. Paradoxically, homosexuality is almost always conceived within the homophobic signifying economy as *both* uncivilized and unnatural." (p. 168), emphasis author's own.

the case and to discuss appropriate punishment. Extreme language and images facilitate extreme responses, both legal and extra-legal. Were it not for that worryingly chance set of circumstances that set her free, Wall would still be in prison serving the life sentence meted out to her because of the simplistic notions of femininity that continue to guide understandings of and response to female criminality.

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An economic perspective on the doctrine of unilateral mistake in English contract law: a remedy-based approach

DR QI ZHOU

*University of Sheffield**

Abstract

The key economic issues in implementing the law of unilateral mistake are twofold. First, it should avoid misallocation of resources; second, it ought to create a sufficient incentive for acquisition of information. However, the rule of unilateral mistake in English contract law does not serve these economic goals satisfactorily. The existing law and economics literature deals extensively with how to achieve these ends by designing the legal standards for a unilateral mistake which can nullify the contract, with little discussion of the function of legal remedy. This paper offers a remedy-based approach and argues that it has economic advantages over the current law.

Keywords: unilateral mistake; contractual mistake; legal remedy; law and economics.

1 Introduction

Assume, for example, that A is a rare-book collector who finds a first edition of *Wealth of Nations* personally autographed by Adam Smith in a second-hand bookshop. The book is exceptionally valuable, but the owner of the bookshop, B, misbelieves that it is an ordinary second-hand book, so offers to sell it for £5. After selling the book to A, the seller learns the truth. Can the seller claim the book back under English contract law? The answer depends on whether A, the buyer, is or is not aware that B, the seller, is mistaken. Arguably, the seller is entitled to the book only if A knows of the mistake. From an economic perspective, two interesting questions remain to be answered. First, does this rule improve allocative efficiency in moving the resource from a low value user to a higher value user? Second, can the rule create a sufficient incentive for A to search for information, for example by spending time and effort on looking for rare books in second-hand bookshops? The purpose of this paper is twofold. First, I seek to demonstrate that the current law can lead to misallocation of resources as well as undermining the incentive for acquisition of information. Second, I will offer a remedy-based approach to unilateral mistake. The paper proceeds as follows.

Section 2 sets out the legal background of unilateral mistake. Section 3 outlines the economic problems associated with the current law. Section 4 reviews the primary

* Dr Qi Zhou is Lecturer in Law, School of Law, University of Sheffield qi.zhou@sheffield.ac.uk. The author is grateful to Anthony Ogus, Frank Stephen, Emilios Avgouleas and Dennis Khong for their helpful suggestions on early drafts of this paper. The author also benefited from discussion with the participants to the Canadian Law and Economics Association Conference 2009 in Toronto. The usual caveat applies.

propositions in the law and economics literature to demonstrate why they are unsuitable for English contract law. Section 5 proposes a remedy-based approach to unilateral mistake. Section 6 concludes the arguments.

2 Legal background

A unilateral mistake is taken to refer to a mistake which is made by one contracting party but is not shared by another, for example the seller knows that the cow being offered for sale is barren, but the buyer misbelieves that the cow is fertile.[1] The English law of unilateral mistake is complicated, treating differently a mistake which is unknown to the non-mistaken party from one which is known to that party. In the current example, if the seller is not aware that the buyer misbelieves that the cow is fertile, the law provides no remedy to the buyer for the unilateral mistake, so the buyer must perform his or her obligations in accordance with the contract. If, however, the seller is aware that the buyer mistakenly believes the cow to be fertile and still contracts with seller, the contract is void *ab initio* and the buyer can request the seller to return the contract price paid in a claim of restitution. In this section, I will briefly outline the relevant legal rules concerning unilateral mistakes as a background to addressing the issue in Section 3: why the current law of unilateral mistake is economically problematic.

A The unilateral mistake unknown to the non-mistaken party

English contract law provides no legal remedy for a unilateral mistake which is unknown to the non-mistaken party. This rule is based on the old legal doctrine of *caveat emptor*, which means that each party bears their own risk; a person who is about to enter into a contract is under no duty to disclose material facts known to them but not to the other party, even facts which the person believes would be operative on the mind of the other.[2] If the seller of a barren cow is unaware that the buyer misbelieves that the cow is fertile, the contract is perfectly valid in law. The seller is not held liable for the buyer's unilateral mistake, unless the seller does something to deceive the buyer. Mere silence attracts no legal liability.[3] This rule was made clear by Cockburn CJ in *Smith* v *Hughes*. He said:

> I take the true rule to be, that where a specific article is offered for sale, without express warranty, or without circumstances from which the law will apply a warranty . . . and the buyer has full opportunity of inspecting and forming his own judgement, if he chooses to act on his own judgement, the rule *caveat emptor* applies. If he gets the article he contracted to buy, and that article corresponds with what it was sold as, he gets all he is entitled to, and is bound by the contract. Here the defendant agreed to buy a specific parcel of oats. The oats were what they were sold as, namely good oats according to the sample. The buyer persuaded himself they were old oats, when they were not so. But the seller neither said nor did anything to contribute to his deception. He has himself to blame.[4]

B The unilateral mistake known to the non-mistaken party

Turning now to a unilateral mistake known to the non-mistaken party, we find that the law becomes more complicated and confusing. This type of mistake may render the contract void *ab initio*, which simply means that the parties never entered into a legally binding

1 J Cartwright, *Misrepresentation Mistake and Non-Disclosure* (London: Sweet & Maxwell, 2007), p. 497.

2 G Treitel, *The Law of Contract* 10th edn (London: Sweet & Maxwell, 1990), p. 361; J Beatson, *Anson's Law of Contract* 28th edn (Oxford/New York: OUP, 2002), p. 323.

3 *Keates* v *Cadogan* (1851) 10 CB 591.

4 (1871) LR 6 QB 597 at 603.

contract. If a contract is held void *ab initio*, each party must return what he or she received from the other party, for example the seller returning the contract price to the buyer and the buyer returning the goods to the seller.

It is, however, less clear in what circumstances a "known unilateral mistake" can render the contract void *ab initio*. To date there has been no clear authoritative interpretation in case law and little agreement among scholars. Two versions of interpretation can be found in the academic literature.

The first version proposes that if one party makes a unilateral mistake which is known to the other party, the contract is void *ab initio*.[5] This interpretation draws upon *Hartog* v *Colin & Shields*,[6] where the plaintiff sued the defendant for breach of contract when the defendant failed to deliver 30,000 Argentine hare skins which were contracted for. The defendant argued that no contract had been entered into, because he made a mistake in offering to sell the hare skins at a price per pound when he had intended to sell them at a price per piece – and more importantly, he alleged that the plaintiff was aware of his mistake and had "fraudulently" accepted the offer. The court held that there was no contract between the plaintiff and the defendant because the defendant made a material mistake in the offer, which should have been and was known to the plaintiff.

The second version suggests that not every "known unilateral mistake" can render the contract void *ab initio*. Known unilateral mistakes can be divided into two types, viz. mistakes as to the subject-matter and those as to the promise. Only the latter type can make the contract void.[7] To illustrate, consider the following examples given by Beatson. A sells X a piece of china. X thinks that it is Dresden china. A knows that X thinks so, and knows that it is not. X makes a mistake as to the subject-matter of the goods, so even though the mistake is known to the non-mistaken party, A, the contract is still legally valid. By contrast, if X thinks that it is Dresden china and also that A intends to sell it as Dresden china, and A knows that X misbelieves that A is selling Dresden china, then X's mistake is as to the promise rather than the subject-matter; therefore, the contract is void *ab initio*.[8] This proposition is based upon *Smith* v *Hughes*.[9] In this case, the buyer believed that the oats which he bought were old, when in fact they were not. More importantly, the seller was aware of the buyer's mistake. In deciding whether the buyer's mistake could nullify the contract, the trial judge directed the jury to consider whether the word "old" had been used by the seller or the buyer in making the contract. If so, the contract was void *ab initio*. If it was not, the contract was valid even if the seller was clearly aware of the buyer's mistake.

It is not the purpose of this paper to evaluate the merits and demerits of the two propositions. For the current purpose, we are more concerned with the judicial approach to unilateral mistakes. I will call the current approach taken by courts the standard-based approach. According to this approach, in deciding whether a unilateral mistake can make the contract void, the court will apply the standard test to investigate whether the non-mistaken party is aware or unaware of the mistake. The legal remedy can be granted for a unilateral mistake only if the non-mistaken party knows that the other party is mistaken. The availability of legal remedy depends upon whether the mistake can pass the test set by the law. Therefore, under the current rule, a unilateral mistake would either have no effect

5 G Treitel, *An Outline of the Law of Contract* 6th edn (Oxford: OUP, 2004), p. 137; R Stone, *The Modern Law of Contract* 7th edn (London: Routledge Cavendish, 2008), p. 388; P Richard, *Law of Contract* 7th edn (London: Pearson Longman, 2006), p. 225.

6 [1939] 3 All ER 566.

7 Beatson, *Anson's* (n. 2 above), p. 323.

8 Ibid., p. 324.

9 (1871) LR 6 QB 597.

on the validity of the contract or nullify it completely. As will be demonstrated in the next section, the standard-based approach combined with the "black and white" legal effect of unilateral mistake is not only economically inefficient, but also distorts the contracting parties' incentive for acquisition of information.

3 Economic problems with the current law

The current law of unilateral mistake gives rise to two economic problems: (a) misallocation of resources; and (b) disincentive to acquisition of information.

A Misallocation of resources

Allocative efficiency requires resources to move from lower to higher value users. Efficiency is achieved when the resources move to the highest value user.[10] From an economic perspective, a contract is a device for resource allocation and it can at least in theory achieve allocative efficiency, as well as ensuring that each step in the allocation process is a Pareto improvement, so that nobody is being made worse off by contracting.[11] A rational person will make a contract if and only if they believe that the value which they receive exceeds the value which they relinquish. Therefore, contracting is a mutual benefit activity. As long as there is a person who is willing to offer a price for the goods higher than the subjective value of the owner, a new contract will be made. The contracting process will continue until the goods go to their highest value user.

However, success in achieving allocative efficiency by contracting depends upon the prerequisite that each contracting party should perfectly realise their own subjective value on the goods, which is measured as the maximum price that the party requests for selling the goods. If the party is mistaken as to their own subjective value, so that the value received from the other party is less than the value the original party transfers, the mistake may lead to misallocation, moving the goods from a high value user to a lower value user. Assume, for example, that A sells a painting to B for £15,000 because A mistakenly thinks that it is a copy. If A had known that the painting was an original, A would not have been willing to sell it for less than £150,000. B knows the truth, but would have been willing to pay no more than £50,000 for an original painting. So, it is efficient for A rather than B to have the painting. But the consequence of A's mistake – selling the painting to B for £15,000 – causes the misallocation of moving the painting from the high value user, A, to the lower value user, B.

It should also be admitted that not every mistake leads to misallocation. Some mistakes merely give rise to redistribution of wealth without affecting allocative efficiency. To illustrate, imagine that B in our example is willing to pay £200,000 for the original painting. In this case, A's mistake does not cause misallocation, because the painting still moves to the higher value user, B. Although the mistake causes A to charge a lower price, thereby making A a loss of £135,000 (£150,000 - £15,000), that is only a private loss to A. From the standpoint of society, A's mistake merely transfers £135,000 from A to B and the total social wealth does not diminish.

Therefore, a contractual mistake will cause a resource misallocation if and only if it leads the resource to move from a high to a low value user. Based upon this economic argument, an efficient law of unilateral mistake should allow the mistaken party to rescind

10 A Ogus, *Costs and Cautionary: Tales economic insights for the law* (Oxford: Hart Publishing, 2006), p. 27; for critical analysis of the definition of allocative efficiency, see e.g. M Trebilcock, "The value and limits of law and economics" in M Richardson and G Hadfield (eds), *The Second Wave of Law and Economics* (Sydney: Federation Press, 1999), pp. 17–22.

11 For elaboration of Pareto improvement and of its implications, see J Coleman, "Efficiency, exchange, and auction: philosophic aspects of the economic approach to law" (1980) 68 *California Law Review* 220.

the contract if that party's subjective value is higher than that of the non-mistaken party; for the same reason, if the subjective value of the mistaken party is lower than that of the non-mistaken party, the law should still enforce the contract, notwithstanding the mistake.

The current law of unilateral mistake is inconsistent with allocative efficiency. When deciding whether the contract is void on the ground of a unilateral mistake, the court does not take account of the allocative outcome caused by its judgment. The crucial factor which the court considers is whether the non-mistaken party is aware of the mistake. This approach can lead to misallocation of resources in two situations.

Firstly, misallocation occurs where the party makes a unilateral mistake unknown to the other party, but the former's subjective value for the goods is higher than that of the latter. According to allocative efficiency, the law should allow the mistaken party to rescind the contract in order for the goods to go to the higher value user. But, under the current legal rule, the contract cannot be voided, because the unilateral mistake is unknown to the non-mistaken party. Consequently, the law moves the goods from the high value user, the mistaken party, to the low value user, the non-mistaken party.

Secondly, misallocation also occurs where one party makes a unilateral mistake known to the other party, but the former's subjective value for the goods is lower than that of the latter. For the same reason as given above, if the subjective value of the non-mistaken party is higher than that of the mistaken party, the contract should be enforced, even though one party is mistaken. However, under the current law, the contract can be voided *ab initio* for a mistake known to the other party. This rule will cause misallocation when the subjective value of the non-mistaken party is higher than that of the mistaken party.

B Disincentive for acquisition of information

A contractual mistake may lead to misallocation of resources, so that reducing the number of mistakes should diminish the probability of misallocation. Information is the antidote to mistake;[12] increasing the amount of information available to a contracting party reduces the level of uncertainty in the party's decision-making, thereby reducing the possibility of making a mistake. When there is an information asymmetry between the parties, it is desirable to create an incentive for the party with superior information to disclose it, where such information may prevent the other from making a mistake. It is, however, equally important to create an incentive for the former to acquire such information in the first place, otherwise there will be no valuable information to prevent the mistake. From an economic perspective, the law would ideally create both incentives.

Before considering the issue of incentive, it is necessary for us to appreciate how a legal rule can create different incentives for the actors. Economists see human behaviour as the result of a cost–benefit assessment in deciding whether or not to act.[13] Legal rules can change the payoff of behaviour for an actor. In theory, the law can encourage an individual to do some socially desirable act by reducing the cost of this behaviour, for example exempting the person from legal liability for any harm incurred by it; it also can deter the individual from socially harmful behaviour by increasing its cost to the individual, for instance imposing a criminal sanction or increasing the amount of compensation payable for the harmful conduct.[14]

12 A Kronman, "Mistake, disclosure, information, and the law of contract" (1978) 7 *Journal of Legal Studies* 1, at 4.

13 G Becker, "Crime and punishment: an economic approach" (1968) 76 *Journal of Political Economy* 169.

14 For general discussions, see G Becker, *The Economic Approach to Human Behaviour* (Chicago: University of Chicago Press, 1976); D Baird, R Gertner and R Picker, *Game Theory and the Law* 6th edn (Cambridge, Mass: Harvard University Press, 2003).

To see how the current law of unilateral mistake affects the incentive for disclosure, the analysis should distinguish the situation where the information to be disclosed is favourable to the disclosing party from one where the information is unfavourable to the same party. In the first case, there is no need for the law to create an incentive for disclosure:[15] a rational party will voluntarily disclose the information if the profit from the disclosure exceeds the cost. In other words, parties will have sufficient incentive to disclose the information which is favourable to them. For example, the seller will voluntarily disclose any information that would raise the contract price; and the buyer, by the same token, has the incentive to reveal any information which might lower the contract price. Therefore, the current law of unilateral mistake does not affect either party's incentive to disclose information favourable to him or herself.

In the second case, parties will not disclose unless the law creates sufficient incentives for them to do so, because a rational party has no incentive to disclose information which is unfavourable to him or her. If the law makes the cost of non-disclosure higher than the cost of disclosure, it will create an effective inducement for the party to disclose. The current law of unilateral mistake can do this. To appreciate this argument, we should consider the difference in the payoff to the party between disclosure and non-disclosure under the current law.

If a party with a piece of unfavourable information discloses this to the other party, there are two possible outcomes. First, the disclosing party may still contract with the other party, if the former is willing to adjust the contract price in favour of the latter. In this case, the disclosing party can still gain from making the contract, although obtaining less than under non-disclosure. But the disclosing party is certainly better off than if not contracting. Second, the other party may refuse to contract, believing that making the contract is not worthwhile. In this case, the disclosing party is unable to gain from contracting. In brief, under the current law, if a party discloses unfavourable information, that party may obtain either a lower profit or nothing.

Consider now the party's payoff for non-disclosure. Under the current law, the party can void the contract if that party has made a unilateral mistake known to the other party. Where the contract is void *ab initio*, the law will restore the parties to the position where no contract had been made: each party must return what he or she received from the other. Thus, when the contract is void, the non-mistaken party is deprived of the opportunity to gain from contracting.

If the party with unfavourable information, knowing that non-disclosure will lead the other party to make a mistake, actually fails to disclose, the payoff from non-disclosure is nil. In contrast, if disclosure is made, there is a possibility for the original party to obtain a positive payoff, since, after disclosure, the other party may choose either to make the contract subject to adjustment of the price or not to contract. If the other party chooses the second option, there will be a contract between them, so that the party with unfavourable information can still enjoy a positive return from contracting. Therefore, the current law creates an incentive for the party with superior information to disclose.

However, the major economic problem with the current law is that it undermines the incentive for information acquisition. Why should rational parties seek information? Their incentive is that they intend to profit from using the information which they have acquired. Under the current law, they are forbidden to profit from using such information and this discourages information-seeking. To illustrate, consider the following example.

15 C Wonnell "The structure of a general theory of non-disclosure" (1991) 41 *Case Western Reserve Law Review* 329 at 341.

The owner of land believes that there no mineral wealth under the land and therefore offers to sell it for £4m. The buyer is a mining firm, according to whose experts there is a one per cent chance that this piece of land contains a quantity of minerals worth £600m, so the *ex ante* value of the land to the firm is £6m (£600m × 1%). But the mining firm will incur a search cost of £1m to assess the mineral value of the land. Imagine further that, if it is discovered that the land contains minerals, the owner will not sell the land for less than £599.5m. The question which we need to answer is whether the firm will invest £1m in discovering the mineral capacity of the land under the current law.

If the law did not excuse the owner's mistake and enforced the contract strictly when it was discovered that the land was rich in minerals, the firm would purchase the land at the price of £4m and then spend another £1m on discovering the mineral capacity, because it could earn an *ex ante* profit of £1m (£6m - £4m - £1m = £1m).

In contrast, if the law excuses the owner's mistake and allows the contract to be rescinded when it is found that the land contains minerals, the firm will not invest £1m in exploration in the first place, because once the contract is rescinded, the firm is not only unable to profit from investing in the search, but cannot recover its search costs, so sustains a loss of £1m.

Under the current law, if the firm does discover minerals under the land without revealing this to the owner, the owner can void the contract on the ground of a unilateral mistake which is known to the non-mistaken party. In this case, the firm will sustain a loss of £1m. If, however, the firm discloses the information to the owner, the owner will raise the contract price to £599.5m. Given the search cost of £1m which has been spent by the firm, it will receive a negative payoff of £0.5m by purchasing the land at this price (£600m - £599.5m - £1m = -£0.5m). Therefore, the best strategy for the firm is not to invest £1m in discovering the mineral capacity. Because the current law will void the contract on the ground of a mistake known to the non-mistaken party, it forbids the party with superior information from capturing profit by using the information. Consequently, it undermines the party's incentive to search for information.

An economic approach to the law of unilateral mistake can generate insights essential for understanding how the law could affect allocation of resources and the incentive for acquisition of information. In this section, I have demonstrated that there are two economic problems associated with the English law of unilateral mistake: misallocation of resources and discouragement of the acquisition of information. There is an interesting question to be answered: could we propose a new rule to overcome these two economic problems? In the next section, I shall review two main solutions proposed in the law and economics literature, as well as pointing out their limitations. Then, in Section 5, I will propose a new solution – a remedy-based approach to unilateral mistake – and argue that the new approach has economic advantages over both the current law and the propositions in the literature.

4 Solutions in the current law and economics literature

The question of how the legal rule affects allocative efficiency and the contracting parties' incentives to disclose and search for information has been extensively researched in law and economics.[16] Much of the literature in this field builds on the contributions of Kronman and of Cooter and Ulen.[17]

A Kronman's approach

Kronman addresses the issue by drawing a critical distinction between information which is acquired deliberately and that which is acquired casually. He proposes that if the non-mistaken party acquires the information casually, the law should rescind the contract for a unilateral mistake; in contrast, if the information is acquired deliberately, the law should enforce the contract even though one party is mistaken. For him, information is acquired casually if the party does not incur any cost in acquiring the information, for example a businessperson acquires a valuable piece of information when accidentally overhearing a conversation on a bus. By contrast, information is acquired deliberately if the party has purposely invested in searching for or producing information, for instance a securities analyst acquires information about a particular corporation in a deliberate fashion – by carefully studying evidence of its economic performance.[18]

The rationale underlying this argument goes as follows. Rescinding a contract on the ground of unilateral mistake implicitly imposes a duty of disclosure on the party with superior information. If the information is acquired casually, imposing the duty to disclose is not likely to discourage the production of socially useful information, since the actor who acquires information casually makes no investment in its acquisition. But imposing the duty of disclosure on the party who acquires information by a deliberate investment would significantly reduce the incentive to make such an investment in the first place, thereby significantly diminishing production of valuable information.[19]

Kronman's proposition has a significant limitation. As Kronman's interest is in the issue of how the law of unilateral mistake can create the incentive for information production, he overlooks the issue of how the law affects allocation of resources. According to Kronman, the contract should be rescinded on the ground of unilateral mistake if the non-mistaken party acquires the information casually. But if the subjective value of the non-mistaken party is higher than that of the mistaken party, the rescission will result in misallocation of resources from the higher value user to the lower. Hence, Kronman's approach may also lead to misallocation of resources.

16 For general discussion, see Kronman, "Mistake, disclosure, information" (n. 12 above); J Hirshleifer "The private and social value of information and the reward to inventive activity" (1971) 61 *American Economic Review* 561; M Eisenberg, "Disclosure in contract law" (2003) 91 *California Law Review* 1645; R Craswell, "Taking information seriously: misrepresentation and nondisclosure in contract law and elsewhere" (2006) 92 *Virginia Law Review* 565; Wonnell, "The Structure" (n. 15 above); S Shavell, "Acquisition and disclosure of information prior to sale" (1994) 25 *RAND Journal of Economics* 20: M Trebilcock, *The Limits of Freedom of Contract* (London: Harvard University Press, 1997), pp. 102–27; O Grosskopf and B Medina, "A revised economic theory of disclosure duties and break-up fees in contract law", a working paper, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=935165; R Birmingham, "The duty to disclose and the prisoner's dilemma: *Laidlaw* v *Organ*" (1988) 29 *William and Mary Law Review* 249; H Kötz, "Precontractual duties of disclosure: a comparative and economic perspective" (2000) 9 *European Journal of Law and Economics* 5.

17 Kronman, "Mistake, disclosure, information" (n. 12 above); R Cooter and T Ulen, *Law and Economics* 4th edn (London: Pearson Addison Wesley, 2003), pp. 281–4.

18 Kronman, "Mistake, disclosure, information" (n. 12 above), p. 13.

19 Ibid.

B Cooter and Ulen's Approach

Unlike Kronman, Cooter and Ulen distinguish productive from redistributive information. For them, productive information can be used to produce more wealth, for example the discovery of a vaccine for polio and the discovery of a shipping route between Europe and China. In contrast, redistributive information creates a bargaining advantage that can be used to redistribute wealth in favour of the informed party. For instance, knowing before anyone else where the state will locate a new highway conveys a powerful advantage in real-estate markets. Searching for redistributive information is socially wasteful. Therefore, they conclude that the law should discourage expenditure of resources on searching for redistributive information.[20] One device to this end is to rescind the contract when one contracting party makes a unilateral mistake which is caused by the non-mistaken party's non-disclosure of redistributive information.

The argument of Cooter and Ulen appears to be based on the earlier work of Hirshleifer,[21] who made a distinction between "foreknowledge" and "discovery". Foreknowledge is knowledge that "will in due time, be evident to all"; it is information that "Nature will autonomously reveal, it involves only the value of priority in time of superior knowledge."[22] This type of information leads only to redistribution of wealth, without increasing social welfare. Discovery, by contrast, is "the recognition of something that possibly already exists, though [it will remain] hidden from view unless and until the discovery is made".[23] Discovered information can generate both private gains to the owner of information and social wealth. Although Cooter and Ulen use different terminology, the theme of their argument is much the same as that of Hirshleifer, in that both seek to distinguish socially valuable from socially valueless information and suggest that the law should provide disincentives for acquisition of the latter.

But the shortcoming of Cooter and Ulen's approach is also obvious. In the context of contract law, it is impossible to draw a clear-cut distinction between productive and redistributive information. In most cases, the information is both productive and redistributive. Recall their earlier example: they argue that information on the discovery of a shipping route from Europe to China is productive. But this information can also be redistributive. Imagine a contractual relation between a Chinese exporter and a European importer. Assume now that the Chinese exporter knows of a new route; this information could reduce the transportation costs of the goods substantially. If the European company learns of this information, it will not purchase the goods unless the Chinese firm agrees to lower the price. But if the Chinese exporter conceals this information from the European buyer, the former can charge the original price and make a higher profit. Thus, the information on the new route redistributes wealth in the form of contract price from the European firm to the Chinese firm.

Conversely, the redistributive information may be of a productive kind. Cooter and Ulen take the information concerning the intended building of a new road as an example of redistributive information. But it may be productive as well. If the owner of land adjacent to the road uses the land for a purely residential purpose, the new highway will reduce the owner's subjective value on the land because of noise generated by passing vehicles. The sooner the owner has the information, the sooner that person will be able to sell the land to

20 Cooter and Ulen, *Law and Economics* (n. 17 above), pp. 281–4.

21 Hirshleifer "The private and social value" (n. 16 above).

22 Ibid., p. 562.

23 Ibid.

someone who values it more highly and buy a new home elsewhere. Thus, information of this kind can speed up the process of resource allocation to the highest value user.[24]

Because Cooter and Ulen's distinction between productive and redistributive information is ambiguous, it cannot be used as a criterion in contract law to determine when the contract should be voided for a unilateral mistake. If the law followed Cooter and Ulen's suggestion to discourage searching for redistributive information, it would lead to inefficient allocation of resources when the information had both redistributive and productive features.

From an economic perspective, the crucial issues in implementing the law of unilateral mistake are improving allocative efficiency as well as creating incentives for acquiring information. In this section, I have demonstrated that neither of the two main propositions in the law and economics literature provides an optimal solution, sharing as they do the characteristic that they seek to provide guidance on determining when the contract is void for a unilateral mistake by classification of mistakes in terms of certain economic features. But there is almost no discussion of how the legal remedy could contribute to solving this problem. In the next section, I will offer a new perspective, the remedy-based approach to the unilateral mistake, arguing that this has advantages over the existing propositions.

5 A remedy-based approach

The legal remedy, as argued by Ogus, is

> an external inducement which can be envisaged as imposing cost or conferring benefits on actors. When integrated into the actor's cost–benefit assessment of the different available behavioural options, they may significantly change preferences, and therefore demand, like any other increase or reduction of price.[25]

From the actor's perspective, the legal remedy is the price which the actor pays for the act. An increase in the price will undermine or overcome the actor's incentive for that act and a decrease in the price will stimulate it.[26]

Based upon this argument, I propose a new approach to unilateral mistake, the remedy-based approach, according to which four suggestions are made: (1) the law should abolish the distinction between the unilateral mistake known to the non-mistaken party and that unknown to the non-mistaken party; (2) the unilateral mistake should not render the contract void *ab initio*; (3) if one party makes a unilateral mistake, whether known or unknown to the other party, the contract is voidable – the law should give discretion to the mistaken party to decide whether or not to rescind the contract; (4) if the mistaken party chooses to rescind the contract, that party should pay the other party for the expectation loss in order to put the latter into the position he or she would have been in if the contract had been perfectly performed. The expectation loss is measured in the same way as damages for breach of contract.

To see how this proposition works, recall our earlier mineralogical example. According to the new approach, if the landowner is mistaken as to the fact that the land is rich in minerals, the owner has the right to decide whether or not to rescind the contract. If the decision to rescind is made, the landowner should compensate the firm for its expectation loss of

24 Similar arguments were made by Kronman and Eisenberg, see Kronman, "Mistake, disclosure, information" (n. 12 above), p. 12; Eisenberg, "Disclosure in contract law" (n. 16 above), pp. 1666–73.

25 Ogus, *Costs and Cautionary Tales* (n. 10 above), p. 101.

26 For general discussion on legal remedy and incentives, see J Barton "The economic basis of damages for breach of contract" (1972) 1 *Journal of Legal Studies* 277; S Shavell, "Damage measures for breach of contract" (1980) 11 *Bell Journal of Economics* 466; Ogus, *Costs and Cautionary Tales* (n. 10 above), pp. 101–5.

£600m. As will be shown, this new approach effectively ends misallocation of resources caused by the current law, while creating a sufficient incentive for acquisition of information.

In the first place, the remedy-based approach is more allocatively efficient than the current law. Allocative efficiency requires goods to move from the lower to the higher value user. Therefore the contract should be rescinded for a unilateral mistake when the subjective value of the mistaken party is higher than that of the non-mistaken party and should not be rescinded when the reverse is true. As outlined already, the current law may lead to inefficient allocation of resources by moving goods from the higher to the lower value user, a problem which the remedy-based approach can alleviate.

In the light of this approach, if the mistaken party rescinds the contract, that party should compensate the non-mistaken party for his or her expectation loss. This is just equal to the non-mistaken party's subjective value – the price the non-mistaken party would request for selling the goods. A rational party will have the incentive to rescind the contract for the mistake only if that party's subjective value exceeds the other party's expectation losses; otherwise, the former will choose not to rescind. Consequently, other things being equal, it can be ensured that as long as the mistaken party rescinds the contract, his or her subjective value will be higher than that of the non-mistaken party and the rescission is allocatively efficient. If the mistaken party waives the right of rescission, it is implied that the mistaken party's subjective value is lower than that of the non-mistaken party, so that it is now enforcement of the contract which is allocatively efficient. Therefore, theoretically speaking, the remedy-based approach does not result in misallocation of resources.

Nonetheless, it is by no means possible to claim that the remedy-based approach can completely eliminate misallocation of resources. The above argument assumes that rescinding the contract generates no cost to the mistaken party and that the mistaken party can discover his or her mistake *ex post*. Obviously, neither assumption is always true in practice. Rescinding the contract will generate a high litigation cost to the mistaken party. If the mistaken party's subjective value on the goods is outweighed by the litigation cost and the expectation damages payable to the non-mistaken party, the party will not rescind the contract, in which case the misallocation cannot be rectified. Thus, the remedy-based approach can be allocatively efficient only if the litigation cost to the mistaken party is low. In addition, not every mistaken party can discover *ex post* that a mistake has been made. It has been widely recognised that individuals have only a limited capacity to digest information.[27] If the mistaken party fails to discover the mistake *ex post*, the remedy-based approach again cannot correct the misallocation caused by the mistake.

Despite the demerits outlined above, the remedy approach is more allocatively efficient than the current law. First, the problems of litigation cost and *ex post* ignorance of the mistake also apply to the current legal regime; it cannot be said that they are more serious under the rule proposed. Second, the remedy approach can correct more misallocations resulting from unilateral mistakes than the current law, under which, once a mistake leads to misallocation, it can be corrected only if the non-mistaken party knows of the mistake. In contrast, the remedy-based approach allows the party to rescind the contract for the mistake, no matter whether the non-mistaken party is aware of it. Thus, more misallocations can be rectified under the remedy-based rule than under the current one.

The second merit of the remedy-based approach is that it can create a sufficient incentive for acquisition of information, which is insufficient under the current law because once the contract is rescinded for the unilateral mistake, the contract is void *ab initio* and each party must return what they have received from the other party. This prohibits parties

27 C Sunstein (ed), *Behavioural Law and Economics* (Cambridge: CUP, 2000).

from capturing any profit derived from the information which they privately own. Therefore, they will lack the incentive to acquire the information in the first place. By contrast, under the remedy-based rule, if the contract is rescinded for a unilateral mistake, the non-mistaken party can claim the expectation loss from the mistaken party. Hence, after receiving compensation from the latter, the former would be put into the position in which he or she would have been had the contract been perfectly performed. The new rule allows the party to capture all of the profits derived from that party's own private information, thereby creating a sufficient incentive to acquire information.

6 Conclusion

The key economic issues in implementing the law of unilateral mistake are to facilitate efficient allocation and to create a sufficient incentive for acquisition of information. In this paper, I have demonstrated that the current English law may both lead to misallocation of resources and discourage parties from acquiring information. In addition, we have recognised that the propositions in the current law and economics literature do not offer an optimal solution. Finally, I have proposed a remedy-based approach to the unilateral mistake problem. As illustrated by this paper, the new approach has economic advantages over the current law. Not only can it create an incentive for acquisition of information, but it also rectifies more misallocation resulting from unilateral mistakes.