



REPORT
ON
REFORM AND MODERNISATION
OF
LAND LAW AND CONVEYANCING LAW

(LRC 74 – 2005)

IRELAND

The Law Reform Commission
35-39 Shelbourne Road, Ballsbridge, Dublin 4

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An Taoiseach Bertie Ahern TD
Department of the Taoiseach
Government Buildings
Upper Merrion Street
Dublin 2

1 July 2005

Report on Reform and Modernisation of Land Law and Conveyancing Law

Dear Taoiseach

I enclose a copy of the Commission's **Report on Reform and Modernisation of Land Law and Conveyancing Law (LRC 74 – 2005)** will be published in the near future.

Yours sincerely

Catherine McGuinness
President

THE LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and make practical proposals for its reform. It was established on 20 October 1975 pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

To date, the Commission has published seventy two Reports containing proposals for the reform of the law; eleven Working Papers; thirty seven Consultation Papers; a number of specialised papers for limited circulation; *An Examination of the Law of Bail*; and twenty five Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications relating to land law and conveyancing is contained in Appendix C to this Report.

Membership

The Law Reform Commission consists of a President, one full time Commissioner and three part-time Commissioners. The Commissioners at present are:

President: The Hon Mrs Justice Catherine McGuinness, Supreme Court

Full-Time Commissioner: Patricia T. Rickard-Clarke, Solicitor

Part-Time Commissioner: Professor Finbarr McAuley, Jean Monnet Professor of European Criminal Justice, University College Dublin

Part-Time Commissioner: Marian Shanley, Solicitor

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THE PROJECT

Publication of this Report marks the completion of the third, and final, phase of the joint project for the major reform and modernisation of land law and conveyancing law which was established in late 2003 by the Department of Justice, Equality and Law Reform and the Law Reform Commission. This project is part of a larger programme of reform which has as its ultimate goal the introduction of a comprehensive system of eConveyancing. Its primary aim is to modernise the substantive law which underpins the conveyancing system and, in so doing, to replace the large number of pre-1922 statutes, some of which are centuries old, still in force in the State.

The *first* phase of the project involved the screening of the pre-1922 statutes with a view to identifying those which could be: (i) repealed without replacement; (ii) replaced without substantial amendment; (iii) replaced with substantial amendment. It also involved a review of the general law. The *second* phase comprised a consultation process which was initiated by publication in October 2004 of the *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP34 – 2004). That Paper set out the results of the first phase and made numerous recommendations with respect to repeal and replacement of pre-1922 statutes and reform of the general law. It invited comments and submissions and the Department and Commission were pleased to receive those submitted by the various individuals and organisations listed in Appendix A. The consultation process was also advanced by an all-day Conference held at UCD on 25 November 2004, at which various expert speakers, including several from overseas, addressed issues raised by the Consultation Paper. The keynote speaker was **Professor J C W Wylie** who had been engaged as the legal researcher with responsibility for carrying out the first phase of the project. Professor Wylie, together with members of the Commission and the Department also gave a presentation to the Dáil Eireann Joint Committee on Justice, Equality, Defence and Women's Rights on 24 November 2004.

The *third* phase of the project has involved the drafting of the legislation to implement the recommendations contained in the Consultation Paper, taking into account the various comments and

submissions received from individuals and organisations. Professor Wylie was again engaged to carry out this task, with the assistance of Marcus Bourke, former Parliamentary Draftsman. Further assistance was provided by the Commission's Substantive Law Working Group, which is part of the eConveyancing Project. Its members are:

The Hon Mrs. Justice Catherine McGuinness, President of the
Law Reform Commission
Commissioner Patricia T. Rickard-Clarke
Commissioner Marian Shanley
Seamus Carroll, Department of Justice, Equality and Law
Reform
Vivienne Bradley, Solicitor
Dr. John Breslin, Barrister-at-Law
Patrick Fagan, Solicitor
Chris Hogan, Former Senior Deputy Registrar, Land Registry
Caroline Kelly, Barrister-at-Law
Deirdre Morris, Solicitor
Marjorie Murphy, Solicitor
Doreen Shivnen, Barrister-at-Law

Detailed comments on the draft Bill were also provided by the Hon. Miss Justice Mary Laffoy and Gavin Ralston SC. The Commission's Legal Researcher who provided much technical assistance in the preparation of this Report was Mary Townsend.

TABLE OF CONTENTS

INTRODUCTION.....	1
CHAPTER 1 DRAFT LAND AND CONVEYANCING	
BILL.....	3
CHAPTER 2 VARIATIONS FROM CONSULTATION	
PAPER.....	7
APPENDIX A LIST OF INDIVIDUALS AND	
ORGANISATIONS RESPONDING	
TO CONSULTATION PAPER.....	11
APPENDIX B LAND AND CONVEYANCING	
BILL 2005.....	13
ARRNGEMENT OF SECTIONS.....	15
PRELIMINARY AND GENERAL.....	24
TENURE AND ESTATES.....	37
FUTURE INTERESTS.....	63
TRUSTS OF LAND.....	68
POWERS.....	92
CO-OWNERSHIP.....	99
APPURTENANT RIGHTS.....	116
CONTRACTS AND CONVEYANCES.....	162
MORTGAGES.....	247
JUDGMENT MORTGAGES.....	309
LIMITATION OF ACTIONS.....	322
APPENDIX C LIST OF LAW REFORM COMMISSION	
PUBLICATIONS.....	365

INTRODUCTION

1. This Report primarily sets out the draft legislation which it is recommended should implement the various recommendations set out in the October 2004 Consultation Paper (LRC CP34 – 2004). The draft Bill, entitled the *Land and Conveyancing Bill 2005*, is set out in Appendix B to this Report. This also contains detailed explanatory notes to each part and section of the Bill.

2. The following principles were adopted in carrying out the first phase of the Joint Project:

- (a) *updating the law, so as to make it accord with changes in society.*
- (b) *promoting simplification of the law and its language, so as to render it more easily understood and accessible;*
- (c) *promoting simplification of the conveyancing process, in particular the procedures involved, including the taking of security over land;*
- (d) *facilitating extension of the registration of title system, with a view to promoting a system of title by registration;*
- (e) *keeping in mind the overall aims of the e-Conveyancing Project and facilitating introduction of an e-conveyancing system as soon as possible.*

3. Chapter 1 of this Report contains some further explanation of the drafting of the Bill and its contents. Chapter 2 discusses areas

where the Bill does not conform strictly with recommendations in the Consultation Paper and explains why this is so.

**CHAPTER 1 DRAFT LAND AND CONVEYANCING
BILL 2005**

1.01 As recommended by the Consultation Paper, the draft Bill seeks to implement two primary objectives: (i) the replacement of all pre-1922 legislation relating to land law and conveyancing; (ii) reform of the general substantive law which underpins conveyancing practice. To that extent the Bill is essential to the implementation of an eConveyancing system.

1.02 The Commission wishes to reiterate that the joint project which culminates in publication of this Report is part of the much larger eConveyancing Project. The latter project has other strands, which have been referred to as the administrative and procedural strands. These are concerned, respectively, with the operation of the various (mostly) public bodies which hold information relating to conveyancing transactions (such as local authorities, the Court Service, Land Registry and Registry of Deeds) and with the conveyancing process. Much work has still to be completed by the Commission in relation to these matters, before specific recommendations can be made with respect to eConveyancing.

1.03 Part of that work involves development of a model for eConveyancing and at the time of writing the preparation of such a model has been put out to tender. This aspect of the project is supported by a grant from the Government's *Information Society Fund*, which is administered by the Department of the Taoiseach, the Department of Finance and Centre for Management and Organisational Development.

1.04 Another part of the larger eConveyancing Project has been a study of systems being developed in other jurisdictions. Some of the overseas speakers at the November Conference at UCD provided information about these.

1.05 Perhaps the greatest problems to be resolved in relation to introduction of an eConveyancing system in this State relate to the

varying degrees to which public bodies here have become computerised. Some bodies have clearly made considerable advances in recent years, but others have a long way to go. An inevitable consequence of this is that it is likely to be some time before a universal system of eConveyancing can be introduced.

1.06 The Commission has reached the initial conclusion that a comprehensive system of eConveyancing can operate only in respect of registered land. Given that much urban land remains unregistered, and, therefore, a high percentage of annual transactions involve unregistered conveyancing, the draft Bill has had to take into account the likely continuance of a substantial number of such transactions in the foreseeable future.

1.07 Introduction of eConveyancing may be facilitated by regulation under the *Electronic Commerce Act 2000*. This power to legislate by statutory instrument is supplemented by *section 91* in the draft Bill set out in Appendix B. Provisions for the establishment of a Property Registration Authority are contained in the *Registration of Deeds and Title Bill 2004* which is currently before the Oireachtas

1.08 Finally the following points should be noted with respect to the draft Bill. First, in accordance with the Commission's *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61 – 2000), every effort has been made to make its provisions as simple, direct and straightforward as possible. It is not insignificant that provisions contained in some 150 pre-1922 statutes and involving hundreds of sections, many of which are couched in archaic, convoluted and verbose language, have been reduced to less than 140 sections and one, albeit necessarily complicated, Schedule in the draft Bill. Most of the sections in the draft Bill are themselves relatively short and simple and, where some complexity has crept in, it is invariably because the subject matter being dealt with is complex.

1.09 Secondly, in order to assist the understanding of the draft Bill, Appendix B includes detailed introductory notes to each Part of the draft Bill and explanatory notes to each section. These cross-refer to the recommendations made in the Consultation Paper and, where appropriate, explain the derivation of particular provisions and what amendments are made to existing pre-1922 statutes. In addition, the side notes to particular sections refer to pre-1922 statutory provisions being replaced and to the relevant paragraph in the Consultation

Paper containing the recommendation being implemented.

1.10 Thirdly, in furtherance of one of the primary objectives, the draft Bill contains a large list of pre-1922 statutes which would be repealed with or without replacement provisions in the Bill itself. This list is set out in *Schedule 1* to the Bill. *Section 8* and that Schedule refer also to amendments to be made to existing, mostly post-1922, statutes. Most of the more important amendments are made in the body of the Bill, itself, in the appropriate context, *ie*, in the section dealing with the subject-matter in question. It is recognised that it is likely that numerous minor amendments to other statutes may be necessary. The identification of these will require a careful checking of the statute book, which will take some time and consultation with the Office of the Parliamentary Counsel. The required amendments will be added at a later stage.

1.11 Fourthly, again in the interests of simplicity and straightforwardness, the draft Bill deals with the issue of transitional provisions in each context where they are relevant, *ie*, in particular sections in the body of the Bill.

1.12 Lastly, the general approach has been taken of making clear where the Bill's provisions would have prospective effect only. Apart from that there is the general rule of interpretation that legislation should not be treated as having retrospective effect. This is particularly important in the field of property in view of the protection of vested rights conferred by the Constitution. Attention is also drawn to the provisions in the *Interpretation Act* dealing with the operation of repeals of statutes (currently *section 21* of the 1937 Act) and construction of references to repealed statutes (*section 20* of that Act).

CHAPTER 2 VARIATIONS FROM CONSULTATION PAPER

2.01 The individuals and organisations responding to the Consultation Paper were generally very supportive of its recommendations. The drafting of the Bill to implement its recommendations involved, therefore, the making of minor adjustments only in the light of this response. However, other factors have resulted in some more substantial variation of what was recommended in the Consultation Paper and the ensuing paragraphs outline what these were.

2.02 Before doing that, it is important to emphasise one point upon which some uncertainty has arisen. As reiterated in Chapter 1, the draft Bill is not concerned primarily, any more than the Consultation Paper was, with the introduction of an eConveyancing system. It is an essential first step toward the introduction of eConveyancing. Closely linked with this is the point that unregistered land conveyancing will continue to apply to a substantial proportion of land transactions for some time and the draft Bill has had to be drafted with this in mind.

2.03 Chapter 11 of the Consultation Paper recommended replacement, with substantial modification, of the old *Registration of Deeds Acts*, dating from 1707. The draft Bill does not deal with this subject because, as anticipated by the Consultation Paper, it is covered by Part 2 of the *Registration of Deeds and Title Bill 2004* currently before the Oireachtas. The Seanad completed its consideration of the Bill in June 2005.

2.04 Chapter 12 of the Consultation Paper contained a number of recommendations for reform of the law relating to adverse possession, based on earlier Reports of the Commission. Since those reports were written the operation of the doctrine has become the subject of increasing controversy. Much of this relates to the extent to which it appears to sanction a person who has no claim whatever to the land becoming the owner of it, without having to pay any

compensation at all to the “paper” owner or even to obtain the sanction of a court order. In England considerable doubts have been expressed by some judges as to whether the doctrine is consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms. Different views were expressed at various court levels in the case of *J A Pye (Oxford) Ltd v Graham* [2002] Ch 676 (High Court), [2001] Ch 804 (Court of Appeal) and [2002] 3 All ER 865 (House of Lords). It is understood that the case has now been appealed to the European Court at Strasbourg. In *Beaulane Properties Ltd v Palmer* [2005] 14 EG 129 (CS) Nicholas Strauss QC (sitting as a Deputy High Court Judge) ruled that the doctrine was incompatible with the protection of peaceful enjoyment of property enshrined in Article 1 of the First Protocol to the Convention. The Westminster Parliament introduced substantial limitations on the doctrine’s operation with respect to registered land in the *Land Registration Act 2002*.

2.05 The Commission has reconsidered the subject in the light of these developments and concerns raised in the Seanad during the Second Stage of the *Registration of Deeds and Title Bill 2004*. Not only has the European Convention been given effect in Irish law by the *European Convention on Human Rights Act 2003*, but there is also the protection of private property rights enshrined in Articles 40 and 43 of the Constitution.

2.06 The Commission has concluded that the doctrine has long served an extremely beneficial and useful purpose in land law and conveyancing practice, by providing a means, to use the traditional language, of “quieting titles”. Many doubtful titles have been settled by conveyancing counsel, and, on occasion, the courts, on the basis of the doctrine and thereby land transactions have been greatly facilitated. This useful purpose should be retained and arguably comes within the “exceptional” circumstances based on “public interest” or “social justice” and “common good” recognised by the Convention and the Constitution. However, it must be recognised that on occasion the doctrine may operate unfairly, especially where it appears to enable a person, who deliberately sets out to take advantage of it, to use it as a means of obtaining ownership of someone else’s land without paying any compensation. The same applies where it appears to exact a very severe penalty on a landowner (the loss of the land) through a mere oversight or mistake.

2.07 The provisions in the draft Bill designed to deal with the doctrine have attempted to draw a distinction between the different situations outlined in the previous paragraph. They allow the doctrine to continue to fulfil its role in settling doubtful titles, but exclude its operation where it would otherwise operate unfairly. As an added protection, it is provided that in future a person claiming under the doctrine should have to validate the claim by obtaining a court order.

2.08 Finally, as again anticipated in the Consultation Paper, several of the miscellaneous items of law reform dealt with in Chapter 13 of the Paper are not covered by the draft Bill, for several reasons. Those relating to the Land Registry and the Registry of Deeds are dealt with by the *Registration of Deeds and Title Bill 2004*. Some are concerned more with the procedural aspect of conveyancing practice and facilitation of eConveyancing (such as matters relating to planning and the *Family Home Protection Act 1976*). These will be picked up as part of the wider eConveyancing project. Other matters relating to post-1922 legislation, such as the *Succession Act 1965*, are likely to be dealt with by separate legislation. This applies also to matters relating to landlord and tenant law, which is the subject of a separate major project being undertaken by the Commission.

**APPENDIX A LIST OF INDIVIDUALS AND
ORGANISATIONS RESPONDING TO
CONSULTATION PAPER**

Kevin Cahill, Global & Western News Bureau
Brendan Carroll
Conveyancing Committee, Law Society of Ireland
Frances Cooke, Revenue Solicitor
Niall Gilligan
Helen Keenan Dunne, Examiner of Titles, Legal Services Division,
Department of Agriculture and Food
Irish Institution of Surveyors
Irish Mortgage Council
John M. Lannon, BL
Dr. John Mee, Faculty of Law, University College, Cork
Ken O' Carroll
Terence O'Keeffe, Dublin City Council
Radiological Protection Institute of Ireland

APPENDIX B LAND AND CONVEYANCING BILL 2005

This draft Bill provides for implementation of the recommendations contained in the *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* published in October 2004 by the Law Reform Commission (LRC CP 34 – 2004). That Paper (“CP”) resulted from a joint project established in late 2003 by the Commission and the Department of Justice, Equality and Law Reform. The project was part of a larger programme of reform being carried out by the Commission, the ultimate goal of which is the introduction of an electronic conveyancing (eConveyancing) system. The reform of the substantive law which underpins the conveyancing system is an essential preliminary step. An important aspect of this reform process, which this Bill implements, is the replacement of obsolete and outdated pre-1922 legislation. It provides for the repeal, and where necessary, replacement of some 150 such statutes.

The draft Bill also provides for modernisation of the general law by getting rid of concepts rooted in the feudal age and other eras no longer relevant to Irish society in the 21st century. Thus it abolishes the system of feudal tenure which is not compatible with the relationship between the State and its citizens as enshrined in the Constitution. In addition the Bill contains many provisions designed to simplify the law and, as a consequence, conveyancing practice. It is not intended, however, to codify the entire law in relation to land because it is important that the courts should remain free to develop equitable principles designed to do justice in particular cases. One of the most significant developments in recent decades has been the application to disputes over land of equitable doctrines like those relating to resulting and constructive trusts and proprietary estoppel.

Although the draft Bill is designed to prepare the ground for the introduction of an eConveyancing system, it recognises that it will be some time before such a system applies to all land transactions. Its introduction is very much dependent upon computerisation of information relating to land and landowners and extension of the registration of title system to all land. Currently much urban land remains unregistered. The draft Bill reflects the fact that traditional conveyancing practice, including that relating to unregistered land, will continue for some time after the Bill is enacted and comes into force.

LAND AND CONVEYANCING BILL

ARRANGEMENT OF SECTIONS

PART 1

Preliminary and General

Section

1. Short title.
2. Commencement.
3. Interpretation generally.
4. Service of notices.
5. Regulations and orders.
6. Offences.
7. Expenses.
8. Repeals and amendments.

PART 2

Tenure and Estates

9. Abolition of feudal tenure.
10. Estates in land.
11. Restrictions on legal estates and interests.
12. Prohibition of fee farm grants.
13. Abolition of the fee tail.
14. Prohibition of leases for lives.
15. Minor not to own a legal estate.

PART 3

Future Interests

16. Abolition of various rules.
17. Scope of *section 16*.
18. Operation of future interests in land.

PART 4

Trusts of Land

19. Trusts of land.
20. Trustees of land.
21. Powers of trustees of land.
22. Overreaching for protection of purchasers.
23. Resolution of disputes.

PART 5

Powers

24. Application of Part 5.
25. Execution of non-testamentary powers of appointment.
26. Release of powers.
27. Disclaimer of powers.
28. Validation of appointments.

PART 6

Co-Ownership

29. Unilateral severance of a joint tenancy.
30. Amendment of *Succession Act 1965*, s. 5.
31. Court orders.
32. Bodies corporate.
33. Waste and encroachment on commonages.

PART 7

Appurtenant Rights

Chapter 1

Easements and profits à prendre

34. Interpretation of *Chapter 1*.
35. Abolition of certain methods of prescription.
36. Acquisition of easements and profits *à prendre* by prescription.
37. Limited interests.
38. Incapacity.
39. Application of *sections 35 to 38*.
40. Extinguishment.
41. Implied grant.

Chapter 2

Rentcharges

42. Prohibition of certain rentcharges.
43. Enforcement.

Chapter 3

Party structures

44. Interpretation of *Chapter 3*.
45. Rights of building owner.
46. Works orders.
47. Terms and conditions of works orders.
48. Discharge and modification.
49. Registration of court orders.

Chapter 4

Freehold covenants

50. Interpretation of *Chapter 4*.
51. Enforceability of freehold covenants.
52. Discharge and modification.
53. Registration of court orders.

PART 8

Contracts and Conveyances

Chapter 1

Contracts relating to land

54. Evidence in writing.
55. Auctions.
56. Passing of beneficial interest.
57. Abolition of Rule in *Bain v Fothergill*.
58. Order for return of deposit.
59. Vendor and purchaser summons.

Chapter 2

Title

- 60. Root of title.
- 61. Leasehold titles.
- 62. Other conditions of sale.
- 63. Protection of purchasers.
- 64. Fraudulent concealment and falsification.
- 65. Notice of rights on common title.

Chapter 3

Deeds and their operation

- 66. Conveyances by deed only.
- 67. Exceptions to deeds.
- 68. Formalities for deeds.
- 69. Escrows by corporate bodies.
- 70. Conveyance to oneself.
- 71. Words of limitation.
- 72. Reservations.
- 73. Benefit of deeds.
- 74. Features and rights conveyed with land.
- 75. Supplemental instruments.
- 76. Partial releases.
- 77. Fraudulent dispositions.

Chapter 4

Contents of deeds

- 78. Construction of instruments.
- 79. All estate clause.
- 80. Receipt in deeds.

- 81. Conditions and covenants not implied.
- 82. Covenants for title.
- 83. Additional covenants for leasehold conveyances.
- 84. Scope of *sections 82* and *83*.
- 85. Covenants by or with two or more persons.
- 86. Covenants by person jointly with others.
- 87. Production and safe custody of documents.
- 88. Notices.

Chapter 5

General provisions

- 89. Restrictions on constructive notice.
- 90. Court orders.
- 91. Regulations for Part 8.

PART 9

Mortgages

Chapter 1

Creation of mortgages

- 92. Legal mortgages.
- 93. Position of mortgagor and mortgagee.

Chapter 2

Powers and rights of mortgagor

- 94. Title documents.
- 95. Abolition of right to consolidate.
- 96. Transfer in lieu of discharge.

- 97. Court order for sale.
- 98. Advances on joint account.

Chapter 3

Powers, rights and duties of mortgagee

- 99. Powers and rights generally.
- 100. Taking possession.
- 101. Abandoned property.
- 102. Mortgagee in possession.
- 103. Power of sale.
- 104. Incidental powers.
- 105. Duties in selling.
- 106. Conveyance on sale.
- 107. Protection of purchaser.
- 108. Mortgagee's receipts.
- 109. Application of proceeds of sale.
- 110. Appointment of receiver.
- 111. Application of income received.
- 112. Insurance.
- 113. Further advances.

Chapter 4

Leases and surrenders

- 114. Leasing powers.
- 115. Exercise of leasing powers.
- 116. Surrenders.

PART 10

Judgment Mortgages

- 117. Interpretation of Part 10.
- 118. Registration of judgments.
- 119. Registration of *lis pendens*.
- 120. Registration of judgment mortgages.
- 121. Company debtor.
- 122. Effect of registration.
- 123. Discharge of judgment mortgages.
- 124. Abolition of power to seize leasehold estate.

PART 11

Limitation of actions

- 125. Amendment of s. 17 of the Act of 1957.
- 126. Amendment of s. 18 of the Act of 1957.
- 127. Amendment of s. 24 of the Act of 1957.
- 128. Amendment of s. 32 of the Act of 1957.
- 129. Application by adverse possessor for vesting order.
- 130. Making of vesting order.
- 131. Leasehold land.
- 132. Liability of tenant.
- 133. Mortgaged land.

ACTS REFERRED TO

AJA 1707	Administration of Justice Act (Ireland) (6 Anne, c.10)
BC(JT)A 1899	Bodies Corporate (Joint Tenancy) Act (62 & 63 Vict., c.20)
CA 1789	Commons Act (Ireland) (29 Geo. 3, c.30)
CA 1791	Commons Act (Ireland) (31 Geo. 3, c.38)
CA 1634	Conveyancing Act (Ireland) (10 Chas. 1, sess. 2, c.3)
CA 1881	Conveyancing Act (44 & 45 Vict., c.41)
CA 1882	Conveyancing Act (45 & 46 Vict., c.39)
CA 1911	Conveyancing Act (1 & 2 Geo. 5 c.37)
IAA 1830	Illusory Appointments Act (11 Geo. 4, & 1 Will. 4, c.46)
JMA 1850	Judgment Mortgage (Ireland) Act (13 & 14 Vict., c.29)
JMA 1858	Judgment Mortgage (Ireland) Act (21 & 22 Vict., c.105)
LPAA 1859	Law of Property Amendment Act (22 & 23 Vict., c.35)
LPAA 1860	Law of Property Amendment Act (23 & 24 Vict., c.38)
PA 1832	Prescription Act (2 & 3 Will. 4, c.71)
PA 1858	Prescription (Ireland) Act (21 & 22 Vict., c.42)
PA 1868	Partition Act (31 & 32 Vict., c.40)
PA 1876	Partition Act (39 & 40 Vict., c.17)
PAA 1874	Powers of Appointment Act (37 & 38 Vict., c.37)
QE 1290	Quia Emptores (18 Edw. 1, cc.1-2)
RPA 1845	Real Property Act (8 & 9 Vict., c.106)
SF 1695	Statute of Frauds (Ireland) (7 Will. 3, c.12)
SLA 1882	Settled Land Act (45 & 46 Vict., c.38)
SLAA 1867	Sale of Land by Auction Act (30 & 31 Vict., c.48)
VCA 1893	Voluntary Conveyances Act (56 & 57 Vict., c.21)
VPA 1874	Vendor and Purchaser Act (37 & 38 Vict., c.78)

LAND AND CONVEYANCING BILL 2005

BILL

entitled

AN ACT TO REPEAL ENACTMENTS THAT ARE OBSOLETE, UNNECESSARY OR OF NO BENEFIT IN MODERN CIRCUMSTANCES, AND TO PROVIDE FOR THE REFORM AND MODERNISATION OF LAND LAW AND CONVEYANCING AND FOR RELATED MATTERS.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

PART 1

PRELIMINARY AND GENERAL

- Short title. **1.** – This Act may be cited as the Land and Conveyancing Act 2005.
- Commence-
ment. **2.** – This Act shall come into operation on such day or days as the Minister may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes and different provisions.

It is envisaged that different Parts of the Act may be brought into force at different times, *eg*, where they are linked with other legislation likely to be introduced: see the notes to Parts 3 and 4.

Interpretation 3. – In this Act, unless the context otherwise requires generally. –

“the Act of 1957” means the *Statute of Limitations 1957*;

“the Act of 1963” means the *Companies Act 1963*;

“the Act of 1964” means the *Registration of Title Act 1964*;

“the Act of 1965” means the *Succession Act 1965*;

“the Act of 1976” means the *Family Home Protection Act 1976*;

“the Act of 1988” means the *Bankruptcy Act 1988*;

“the Act of 1989” means the *Building Societies Act 1989*;

“the Act of 1995” means the *Family Law Act 1995*;

“the Act of 1996” means the *Family Law (Divorce) Act 1996*;

“the Act of 2000” means the *Planning and Development Act 2000*;

“the Act of 200-” means the *Registration of Deed and Titles Act 200-*;

“assent” has the meaning assigned to it by *section 53* of the Act of 1965;

“charge by way of legal mortgage” has the meaning assigned to it by *section 92(1)*;

“conveyance” includes an appointment, assent, assignment, charge, disclaimer, lease, mortgage, release, surrender, transfer, vesting certificate, vesting declaration, vesting order and every other assurance by way of instrument except a will; and “convey” shall be read accordingly;

“the court” means the High Court and, subject to its jurisdictional limits in respect of land, the Circuit Court;

“covenant” includes an agreement, a condition, reservation and stipulation;

“deed” has the meaning assigned to it by *section 68(2)*;

“development” has the meaning assigned to it by *section 3* of the Act of 2000;

“disposition” includes a conveyance and a devise, bequest or appointment of property by will and “dispose” shall be read accordingly;

“exempted development” has the meaning assigned to it by *section 4* of Act of 2000;

“fee farm grant” has the meaning assigned to it by *section 12(5)*;

“fee simple estate in possession” has the meaning assigned to it by *section 11(2)*;

“freehold covenant” has the meaning assigned to it by *section 50*;

“incumbrance” includes an annuity, charge, lien, mortgage, portion and trust for securing an annual or capital sum; and “incumbrancer” shall be read accordingly and includes every person entitled to the benefit of an incumbrance or to require its payment or discharge;

“instrument” includes a deed, will, or other document in writing but not a statutory provision;

“land” includes –

- (a) any estate or interest in or over land, whether corporeal or incorporeal;
- (b) mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land;
- (c) land covered by water;
- (d) buildings or structures of any kind on the land and the airspace previously or to be occupied by such buildings or structures, and any parts of them, whether the division is made horizontally, vertically or in any other way;
- (e) any part of land;

“Land Registry” has the meaning assigned to it by *section 7* of the Act of 1964;

“landlord” includes a lessor where the leasehold estate has been created orally;

“lease” as a noun means the instrument creating a leasehold estate; and as a verb means the granting of a leasehold estate;

“leasehold estate” has the meaning assigned to it by *section 11(3)*;

“legal estate” has the meaning assigned to it by *section 11(1)*;

“legal interest” has the meaning assigned to it by *section 11(4)*;

“lessee” means the person, including a sublessee, in whom a leasehold estate is vested;

“lessor” means the person, including a sublessor, entitled to the legal estate immediately superior to a leasehold estate;

“Minister” means the Minister for Justice, Equality and Law Reform;

“mortgage” includes any charge or lien on any property for securing money or money’s worth and a judgment mortgage;

“mortgagee” includes any person having the benefit of a charge or lien and any person deriving title to the mortgage under the original mortgagee;

“mortgagor” includes any person deriving title to the mortgaged land under the original mortgagor or entitled to redeem the mortgage;

“notice” includes constructive notice;

“personal representative” means the executor or executrix or the administrator or administratrix for the time being of a deceased person;

“possession” includes the receipt of, or the right to receive, rent and profits, if any;

“property” includes all property both real and personal and any part of such property;

“purchaser” means an assignee, chargeant, grantee, lessee, mortgagee, or other person who acquires land for valuable consideration; and “purchase” shall be read accordingly;

“registered land” has the meaning assigned to it by *section 3(1)* of the Act of 1964;

“Registry of Deeds” has the meaning assigned to it by *section 6* of the Act of 200-;

“rent” includes a rent service or a rentcharge, or other annual or periodic payment in money or money’s worth, reserved or issuing out of or charged on land, but does not include interest;

“rentcharge” means any annual or periodic sum charged on or issuing out of land, except –

(a) a leasehold rent; or

(b) interest.

“right of entry” has the meaning assigned to it by *section 11(10)(a)*;

“right of re-entry” has the meaning assigned to it by *section 11(10)(b)*;

“strict settlement” has the meaning assigned to it by *section 19(1)(a)*;

“sublease” includes a sub-sublease; and
“sublessee” shall be read accordingly;

“tenant” includes a lessee where the leasehold estate has been created orally;

“trust corporation” has the meaning assigned to it by *section 30(4)* of the Act of 1965;

“trust of land” has the meaning assigned to it by *section 19(1)*;

“unregistered land” has the meaning assigned to it by *section 3(1)* of the Act of 1964;

“valuable consideration” does not include marriage or a nominal consideration in money;

“will” includes codicil.

Section 3 contains various definitions of expressions, including references to statutes, used in the Bill.

Service of notices.

8.43

CA 1881, s.
67

4. – (1) A notice authorised or required to be given or served by or under this Act shall, subject to *subsection (2)*, be addressed to the person concerned by name and may be given to or served on the person in one of the following ways:

- (a) by delivering it to the person; or
- (b) by leaving it at the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address; or
- (c) by sending it by post in a prepaid letter to the address at which the person ordinarily resides or, in a case in which an address for service has been furnished, to that address; or
- (d) where the notice relates to a building and it appears that no person is in actual occupation of the building, by affixing it in a conspicuous position on the outside of the building or the property containing the building; or
- (e) by sending it by email, fax or other electronic means.

(2) Where the notice concerned is to be served on or given to a person who is the owner, landlord, tenant or occupier of a building and the name of the person cannot be ascertained by reasonable inquiry it may be addressed to the person at that building by using the words “the owner”, “the landlord”, “the tenant” or “the occupier”, as the case may require.

(3) For the purposes of this section, a company shall be deemed to be ordinarily resident at its registered office, and every other body corporate and every unincorporated body shall be deemed to be ordinarily resident at its principal office or place of business.

(4) Where a notice required or authorised to be served or given by or under this Act is served or given on behalf of a person, the notice shall be deemed to be served or given by that person.

(5) A person shall not, at any time during the period of 3 months after the notice is affixed under *subsection (1)(d)* remove, damage or deface the notice without lawful authority.

(6) A person who knowingly contravenes *subsection (5)* is guilty of an offence.

Section 4 provides for service of notices provided for by the Bill. *Section 88* of the Bill applies these provisions to private documents.

Regulations and orders.

5. - (1) Subject to *subsection (5)*, the Minister may make regulations prescribing any matter or thing which is referred to in this Act as prescribed or to be prescribed.

(2) Every order and regulation made by the Minister under this Act shall be laid before each House of the Oireachtas as soon as may be after it is made and, if a resolution annulling the order or regulation is passed by either such House within the next 21 days on which that House has sat after the order or regulation is laid before it, the order or regulation shall be annulled accordingly but without prejudice to the validity of anything previously done thereunder.

(3) The Minister may by order amend or revoke an order under this Act.

(4) An order under *subsection (3)* shall be made in the like manner and its making shall be subject to the like (if any) consents and conditions as the order that it is amending or revoking.

(5) Where any such matter or thing relates to –

- (a) the Registry of Deeds, it shall be prescribed by general rules made under *section 26* of the Act of 200-, or
- (b) the Land Registry, it shall be prescribed by general rules made under *section 126* of the Act of 1964, as amended by *section 43* of the Act of 200-.

Section 5 makes provision for the making of regulations and orders relating to prescribed matters under the Bill, but *subsection (5)* makes it clear that where any matter relates to the Registry of Deeds or Land Registry it should be provided for under the legislation governing those registries.

- Offences.
6. – (1) A person convicted of an offence under this Act is liable on summary conviction to a fine not exceeding €3,000 or imprisonment for a term not exceeding 6 months or both.
- (2) If the contravention in respect of which a person is convicted of an offence under this Act is continued after the conviction, the person is guilty of a further offence on every day on which the contravention continues and for each such offence the person is liable on summary conviction to a fine not exceeding €250.
- (3) Proceedings in relation to an offence under this Act may be brought and prosecuted by [].
- (4) Notwithstanding *section 10(4)* of the *Petty Sessions (Ireland) Act 1851*, proceedings for an offence under this Act may be instituted at any time within one year after the date of the offence.
- (5) Where a person is convicted of an offence under this Act the District Court shall, unless it is satisfied that there are special and substantial reasons for not so doing, order the person to pay to [] the costs and expenses, measured by the Court, incurred by [] in relation to the investigation, detection and prosecution of the offence.

Section 6 makes provision for offences under the Bill.

Expenses. 7. – The expenses incurred by the Minister in the administration of this Act shall, to such extent as may be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.

Section 7 is a standard provision.

Repeals and amendments. **8.** – (1) Each enactment specified in *column (2)* of *Schedule 1* is repealed to the extent specified in *column (3)* of that *Schedule*.

(2) Any reference in any enactment to –

- (a) “the Conveyancing Acts 1881 to 1911” or to any of them, or
- (b) “the Settled Land Acts 1882 to 1890” or to any of them, or
- (c) any particular provision in those Acts,

is to be read, so far as is appropriate, as a reference to this Act or to the equivalent or substituted provision in this Act.

This section and *Schedule 1* provide for repeals and amendments. *Subsection (2)* provides for a general amendment of the numerous references to the *Conveyancing Acts* and *Settled Land Acts* in various post-1922 Acts, but some of these will require more specific amendment. Some sections of the Bill also make specific amendments relating to a particular context.

PART 2

TENURE AND ESTATES

This Part implements the recommendations contained in Chapter 2 of the CP. It introduces some radical changes to the system of land ownership which has existed in Ireland for many centuries. In particular, it abolished finally the old feudal concept of tenure, but preserves ownership of land through the related concept of estates. However, the system of estates is considerably simplified as recommended by the CP.

PART 2

TENURE AND ESTATES

Abolition of feudal tenure. **9.** - (1) In so far as it survives, feudal tenure is abolished and ownership of all land continues in accordance with *section 10*.

2.09

(2) *Subsection (1)* does not affect –

(a) the position of the State under –

2.13

(i) the *State Property Acts 1954* and *1998*;

QE 1290,
cc.1 and 2

(ii) *section 73* of the Act of 1965,

(b) the concept of a freehold estate as specified in *section 10*,

(c) the freedom to dispose of a fee simple estate (otherwise known as the rule against inalienability).

Section 9 implements the recommendation in the CP that the concept of feudal tenure should be abolished, as being incompatible with the relationship between the State and its citizens, and that as between citizens, as set out in the Constitution (see paras 2.02-2.09 of the CP). The removal of the concept of tenure facilitates the repeal without replacement of numerous pre-1922 statutes relating to this outmoded concept (see para 2.08 of the CP).

Subsection (1)

Subsection (1) contains the basic proposition that feudal tenure is no longer to be regarded as existing in the State.

Subsection (2)

Subsection (2) clarifies the effect of the abolition of feudal tenure. *Paragraph (a)* deals with the position of the State as a result of the abolition. Nothing in the new legislation can affect the position of the State, and the people of Ireland, as regards ownership of land under Articles 10 and 49 of the Constitution. *Subparagraph (a)(i)* preserves the position of the State under the *State Property Acts 1954 and 1998*, which provide for the management and control of State land, as prescribed by Articles 10.3 and 10.4 of the Constitution. *Subparagraph (a)(ii)* preserves the position of the State as ultimate intestate successor. This replaced the old feudal concept of escheat which was abolished by *section 11(3)* of the *Succession Act 1965*. *Paragraph (b)* preserves the concept of estates in land which the CP recommended should be retained (see paras 2.10-2.13 of the CP). The operation of estates is further explained by section 10. *Paragraph (c)* preserves the rule against inalienability, which was enshrined in the very old feudal statute *Quia Emptores 1290*. That statute is amongst the many pre-1922 statutes being repealed (see *section 8* and *Schedule 1*), but this rule, which applies only to the freehold fee simple estate, remains an important distinguishing feature of such an estate, in contrast to a leasehold estate. It has been applied by Irish Courts in recent times: see *Re Dunne's Estate* [1998] IR 155.

Nor does the new legislation have any impact on the power of the State to control land use and development under legislation like the *Planning and Development Acts 2002 to 2004* or to acquire land compulsorily for public purposes. The vital point is that the source of such powers is legislation and they do not derive from the position of the State (or the former Crown) under the feudal tenure system (see para 2.05 of the CP).

Estates in
land.
2.13

10. - (1) The concept of an estate, whether freehold or leasehold, in land is retained and, subject to this Act, continues to denote the nature and extent of land ownership.

(2) From the commencement of this Act, such an estate retains its pre-existing characteristics, but without any tenurial incidents.

(3) All references in any enactment or any instrument (whether made or executed before or after the commencement of this Act) to tenure or estates in land, or to the holder of any such estate, shall be read accordingly.

Section 10 implements the recommendation in the CP that the concept of an estate in land should be retained (paras 2.10 – 2.13 of the CP). The ability to divide the ownership of land amongst different persons on a “temporal” basis, *ie*, with those persons enjoying the benefits of ownership for different periods of time, was an inherent feature of the feudal system as it operated in Ireland and many other common law jurisdictions. It introduced an important element of flexibility, as did the division of ownership between the legal and equitable or beneficial title which developed by using the concept of a trust. In this respect our system of land ownership is to be distinguished from civil law systems which do not recognise the concept of estates in land, nor that of a trust. Thus land may be conveyed either directly to or on trust for A for life, then to B in fee simple. In this example, what A “owns” is a present life estate (entitling A to occupy the land and enjoy its benefits for his or her lifetime). What B owns is a future fee simple estate which will not fall into possession until A dies. B’s estate (or interest) stays “in remainder” until that happens and, meanwhile, he or she is not entitled to occupy the land or otherwise enjoy its benefits. As a consequence, under our system what A

and B own is not the land as such (*ie*, the physical entity) but rather their respective estates. In view of the flexibility and other advantages which this system has provided for landowners over the centuries, it remains relevant to ownership in modern times.

Subsection (1)

Subsection (1) confirms that this fundamental feature of land ownership is being retained and that the abolition of the concept of feudal tenure by *section 9* does not affect it. Although *section 9* relates only to feudal tenure, and therefore to freehold land only, *subsection (1)* refers also to leasehold estates to make it clear that the concept of estates will continue to operate in respect of leasehold land as well.

Subsection (2)

Subsection (2) confirms that freehold and leasehold estates will continue to have their usual attributes, but not any incidents which relate to feudal tenure. The CP explained that, apart from the conceptual notion of tenure, it is unlikely that any tenurial incidents have survived to modern times. The abolition of escheat by the *Succession Act 1965* probably removed the last surviving one (see paras 2.02 – 2.07 of the CP).

Subsection (3)

Subsection (3) provides that existing or future statutes or documents relating to land should be construed in accordance with the provisions of *subsections (1)* and *(2)*.

Restrictions
on legal
estates and
interests.

2.16
4.18

11. – (1) The only legal estates in land which are capable of being created or disposed of are -

- (a) a fee simple estate in possession,
- (b) a leasehold estate.

(2) For the purposes of *subsection (1)*, a “fee simple estate in possession” includes a -

- (a) determinable fee,
- (b) fee simple subject to a right of entry or a right of re-entry,
- (c) fee simple subject only to –
 - (i) a power of revocation,
 - (ii) an annuity or other payment of capital or income for the advancement, maintenance or other benefit of any person,
 - (iii) a right of residence which is not an exclusive right over the whole land.

(3) For the purposes of *subsection (1)*, a “leasehold estate” means, subject to *sections 12* and *14*, the estate created by a lease or orally for a term –

- (a) of less than a year, or
- (b) of a year or years, or
- (c) of a year or years and a fraction of a year, or
- (d) from year to year or any other recurring period,

so that the relationship of landlord and tenant exists between the parties and irrespective of whether or not the estate –

- (i) takes effect in possession or in future, or
- (ii) is subject to another legal estate or interest, or
- (iii) is for a term which is uncertain or liable to determination by notice, re-entry or operation of law or by virtue of a provision for cessor on redemption or in any other event.

(4) The only legal interests in land which are capable of being created or disposed of are –

- (a) an easement,
- (b) a freehold covenant,
- (c) an incumbrance,
- (d) a leasehold rent,
- (e) a possibility of reverter,
- (f) a profit *à prendre*, including a mining right,
- (g) a public or customary right,
- (h) a rentcharge,
- (i) a right of entry or of re-entry attached to a legal estate,

- (j) a wayleave or other right to lay cables, pipes, wires or other conduits,
- (k) any other legal interest created by or under a court order or any statutory provision.

(5) A legal estate or legal interest recognised by this section as capable of being created or disposed of has, subject to this Act, the same attributes as the corresponding legal estates and interests existing before the commencement of this Act and may subsist concurrently with, or subject to, any other legal estate or interest in the same land.

(6) Subject to this Act, estates and interests not mentioned in *subsections (1) to (3)* take effect as equitable interests only, but this does not prevent the creation of estates and interests so mentioned as equitable interests.

(7) Nothing in this Act affects judicial recognition of equitable interests.

2.32 (8) The conversion of a life estate into an equitable interest does not affect a life owner's liability for waste.

(9) All estates and interests in land, whether legal or equitable, including –

- (a) a contingent, executory or future equitable interest, or a possibility coupled with an interest, whether or not the object of the gift or limitation of such interest or possibility is ascertained, or

- (b) a possibility of reverter or right of entry or re-entry, whether immediate or future or vested or contingent,

may be disposed of.

(10) In this section a –

- (a) right of entry is a right to take possession of land or of its income and to retain that possession or income until some obligation is performed,
- (b) right of re-entry is a right to forfeit the legal owner's estate in the land.

Section 11 implements the CP's recommendations for simplification of the law, by restricting the estates and interests which will, in future, be regarded as conferring legal title to the land. These provisions are linked with those in Part 4 (Trusts of Land) and Part 7 (Appurtenant Rights).

Subsection (1)

Subsection (1) makes it clear that a legal owner will in future hold either a fee simple (freehold) estate or a leasehold estate. As regards the other two freehold estates recognised by our law, the fee tail is abolished by *section 13* and the life estate will confer an equitable interest only (see note to *subsection (8)* below). Where a life estate has been created, so that there is a fee simple held in reversion by the grantor or in remainder by some other person due to get it in possession after the death of the life estate owner, a trust of the land will come into operation under Part 4. The legal title, the fee simple in possession, will then be held by the trustees.

This is why *paragraph (a)* of *subsection (1)* confines the legal freehold estate to a fee simple “in possession”. Any fee simple in reversion or remainder will be held under a trust in accordance with Part 4 and so will necessarily be an equitable interest only. As regards *paragraph (b)*, this covers leasehold estates as the definition in *subsection (3)* makes clear. Excluded, however, are “hybrid” leases prohibited by *sections 12* and *14*.

Subsection (2)

Subsection (2) implements the CP’s recommendation that “modified” fees standing on their own, *ie*, those which do not involve a clear succession of interests, should not attract the trust provisions of Part 4 (which replace the former settlements legislation) (see paras 2.15 – 2.16 and 4.17 – 4.18 of the CP). The point about “modified” fees is that the holder of the fee simple is very close to being the full owner of the land and the likelihood of it going to someone else is usually very remote. This is unlike the case of a typical settlement, *eg*, where land is settled on A for life with a remainder to B in fee simple, B has a clear expectation of succeeding to the land on A’s death. There is a definite succession of interests, whereas in the case of modified fees there is no such certainty. For this reason the CP recommended that the holder of such a fee simple should remain the owner of the legal title to the land and be able to deal with it accordingly.

Paragraph (a) refers to a determinable fee, *eg*, a grant by A to B in fee simple so long as Dublin remains the capital city of Ireland. Here A has a mere possibility of reverter, *ie*, the land will only revert (automatically) to A if and when the event specified occurs. That may never happen and so B has a legal fee simple in possession. A has at most a mere hope of getting the land back which is nevertheless categorised as a legal interest by *subsection (4)*. *Paragraph (b)* refers to two

types of conditional fee simple. One is where the grantor reserves a right of entry to enforce some obligation, *eg*, a grant by A to B in fee simple on condition that B covenants to maintain a boundary wall, reserving the right to take possession of the property if there is a breach of the covenant and to retain possession until the breach is rectified. The other is where a right of re-entry is reserved which is a much more drastic remedy. As in the case of such a right which is invariably reserved in a lease, it entitles the holder to forfeit the grantee's estate in the land and to resume ownership. In the case of a grant of a fee simple, such a right of re-entry is often not linked to the performance of an obligation, but rather, as in the case of a determinable fee, is linked to the occurrence of some event, *eg*, a grant by A to B in fee simple, but if Dublin ceases to be the capital city of Ireland, A may re-enter the land and resume ownership. Unlike in the case of a determinable fee, there is no automatic forfeiture, and B will not lose the fee simple until A exercises the right of re-entry. Again this is likely to be a remote possibility and so B will still be regarded as legal owner. *Paragraph (b)* does not draw a distinction between a right of entry or re-entry in favour of the grantor or in favour of a third party, as the CP did. The view has been taken that this is a very fine distinction of doubtful practical significance.

Paragraph (c) deals with other situations where the fee simple estate is subject only to some minor interest or incumbrance, so that the owner of the fee simple remains the substantial owner of the property and should retain the legal title. *Subparagraph (i)* refers to the situation where the fee simple is subject only to a power of revocation. *Subparagraph (ii)* refers to the situation where the fee simple is subject only to an annuity or charge for the benefit of someone else.

Subparagraph (iii) refers to the situation where the fee simple is subject only to a right of residence in favour of someone else, which is not equivalent to a life interest, as would be the case where the right is an exclusive one relating to the entirety of the land in question. This reflects the distinction between different rights of residence made by *section 81* of the *Registration of Title Act 1964*.

Subsection (3)

Subsection (3) makes it clear that the various categories of leasehold estate hitherto recognised as conferring legal ownership will largely continue under the new Act. The exception to this general rule is where the Bill prohibits the future creation of certain categories, *ie* fee farm grants (*section 12*) and various leases for lives (*section 14*).

Subsection (4)

Subsection (4) lists the various interests in land which should be recognised as legal interests, as opposed to merely equitable interests. This distinction is important because the general rule is that legal interests bind all successive owners of the land, whereas a mere equitable interest may lose priority to subsequent purchasers of a legal estate. *Subsection (4)* is largely declaratory of the existing law, but resolves doubts as to whether a possibility of reverter or right of entry or re-entry are legal interests. It is important to emphasise that *subsection (4)* simply lists those interests which are “capable” of being legal interests; whether in a particular case an interest is in fact legal will depend on such matters as how it is created. Thus under *section 66* an express grant of, *eg*, a legal interest like an easement or profit à *prendre* for a freehold (fee simple) estate must be made by deed.

On the other hand, under *section 4 of Deasy's Act (Landlord and Tenant Law Amendment Act, Ireland, 1860)* a lease of such an interest need only be in writing or, in certain cases, may be created orally. A failure to comply with such formalities may result in an equitable interest only being created (see *subsection (6)*).

Subsection (5)

Subsection (5) preserves the existing attributes of legal estates and interests, including the essential flexibility of our system of land ownership, whereby more than one estate or interest can be held concurrently in respect of the same land.

Subsection (6)

Subsection (6) states the corollary of *subsections (1) to (3)*, *ie*, those estates and interests which cannot be legal ones must necessarily exist as equitable interests only. This is, however, subject to other provisions of the Act, such as those which abolish certain types of estate and interest, *eg*, fee farm grants (*section 12*), fees tail (*section 13*), leases for lives (*section 14*) and certain rentcharges (*section 42*). However, it is also made clear, as indicated earlier, that estates and interests which may be legal ones coming within *subsections (1) to (3)* may also exist as equitable ones, *eg*, because the formalities for creating them as legal ones have not been followed.

Subsection (7)

Subsection (7) also contains an important saving of the courts' general equitable jurisdiction to recognise new equitable interests in land. Recent decades have illustrated the exercise of this jurisdiction, particularly by employing the concepts of resulting and constructive trusts and the doctrine of proprietary estoppel.

Subsection (8)

Subsection (8) recognises another corollary of *subsection (1)*, which is that the other freehold estate still recognised by the Bill, the life estate, will in future operate as an equitable interest only. As explained earlier, such an estate will necessarily create a succession of interests which attracts the trust provisions in Part 4. Thus, where there is a grant by A to B for life, with remainder to C in fee simple, the fee simple in possession (legal title) will vest in the trustees, who will hold the land on trust for B for life and then for C in fee simple. Both B's life estate and C's fee simple in remainder (not being "in possession") are equitable interests. Similarly, if instead of a remainder in favour of C, the grant by A makes no provision for what is to happen on B's death, there will be a fee simple in reversion in favour of A. Again the land will vest in trustees and both B's life estate and A's fee simple in reversion will be equitable interests.

Subsection (9)

Subsection (9) re-enacts the substance of *section 6* of the *Real Property Act 1845* and makes it clear that it covers interests like possibilities of reverter.

Subsection (10)

Subsection (10) simply provides clarification of the distinction between a right of entry and a right of re-entry, as illustrated earlier.

Prohibition of fee farm grants. **12.** - (1) The creation of a fee farm grant at law or in equity is prohibited.

2.22

(2) Any instrument entered into after the commencement of this Act purporting to –

- (a) create a fee farm grant, or
- (b) grant a lease for life or lives renewable for ever or for any period which is perpetually renewable,

vests in the purported grantee or lessee a legal fee simple or, as the case may be, an equitable fee simple and any contract for such a grant entered into after such commencement operates as a contract for such a vesting.

(3) A fee simple which vests under *subsection (2)* is freed and discharged from any covenant or other provision relating to rent, but all other covenants or provisions continue in force so far as consistent with the nature of a fee simple estate or interest.

(4) *Subsection (2)* does not apply to any contract or instrument giving effect to a contract entered into before the ___ day of ___ 2005.

(5) In this section a “fee farm grant” means any –

- (a) grant of a fee simple, or
- (b) lease for ever or in perpetuity,

reserving or charging a perpetual rent, whether or not the relationship of landlord and tenant is created between the grantor and grantee, and includes a sub-fee farm grant.

(6) Notwithstanding *section 11(4)*, any fee farm rent existing at law at the commencement of this Act continues as a legal interest and capable of being disposed of.

Section 12 implements the recommendation in the CP that the future creation of fee farm grants should be prohibited. This was part of the scheme to simplify the law, by reversing the confusion between freehold and leasehold ownership which such grants involve (see paras 2.17 – 2.26 of the CP). The primary reason for the creation of such grants nowadays is to get round the difficulties relating to enforceability of freehold positive covenants against successors in title. That problem is, however, resolved by the provisions relating to such covenants in Part 7 (see *section 51*). *Section 12* concerns only the creation of future grants and does not deal with existing fee farm grants. The effect of *section 12* will be to resolve the doubt which exists as to whether the prohibition on the creation of new “ground rents” in respect of dwellings in the *Landlord and Tenant (Ground Rents) Act 1978* applies to fee farm grants (see paras 2.19 – 2.20 of the CP). However, *section 12* does not deal with conversion of existing fee farm grants, or redemption of existing fee farm rents. The CP recommended that this matter should be considered as part of a general review of the ground rents legislation (see para 2.23 of the CP).

Subsection (1)

Subsection (1) contains the prohibition on the future creation of fee farm grants, whether legal or equitable.

Subsection (2)

Subsection (2) provides for the effect of any attempt by a grantor to ignore the prohibition. In effect the grantor will suffer the penalty of losing the rent, *ie*, the grantee will obtain the fee simple discharged from any obligations relating to the rent. However, any other obligations, such as covenants restricting the use of the land, will remain enforceable as provided by *section 51*. On the other hand, any other obligation incompatible with a fee simple estate, such as one offending the rule against inalienability (see *section 9(2)(c)*), would also not remain enforceable. Any contract for a grant offending the prohibition would operate as a contract to create a fee simple similarly discharged from such obligations.

Paragraph (b) has been included because one of the pre-1922 statutes being repealed is the *Renewable Leasehold Conversion Act 1849*. Under *section 37* of that Act any post-1849 lease for lives or years perpetually renewable operates as a fee farm grant. With that repeal, it is necessary to make provision for the effect of such a lease purported to be created after that repeal. It too would vest a fee simple discharged from the rent and other incompatible obligations, and any contract would operate as a contract to create such a fee simple.

Subsection (3)

Subsection (3) spells out the provisions relating to the discharge of rent and other incompatible obligations.

Subsection (4)

Subsection (4) contains a saving for contracts entered into prior to the date of the publication of the draft Bill.

Subsection (5)

Subsection (5) makes it clear that the section applies to every kind of fee farm grant, including the most common category creating the relationship of landlord and tenant and the much less common category creating a rentcharge payable by the grantee.

Subsection (6)

Subsection (6) contains a saving for existing fee farm rents. Since no new ones can be created as a result of *section 12*, they are not included in the list of legal interests contained in *section 11(4)*. However, *subsection (6)* preserves existing ones where they are legal interests.

Abolition of the fee tail. **13.** – (1) The creation of a fee tail of any kind at law or in equity is prohibited.

2.29 (2) Any instrument entered into after the commencement of this Act purporting to create a fee tail in favour of any person vests in that person a legal fee simple or, as the case may be, an equitable fee simple and any contract for such a creation entered into before or after such commencement operates as a contract for such vesting.

(3) Where, immediately before the commencement of this Act, a person was entitled to a fee tail at law or in equity prohibited by this section, that person is entitled, on such commencement, to a legal fee simple or, as the case may be, an equitable fee simple.

(4) In *subsection (3)* “fee tail” includes a –

- (a) base fee provided the protectorship has ended, and
- (b) base fee created by failure to enrol the disentailing deed,

but does not include the estate of a tenant in tail after possibility of issue extinct.

(5) A fee simple which vests under *subsection (2)* or *subsection (3)* is –

- (a) not subject to any estates or interests limited by the instrument creating the fee tail to take effect after the determination of the fee tail,
- (b) subject to any estates or interests limited to take effect in defeasance of the fee tail which would be valid if limited to take effect in defeasance of a fee simple.

Section 13 implements the recommendations in the CP that the archaic fee tail estate should be abolished and any existing fee tail should be converted into a fee simple, as can be done by executing a disentailing assurance (deed) under the *Fines and Recoveries (Ireland) Act 1834* (see paras 2.27 – 2.30 of the CP).

Subsection (1)

Subsection (1) contains the prohibition on creation of fees tail in the future.

Subsection (2)

Subsection (2) provides that, if this prohibition is ignored, the purported creation of a fee tail will in fact create a fee simple and a contract for such a creation will operate accordingly. In view of the conversion provisions in *subsection (3)* this includes any contract entered into before the commencement of the Act.

Subsection (3)

Subsection (3) automatically converts existing fees tail into fees simple, thereby achieving automatically what could be achieved by executing a disentailing assurance under the *Fines and Recoveries (Ireland) Act 1834*. This facilitates the repeal of that Act.

Subsection (4)

Subsection (4) makes it clear that the automatic conversion provisions of *subsection (3)* vary in their application to a number of situations where a barring of the entail under the *Fines and Recoveries (Ireland) Act 1834* was not effective or possible.

Paragraph (a) refers to the situation where the tenant in tail executes a disentailing assurance without the consent of the “protector”, usually the holder of a prior interest (eg, a life estate owner, as where a grant was made to A for life, remainder to B in fee tail, and B executes the disentailing assurance while A is still alive and without A’s consent) or some other person specified in the grant. This would create a “base fee” only, whereby the issue in tail are barred, but not reversioners or remaindermen. *Paragraph (a)* preserves this position, but provides that once the protectorship ends (eg, on the death of the protector) the automatic conversion provisions of *subsection (3)* will operate. At that point the holder of the base fee would, at present, become free to execute a fully effective disentailing assurance on his or her own.

Paragraph (b) deals with another kind of base fee, sometimes referred to as a “voidable” or “determinable” base fee. This arises where the disentailing assurance would be fully effective but for the failure to enrol it in the High Court within six months, as required by *section 39* of the *Fines and Recoveries (Ireland) Act 1834*. This technicality has often been forgotten in the past but it has the serious effect of rendering the base fee determinable by the issue in tail, ie, in effect the former tenant in tail becomes a life owner only. The Law Reform Commission had previously described this enrolment requirement as “excessive”: see *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989), para 14. It was recommended that it should be replaced by the more usual practice of registering the deed in the Registry of Deeds or Land Registry. That was made in the context of the fee tail estate surviving. In view of the provisions of *section 13*, and since this matter concerns only a technical mistake made by the tenant in tail himself or herself, *paragraph (b)* applies the automatic conversion provisions to such cases. The need for enrolment would go in any event with the repeal of the 1834 Act.

The last part of *subsection (4)* on the other hand, excludes the operation of the conversion provisions from a rare case where a tenant in tail holds an “unbarrable” entail. This arises where what is known as a fee tail “special” has been created and the issue (successors) to succeed have to be the children of a specified spouse. If that spouse predeceases the tenant in tail and they have no children, the tenant becomes a tenant in tail “after possibility of issue extinct”. *Section 15* of the 1834 Act provides that such a tenant cannot execute a disentailing assurance. The result is that the tenant in tail becomes, in effect, a tenant for life and the reversionary or remainder estate due to take effect on determination of the fee tail will take effect on the tenant in tail’s death. *Subsection (4)* preserves the vested interest of the owners of such reversions or remainders.

Subsection (5)

Subsection (5) clarifies the effect of *subsections (2)* and *(3)*. The vesting of a fee simple is not subject to the interests of the reversioners or remaindermen due to take the land when the fee tail comes to an end. Thus where land was granted to A in fee tail, with remainder to B in fee simple, the fee simple will vest in A and B will be left with no interest. That is already the effect of A executing a disentailing assurance under the 1834 Act and *paragraph (a)* reflects this. *Paragraph (b)* reflects the fact that it is possible to attach a “defeasance” condition to a fee tail, just as it is in respect of a fee simple, *eg*, a grant to A in fee tail, but if Dublin ceases to be the capital city of Ireland, then B has the right to re-enter and take over as holder of the fee simple. The fee simple created by a disentailing assurance executed by A would remain subject to this right of re-entry and *paragraph (b)* makes it clear that that would remain the case under *section 13*.

Prohibition of leases for lives. **14.** – (1) The grant, after the commencement of this Act, of a lease for –

2.36

- (a) a life or lives,
- (b) a life or lives combined with a concurrent or reversionary term of any period,
- (c) any term coming to an end on the death of a person or persons,

and any contract for such a grant entered into after the _ day of _ 2005 is void.

Section 14 implements the recommendation of the CP that, in order to reduce the confusion between freehold and leasehold estates and thereby simplify the law, the future creation of various categories of leases linked to persons' lives should be prohibited (see paras 2.33 – 2.36). The section does not deal with the category which used to be common, a lease for lives renewable for ever. These were dealt with by the *Renewable Leasehold Conversion Act 1849, section 37* of which provided that after 1849 such leases would operate instead as fee farm grants. Pre-1849 leases which were not converted into a fee simple interest were converted by *section 74* of the *Landlord and Tenant (Amendment) Act 1980* (see para 2.34 of the CP). These provisions are being replaced by *section 12* of this Bill. *Section 14* deals with the much less common lease for a life or lives without a perpetual renewal provision and/or lease linked otherwise to a life or lives, such as a combination of a term of years and lives. It prohibits their future creation, but, unlike previous sections, there are no provisions for conversion of existing leases. The CP took the view that these leases are so rare nowadays that it was not appropriate to impose conversion provisions on existing ones (para 2.35 of the CP).

The section specifies the categories of leases to which the prohibition applies. *Paragraph (a)* deals with a straightforward lease for a life or lives. This should not be confused with a grant of a freehold life estate, which, under *section 11*, becomes an equitable interest only. *Paragraph (b)* deals with cases where the lease combines a grant for a term with a life or lives, eg, a lease to X for the lives of A, B, and C and for 35 years. It is often a matter of construction whether the term of years runs concurrently with the lives or is reversionary (*ie*, runs from the death of the last surviving life). *Paragraph (c)* deals with a variation of the *paragraph (b)* situation, *ie*, where a term of years is granted but it is determinable on the death of a life or the last survivor of a number of lives.

The section in this instance renders any attempt to create such leases void. This approach has been adopted because of the rarity of such leases and avoids the need for complicated conversion provisions that would otherwise be necessary to deal with the various categories if the prohibition is ignored. It is simpler to nullify any such ignoring of the prohibition.

Minor not to own a legal estate. **15.** – (1) From the commencement of Part 4, a minor is not capable of owning a legal estate or interest in land.

4.16 (2) Any party to a conveyance shall, until the contrary is proved, be presumed to have attained full age at the date of its execution.

Section 15 reflects what has long been the position in practice as a result of *sections 59 and 60* of the *Settled Land Act 1882* whereby land held by a minor constitutes settled land, but the powers of dealing with it may be exercised by the trustees of the settlement, thereby rendering such dealings fully effective. Otherwise any transaction carried out by the minor is liable to be set aside when the minor reaches full age (18 years). Under the new settled land regime introduced by Part 4 of the Bill the legal title to land belonging to a minor would be vested in trustees and the minor would have an equitable interest only (see para 4.16 of the CP).

Subsection (1)

Subsection (1) reflects what would be the position under Part 4 (see section 18).

Subsection (2)

Subsection (2) is designed to simplify conveyancing by creating a presumption that any party to a conveyance is of full age. This removes the need for those acting for purchasers to make enquiries or to raise requisitions relating to this matter.

PART 3

FUTURE INTERESTS

This Part implements the recommendations contained in Chapter 3 of the CP. This endorsed the recommendations contained in the Commission's earlier *Report on the Rule Against Perpetuities and Cognate Rules* (LRC 62-2000). That Report called for a substantial simplification of the law by abolition of several exceptionally complicated rules governing the vesting of interests in the future. These were the rule against perpetuities and cognate rules, such as the Rule in *Whitby v Mitchell*, the rule against accumulations and the Rule in *Purefoy v Rogers*. The Commission took the view that abolition of the rule against perpetuities should be accompanied by introduction of variation of trusts legislation: see para 4.32 of LRC 62-2000 and *Report on Variation of Trusts* (LRC 63-2000). The Commission reiterated its views on this matter in its Consultation Paper on *Trust Law: General Proposals* (LRC CP 35-2005), Chapter 11. It is envisaged, therefore, that Part 3 of this Bill will not be brought into force until variation of trusts legislation is enacted.

The CP added an additional recommendation, the abolition of the complex common law contingent remainder rules (see paras 3.02-3.04 of the CP). It did so because it involved a much wider review of land law and conveyancing law than was carried out by the earlier Report. In particular, many of its recommendations were concerned with getting rid of outmoded feudal concepts from which the remainder rules derived their function.

Under the new scheme for land ownership enshrined in Parts 2 and 4 of this Bill, every future interest, whether contingent or otherwise, will operate as an equitable interest only and the freehold legal title (the fee simple in possession) will be vested in trustees. That title will be held in trust for the beneficiaries entitled to the various future interests created in respect of the land.

PART 3

FUTURE INTERESTS

Abolition of various rules. **16.** - Subject to *section 17*, the following rules are abolished:

- 3.04
- (a) the rules known as the common law contingent remainder rules,
 - (b) the rule known as the Rule in *Purefoy v. Rogers*,
 - (c) the rule known as the Rule in *Whitby v. Mitchell* (also known as the old rule against perpetuities and the rule against double possibilities),
 - (d) the rule against perpetuities,
 - (e) the rule against accumulations.
-

Section 16 implements the recommendation in the Law Commission's Report and CP for abolition of various rules governing future interests.

Scope of
section 16.

17. – *Section 16* applies to any interest in property whenever created, but does not apply if, in reliance on such an interest being invalid by virtue of the application of any of the rules abolished by that section –

- (a) the property has been distributed or otherwise dealt with, or
- (b) any person has done or omitted to do any thing which renders the position of that or any other person materially altered to that person's detriment after the commencement of this Part.

Section 17 defines the scope of *section 16*. It recognises that some of the rules being abolished by the section were not confined to land, but applied also to future interests in other property, *eg*, the rule against perpetuities. Notwithstanding the general scope of the Bill (which deals with land), the abolition of the rules is meant to be comprehensive and total. It also makes it clear that it applies to all interests in property whenever created, but subject to the saving detailed in *paragraphs (a)* and *(b)* for “vested” rights. This saving protects the interest of any person who has already taken property, or has materially altered his or her position, on the basis that some prior disposition of the property was void under any of the rules abolished by *section 16*. The time for assessing whether such material alteration of position has occurred, or legitimate expectation has arisen, is after the abolition has taken effect.

Operation of
future
interests in
land.

3.03

18. - (1) Subject to *subsection (2)*, all future interests in land, whether vested or contingent, exist in equity only.

(2) *Subsection (1)* does not apply to a –

- (a) possibility of reverter, or
- (b) right of entry or a right of re-entry attached to a legal estate.

Section 18 is consequential upon *section 16* and, as recommended in paragraph 3.03 of the CP, *subsection (1)* provides that future interests in land will operate in equity only after Part 3 of the Bill comes into force, as interests taking effect under a trust. *Subsection (2)* makes it clear that this does not apply to certain future interests which under *section 11(4)* of the Bill can operate as legal interests. These are a possibility of reverter attached to a determinable fee simple and a right of entry or re-entry attached to a legal estate.

PART 4

TRUSTS OF LAND

This Part implements the recommendations in Chapter 4 of the CP. These were designed to simplify greatly the existing law relating to the various ways in which family settlements of land may be created. Such settlements may take the form of a “strict” settlement, where land is settled directly on persons in succession without the use of a trust. Alternatively, the land may be vested in trustees to hold for beneficiaries in succession, but the existing law complicates matters by drawing a distinction between a trust for sale and a “holding” trust (where, at most, the trustees have a power of sale, *ie*, there is no obligation to sell). The CP recommended replacement of the existing law with a new statutory scheme, under which all forms of settlement and trusts of land would, in future, fall within a single “trust of land” concept (see paras 4.15-4.27 of the CP).

In accordance with the recommendations in the CP, Part 4 sets out a much simplified scheme to replace the complicated provisions of the *Settled Land Acts 1882-90*. It does so by conferring on trustees of trusts of land plenary powers in respect of the land. These would operate by way of “default”, *ie* be applicable unless restricted expressly by the instrument creating the trust (where such an instrument exists). Apart from that, the general law of trusts would apply, in particular the law governing the obligations owed by trustees to beneficiaries. The same would apply to powers of trustees, in so far as the general law, including statute law, imposes restrictions on exercise of certain powers. This whole subject was the subject of a separate Consultation Paper published by the Law Reform Commission in February 2005, *Trust Law: General Proposals* (LRC CP 35-2005).

It is envisaged that this will result in comprehensive legislation dealing with the law of trusts generally, so that Part 4 of this Bill may not be brought into force until that legislation is also enacted.

Although Part 4 applies to a wide range of trusts of land, including implied, resulting and constructive trusts and bare trusts, it does not apply to charitable trusts. That subject was also dealt with by another Consultation Paper published by the Law Reform Commission in February 2005, *Charitable Trust Law: General Proposals* (LRC CP 36-2005). It is envisaged that this will lead to separate legislation on an area to which special considerations of a public nature apply.

PART 4

TRUSTS OF LAND

Trusts of
land.

4.14

SLA 1882

19. – (1) Subject to this Part, where land is –

- (a) for the time being held for interests limited by an instrument, whenever executed, to persons by way of succession without the interposition of a trust (in this Part referred to as a “strict settlement”), or
- (b) held, either with or without other property, on a trust whenever it arises and of whatever kind, or
- (c) vested, whether before or after the commencement of this Part, in a minor,

there is a trust of land for the purposes of this Part.

(2) For the purposes of –

- (a) *subsection (1)(a)*, a strict settlement exists where an estate or interest in reversion or remainder is not disposed of and reverts to the settlor or the testator’s successors in title, but does not exist where a person owns a fee simple estate in possession,
- (b) *subsection (1)(b)*, a trust includes an express, implied, resulting, constructive and bare trust and a trust for sale.

(3) Subject to this Part, a trust of land is governed by the general law of trusts.

(4) This Part does not apply to land held directly for a charitable purpose and not by way of a remainder.

Section 19 establishes the new statutory model of a “trust of land”. This covers all forms of a trust of land and settlements of land where no trust has been used. In order to simplify the law further the new model will apply to existing trusts and settlements, subject to adjustments necessary to deal with situations where under the present law no trust or trustees would necessarily be involved initially. *Sections 20* and *21* make these adjustments.

Subsection (1)

Paragraph (1)(a) covers cases where there is what is usually referred to as a “strict settlement”, *ie*, where land is limited to persons in succession without the interposition of a trust. A simple example would be a grant “to A for life, with remainder to B in fee simple”. Under the existing law, including the *Settled Land Acts 1882-90*, A would have the powers of dealing with the land of a “tenant for life”, including the power of sale. However, although not a trustee of the land, the tenant for life is regarded as a “trustee of the powers”, so that in exercising the powers regard must be had to the interests of the other beneficiaries supposed to take the land in succession. This position of the tenant for life is reiterated by the requirement that upon a sale, or other disposition of the land, made by the tenant for life which raises capital money, that capital money must not go to the tenant for life. Instead, under *section 22* of the *Settled Land Act 1882* it must be paid to independent “trustees of the settlement” (usually nominated by the deed of settlement), or else, under *section 46* of the 1882 Act, paid into court. If this is not done, the purchaser or other person dealing with the tenant for life will not obtain a good title. In this respect the imposition of a direct trust in the case of such strict settlements may be regarded as a recognition of the practical realities of the parties’ position.

Paragraph (1)(b) covers all situations where land is held on some form of trust, whether it has come into existence before the commencement of Part 4 or after that commencement. *Subsection (2)(b)* clarifies this point, by making it plain that Part 4 applies not only to a trust created expressly (eg, taking the example given earlier, when land is conveyed or left by will “to X and Y to hold on trust for A for life, with remainder to B in fee simple”, the trust being either a holding trust or trust for sale), but also to one which arises from the application of equitable principles (eg, an implied, resulting or constructive trust). It also makes it clear that it incorporates a situation where there is no succession of interests, eg a bare trust, where land is held by a trustee or nominee for a beneficiary who is entitled absolutely to the land.

Paragraph (1)(c) deals with a special case where under the existing law settled land is deemed to exist, ie, where it is vested in a minor. However, although the legal fee simple may be vested in the minor absolutely, he or she is deemed to be a tenant for life for the purposes of the *Settled Land Act 1882* (see *section 59*). Despite that, if an effective sale or other major disposition is to be made of the land (ie, one which the minor cannot disown on reaching his or her majority), it must be made by trustees of the settlement or under a court order (in accordance with *section 60* of the 1882 Act) rather than by the minor. Again, by imposing a trust, *paragraph (1)(c)* may be regarded as recognising the practical realities.

Subsection (2)

Subsection (2) clarifies *subsection (1)*. *Paragraph (a)* makes it clear that a succession of interests necessary to create a strict settlement for the purposes of *subsection (1)(a)* exists even though on the face of it no express succession has been created.

For example, if land is granted by A, holder of a fee simple estate, simply “to B for life”, there appears to be no limitation to persons in succession. However, there is, in fact and in law, a succession, because a reversion in favour of A will automatically come into existence upon the making of the grant. It is also made clear, however, that there is no succession where a person holds a “modified” fee simple – this ties in with the provisions in *section 11(1)* and *(2)*. The CP recommended that it was not appropriate to impose a trust on the holder of such a fee simple. *Paragraph (b)* has already been explained.

Subsection (3)

Subsection (3) makes it clear that any trust of land arising under Part 4 is governed by the general law, including new statute law which may be enacted in the future. This is, however, qualified because Part 4 applies some provisions which would not necessarily apply under the general law. For example, *section 21* provides that trustees of land have the powers of dealing with the land of an absolute owner, which would not be the general rule for trustees of other kinds of property.

Subsection (4)

Subsection (4) makes it clear that Part 4 does not apply to land held directly for charitable purposes. Charitable trusts give rise to special considerations. They are already the subject of particular legislation (the *Charities Acts 1961* and *1973*) and are likely to be the subject of further legislation in the near future. Part 4 does apply where the land is held initially for an individual, but with a remainder over in favour of a charity.

Trustees of
land.

4.20

SLA 1882

20. – (1) The following persons are the trustees of a trust of land (in this Part referred to as the “trustees of land”) –

- (a) in the case of a strict settlement, where it –
 - (i) exists at the commencement of this Part, the tenant for life within the meaning of the *Settled Land Act 1882* together with any trustees of the settlement for the purposes of that Act,
 - (ii) is purported to be created after the commencement of this Part, the persons who would fall within *paragraph (b)* if the instrument creating it were deemed to be an instrument creating a trust of land,
- (b) in the case of a trust of land created expressly –
 - (i) any trustee nominated by the trust instrument, but, if there is no such person, then,
 - (ii) any person on whom the trust instrument confers a present or future power of sale of the land, or power of consent to or approval of the exercise of such a power of sale, but, if there is no such person, then,

- (iii) any person who, under either the trust instrument or the general law, has power to appoint a trustee of the land, but, if there is no such person, then,
 - (iv) the settlor or, in the case of a trust created by will, the testator's personal representative or representatives,
- (c) in the case of land vested in a minor before the commencement of this Act or purporting so to vest after such commencement, the persons who would fall within *paragraph (b)* if the instrument vesting the land were deemed to be an instrument creating a trust of land,
- (d) in the case of land the subject of an implied, resulting, constructive or bare trust, the person in whom the legal title to the land is vested.

(2) For the purposes of –

- (a) *subsection (1)(a)(ii)* and *(1)(c)*, the references in *subsection (1)(b)* to “trustee” and “trustee of the land” includes a trustee of the settlement,
- (b) *subsection (1)(b)(iii)* a power to appoint a trustee includes a power to appoint where no previous appointment has been made,

(3) Nothing in this section affects the right of any person to obtain an order of the court appointing a trustee of land or vesting land in a person as trustee.

Section 20 follows on from *section 19* and specifies for the purposes of each category of trust of land, whether an existing trust or settlement or future trust, who are the trustees of the land.

Subsection (1)

Paragraph (a) of *subsection (1)* deals with strict settlements. *Subparagraph (i)* covers a settlement already in existence at the commencement of Part 4, where the powers of dealing with the land would be vested directly in the tenant for life, but subject to the indirect role of trustees of the settlement. Some continuity of that position is preserved by making the tenant for life and the trustees (if, as they should be in any well-drafted settlement, such trustees have been nominated) the joint trustees. If there are no trustees of the settlement, the tenant for life will be the sole trustee, but, in accordance with the safeguard which already exists under current law, will not be able to deal with it without another trustee being appointed. As a last resort that appointment can be made by the court (see *subsection (3)*). That safeguard remains under the proposed statutory scheme (see *section 22(2)(a)*). *Subparagraph (ii)* deals with any new purported strict settlement created after the commencement of Part 4. Under *section 19(1)(a)* this would nevertheless operate as a trust of land, notwithstanding the failure to vest the land initially in trustees. *Subparagraph (ii)* adapts *paragraph (b)* by specifying that in such a case the deed of settlement is to be treated as if it were an instrument creating a trust of land for the purposes of identifying who are the trustees in whom the legal title to the land will vest.

Thus, if, after the commencement of Part 4, land is granted directly “to A for life, with remainder to B in fee simple” and X and Y are nominated as the trustees of the settlement, the land would vest in X and Y to hold on trust for A for life, with remainder to B in fee simple. The same would apply if, instead of the settlement nominating X and Y as trustees of the settlement, it gave them a power to appoint trustees of the settlement or a power to consent to or approve such an appointment. If there are no such persons, the fall-back position is that the court can appoint trustees – see *subsection (3)*.

Paragraph (b) covers the case of a trust of land created expressly. Usually the trustees will be nominated in the trust instrument, but, if there are none, the paragraph goes on to specify other persons connected with the trust who would become the trustees instead, such as persons given a power of dealing with the land or a power to appoint trustees. *Paragraph (2)(b)* makes it clear that this includes a power to make an appointment for the first time, *ie*, not just a power to appoint a replacement for an existing trustee. If there are no such persons, the settlor or, in the case of the trust created by will, the testator’s personal representatives would be the trustees, pending appointment of someone else to act as trustee. Under *section 50(3)* of the *Succession Act 1965* where there are no trustees of the settlement, the personal representatives proving a will which settles land are deemed to be the trustees until such trustees are appointed. The same applies where land is left to a minor and no trustees of the settlement have been nominated by the will (see *sections 57 and 58(2)* of the 1965 Act). The final “default” provision would be an appointment by the Court. *Subsection (3)* preserves that jurisdiction.

Paragraph (c) deals with the special case of land vesting in a minor directly. Where such a vesting occurred prior to the commencement of Part 4, a trust would come into force automatically by virtue of *section 19(1)(c)*. Under *section 15* a minor cannot own a legal estate after the commencement of Part 4 and so again a trust automatically comes into force. *Paragraph (c)* adapts the provisions of *paragraph (b)* in order to identify who would be a trustee for the minor.

Paragraph (d) deals with non-express trusts, *ie*, where a trust arises by application of equitable principles such as those relating to resulting or constructive trusts, and special trusts like a bare trust. It is declaratory of the existing law, that in such cases the person in whom the legal title is vested is the trustee.

Subsection (2)

Subsection (2) clarifies some of the provisions in *subsection (1)*. *Paragraph (a)* adapts *subsection (1)(b)* (which deals with cases where the land has been put directly in a trust) to cases where a strict settlement or vesting in a minor without a direct trust has been made. *Paragraph (b)* makes it clear that a person with a power to appoint a trustee includes someone with a power to make the initial appointment, as opposed to an appointment of a replacement for an existing trustee.

Subsection (3)

Subsection (3) confirms that the ultimate “default” provision of obtaining an order of the court for appointment of a trustee or vesting of land in a person as trustee remains. Apart from the court’s inherent jurisdiction to make such an appointment, *section 38* of the *Settled Land Act 1882* conferred jurisdiction to appoint trustees of the settlement in the case of settled land (including where land was vested in a minor).

Furthermore, the court has a statutory jurisdiction under *section 35* of the *Trustee Act 1893* to make an appointment of trustees generally whenever it is found otherwise “inexpedient, difficult or impracticable” to make an appointment. There is also a statutory jurisdiction to make vesting orders: see 1893 Act, *sections 26* and *35* and *Trustee Act 1893 Amendment Act 1894*. It is envisaged that this statutory jurisdiction will be upgraded in new legislation to replace this pre-1922 legislation governing trusts and *subsection (3)* confirms that any such legislation would apply to trusts of land operating under Part 4.

Powers of trustees of land.

21. - Subject to –

4.22

- (a) the duties of a trustee, and
- (b) any restrictions imposed by any statutory provision (including this Act) or the general law or by any instrument or court order relating to the land,

a trustee of land has the power of an absolute owner to convey or otherwise deal with it.

Section 21 implements the recommendation in the CP that the new statutory scheme governing settlements and trusts of land should confer on trustees the powers of an absolute owner (see paras 4.21-4.22 of the CP). This greatly simplifies the existing law governing settlements, where the *Settled Land Acts 1882-90* contain numerous provisions conferring various statutory powers, but subject to various limitations. This usually results in settlors being advised to enhance those powers by express provisions in the instrument creating the settlement. Instead *section 21* adopts the opposite approach by conferring on a trustee of land the powers of an absolute owner and leaves it to settlors to decide whether some express restriction should be put on the trustee.

It is important to emphasise that there are limitations to a trustee of land's powers. *Paragraph (a)* makes it clear that, notwithstanding the wide powers being conferred on the trustee, he or she is still a trustee and, therefore, subject to the duties of a trustee.

These derive partly from equitable principles developed by the courts over the centuries and partly from statutory provisions, *eg*, the duty when making an investment of trust funds to take account of such matters as an appropriate diversification and liquidity of investments (see *Article 3* of the *Trustee (Authorised Investments) Order 1998 (Amendment) Order 2002* (SI No 595 of 2002) made under *section 2* of the *Trustee (Authorised Investments) Act 1958*).

Paragraph (b) makes it clear that the powers conferred by *section 21* are subject to any restrictions imposed by any statute, including the present Bill, *eg*, the need for two trustees or a trust corporation where the land is being disposed of (see *section 22*). Such restrictions may also be implied by the general law, *eg*, in the case of a bare trustee holding the land for an absolute owner. It also makes it clear that it is open to the settlor or testator in the case of an express trust to include restrictions in the trust instrument (provided, of course, they do not offend the general law, including statute law). It also makes it clear that a trustee must comply with any restriction imposed by a court order.

Overreaching 22. – (1) Subject to *subsection (3)*, a conveyance to a purchaser of a legal estate or legal interest in land by the persons specified in *subsection (2)* overreaches any equitable interest in the land so that it ceases to affect that estate or interest, whether or not –

4.24

- (a) the purchaser has notice of the equitable interest, or
- (b) any person entitled to that interest is in actual occupation of the land.

(2) For the purposes of *subsection (1)*, the “persons specified” –

- (a) shall be at least two trustees or a trust corporation where the trust land comprises –
 - (i) a strict settlement, or
 - (ii) a trust, including a trust for sale, of land held for persons by way of succession, or
 - (iii) land vested in or held on trust for a minor,

6.20

- (b) may be a single trustee or owner of the legal estate or interest in the case of any other trust of land.

(3) *Subsection (1)* does not apply to –

- (a) any conveyance made for fraudulent or other improper purposes of which the purchaser has actual knowledge at the date of the conveyance or to which the purchaser is a party, or

- (b) any equitable interest –
- (i) to which the conveyance is expressly made subject, or
 - (ii) protected by deposit of title documents relating to the legal estate or legal interest, or
 - (iii) in the case of a trust coming within *subsection (2)(b)*, protected by registration prior to the date of the conveyance.

(4) In *subsection (3)(b)(iii)*, “protected by registration” means registration of the equitable interest in the Registry of Deeds or Land Registry, as appropriate.

(5) *Section 72(i)(j)* of the Act of 1964 is amended by the insertion after “disclosed” of –

“or where a transfer is made in accordance with *section 22(1)* of the *Land and Conveyancing Act 2005*”.

(6) Where an equitable interest is overreached under this section it attaches to the proceeds of sale and the trustees or trust corporation shall give effect to it accordingly.

(7) Nothing in this section affects the operation of the Act of 1976.

Section 22 provides, as recommended by the CP (see paras 4.23-4.24 and 6.17-6.20), for the protection of purchasers of land from trustees or legal owners of land. Subject to some limitations, the general rule is that a purchaser should obtain good legal title to the land without being concerned with equitable interests.

Subsection (1)

Subsection (1) provides the general rule that a conveyance (which, in accordance with the definition in *section 3*, includes a transfer of registered land) of a legal estate or legal interest (both defined by *section 11*) will “overreach” any equitable interests, *ie*, the purchaser will obtain a clear legal title and will not be bound by the equitable interests. Instead, any equitable interest previously affecting the land will attach to the proceeds of sale and the trustee or trustees will hold that money subject to that interest. This is confirmed by *subsection (6)*. The extent to which a conveyance overreaches an equitable interest varies according to the type of trust of land or situation whereby the legal owner holds the land subject to another person’s equitable interest, as specified by *subsection (2)*. The requirement for such overreaching that the conveyance must be made by at least two trustees accords with the safeguard currently contained in *section 39* of the *Settled Land Act 1882*. The Law Reform Commission recently recommended that this safeguard should be retained and that the alternative of a “trust corporation” should be introduced generally (see *Consultation Paper on Trust Law: General Proposals* (LRC CP 35-2005) paras 1.46-1.87). Provision is made for such corporations in *section 57* of the *Succession Act 1965* (dealing with minor beneficiaries of a deceased person’s estate).

It is important to note that the general rule is that such overreaching will operate in favour of a “purchaser” only (see the definition in *section 3*). Furthermore *paragraph (a)* emphasises that such overreaching occurs whether or not the purchaser has notice of the equitable interests. This is the rule currently where a tenant for life conveys settled land under the *Settled Land Act 1882*, but *section 22* gives it a wider scope in the interests of simplifying conveyancing. That wider scope is reiterated by *paragraph (b)*, which concerns an issue which causes conveyancers much difficulty and uncertainty under current law. Under *section 72 (1)(j)* of the *Registration of Title Act 1964* a person with a “right” (which includes an equitable interest) to land, who is also in “actual occupation” of the land, is given the special protection of having a burden which affects registered land without registration, *ie*, a transferee of the land automatically takes subject to that right even though it has not been protected by lodgment of a caution or inhibition. So far as unregistered land is concerned, it is probable that a purchaser is again bound by the interest because, under the doctrine of constructive notice, the fact of “occupation” would be treated as sufficient to alert the purchaser to the need to make enquiries. *Paragraph (b)* resolves this issue in favour of overreaching provided the conveyance is made in accordance with *subsection (2)*. It must also be emphasised, as is explained below, that “overreaching” is designed only to facilitate conveyancing and does not mean that the owner of the equitable interest loses all rights. It simply means that they cease to affect the land and instead attach to the proceeds of sale which replaces the land and is held on trust for the previous owner of an equitable interest in the land.

Subsection (2)

Subsection (2) distinguishes between two types of case. *Paragraph (a)* deals with cases which under existing law would fall within the *Settled Land Acts 1882-90*, ie, where land is either limited directly to or held on trust for persons by way of succession or vested in a minor. In such cases, which are brought within the concept of a trust of land by *section 19* of this Bill, overreaching will only take effect where the conveyance is made by at least two trustees or a trust corporation. *Paragraph (b)* deals with other trusts of land, such as cases involving “hidden” co-ownership. The typical case is where the legal title is vested in one person, but another has acquired an equitable interest under a resulting or constructive trust. The CP drew attention to the conveyancing difficulties which arise in such cases where the co-owners are not spouses, so that the need for consent to a conveyance by the spouse holding the legal title does not arise under the *Family Home Protection Act 1976*. The CP recommended that overreaching should take place in such cases unless the equitable interest had been protected by registration in the Registry of Deeds or, in the case of registered land, the Land Registry (see paras 6.17-6.20). The important differences from cases falling within *paragraph (a)* are that in the case of *paragraph (b)* overreaching will occur even though the conveyance (or transfer) is made by one trustee or sole owner of the legal estate or interest, but, on the other hand, it will not occur if the owner of the equitable interest has protected it by registration prior to the conveyance (or transfer) (see *subsection (3)(b)(iii)*).

Subsection (3)

Subsection (3) contains further safeguards for the owner of an equitable interest. *Paragraph (a)* prevents overreaching taking effect where the purchaser has actual knowledge of or is a party to fraud or other improper conduct relating to the sale or other disposition of the land. *Paragraph (b)* deals with other situations where it is not appropriate that an equitable interest should be overreached. *Subparagraph (i)* covers the obvious case where the purchase is expressly subject to the equitable interest continuing to affect the land. *Subparagraph (ii)* recognises the common transaction whereby an equitable mortgage is created by deposit of title documents relating to the land with the lender. That deposit forms the essence of the lender's security and will alert the purchaser to the existence of the equitable mortgage. *Subparagraph (iii)* contains the essence of the new general rule being introduced for "hidden" equitable interests, that the owner of an equitable interest in land must in future protect it by registration in order to avoid it being overreached.

Subsection (4)

Subsection (4) explains that protection by registration means registration of the equitable interest in the Registry of Deeds or Land Registry, depending upon whether it relates to unregistered or registered land. The precise method of registration is to be prescribed by regulations or orders made in accordance with *section 5(5)*.

Subsection (5)

Subsection (5) ensures that there is no conflict between the provisions of *section 22* and *section 72* of the *Registration of Title Act 1964*. An equitable interest will not be a *section 72* burden where it has been overreached in accordance with *section 22*.

Subsection (6)

Subsection (6) reiterates the point made earlier, that overreaching does not destroy the equitable owner's rights. It simply shifts them from the land to the proceeds of sale raised on the conveyance of the land, which will be in the hands of the trustees. It emphasises that the trustees must hold that money on trust so as to ensure that the equitable owner gets his or her share.

Subsection (7)

Subsection (7) contains a saving for a spouse whose consent to a disposition of the family home is required under the *Family Home Protection Act 1976*.

Resolution of disputes. **23.** – (1) Any person having an interest in a trust of land may apply to the court in a summary manner for an order to resolve a dispute between the –

4.26

- (a) trustees themselves, or
- (b) beneficiaries themselves, or
- (c) trustees and beneficiaries, or
- (d) trustees or beneficiaries and other persons interested,

in relation to any matter concerning the –

- (i) performance of their functions by the trustees, or
- (ii) nature or extent of any beneficial or other interest in the land, or
- (iii) other operation of the trust.

(2) Subject to *subsection (3)*, in determining an application under *subsection (1)* the court may make whatever order and direct whatever inquiries it thinks fit in the circumstances of the case.

(3) In considering an application under *subsection (1)* the court shall have regard to –

- (a) the purposes which the trust of land is intended to achieve,
- (b) the interests of any minor or other beneficiary subject to any incapacity,
- (c) the interests of any secured creditor of any beneficiary,
- (d) any other matter which the court considers relevant.

(4) For the purposes of *subsection (1)* a “person having an interest” includes a mortgagee or other secured creditor.

(5) Nothing in this section affects the jurisdiction of the court under *section 36* of the Act of 1995.

Section 23 implements the recommendation in the CP that there should be an effective mechanism for resolution of disputes (see paras 4.25-4.26 of the CP). It enables any person interested in a trust of land to apply to the court (the Circuit or High Court, depending upon the usual jurisdictional limits) for an order to determine a dispute.

Subsection (1)

Subsection (1) makes it clear that the dispute may involve one as between the trustees (where there are more than one) themselves, as between the beneficiaries themselves, as between the trustees and beneficiaries, or as between the trustees or beneficiaries and other interested persons, such as a mortgagee. It also makes it clear that the dispute may relate to how the trustees perform their duties or exercise their powers, the nature or extent of any beneficial or other interest in the land, or the other operation of the trust.

Subsection (2)

Subsection (2) confers a very wide jurisdiction on the court as to the order it may make, including directing inquiries to be made.

Subsection (3)

Subsection (3) specifies a number of matters which the court may take into account in exercising its discretion, such as the interests of minors or other persons subject to any incapacity.

Subsection (4)

Subsection (4) makes it clear that for the purposes of the section a “person having an interest” who may bring an application, or in relation to whom a dispute may arise in respect of which a trustee or beneficiary may bring an application, includes a mortgagee or other secured creditor.

Subsection (5)

Subsection (5) provides a saving for the jurisdiction to determine questions between spouses in relation to property now contained in *section 36* of the *Family Law Act 1995*.

PART 5

POWERS

Part 5 implements the recommendations in Chapter 5 of the CP. It is concerned with powers relating to property. These usually involve the conferment by an owner of property (not necessarily land) (the “donor”) of authority on another person (the “donee”) to dispose of the property in some way. A common example is a power of attorney, comprehensive provisions for which were contained in the *Powers of Attorney Act 1996*. Another common example is a power of appointment, which usually authorises the donee to select (“appoint”) from a group of other persons (the “objects”) which of them (the “appointees”) should take a specified property and in what shares. It should also be noted that various powers are conferred by statute, *eg*, the powers conferred on personal representatives under the *Succession Act 1965* and those conferred on mortgagees by Part 9 of this Bill.

Part 5 contains a number of provisions which apply to powers generally (but not powers of attorney to the extent that they are covered by the 1996 Act) and some which relate to powers of appointment specifically. To a large extent they replace existing statutory provisions in a simpler and more cohesive form, but otherwise without substantial amendment.

PART 5

POWERS

Application of Part 5 **24.** - Except where stated otherwise, this Part applies to powers created or arising before or after the commencement of this Act.

Section 24 makes it clear that Part 5 applies generally to powers whenever conferred. This is because, as explained above, its provisions largely replace existing law without substantial amendment. The one exception is contained in *section 25*, as explained below.

Execution of non-testamentary powers of appointment. **25.** – (1) Subject to *subsection (2)*, an appointment made by deed after the commencement of this Act is only valid provided the requirements of *section 68* are met.

(2) *Subsection (1)* does not –

LPAA 1859,
s. 12

5.07

(a) prevent a donee making a valid appointment in some other way expressly authorised by the instrument creating the power of appointment, or

(b) relieve a donee from compliance with any direction in the instrument creating the power of appointment that –

(i) the consent of any person is necessary to a valid appointment, or

(ii) an act is to be performed having no relation to the mode of executing and attesting the deed of appointment in order to give validity to any appointment.

Section 25 replaces *section 12* of the *Law of Property Amendment Act 1859*. It relates to execution of non-testamentary powers of appointment, *ie*, those not to be executed by making a will, which are covered by *section 79* of the *Succession Act 1965*. As recommended by the CP (see paras 5.06-5.07 of the CP), *section 25* alters the provisions in *section 12* of the 1859 Act which mean that the donee of the power has to meet requirements not necessary for deeds generally (*eg*, attestation by two or more witnesses).

Instead, following the precedent in *section 79* of the 1965 Act, *section 25* requires simply that a deed executing a power of appointment should only have to meet the requirements for execution and attestation of deeds generally. These are now set out in *section 68* of this Bill.

Subsection (1)

Subsection (1) contains the new requirement and, because this changes the existing law in *section 12* of the 1859 Act, the provision applies only to deeds executed after the commencement of the new legislation.

Subsection (2)

Subsection (2) contains various qualifications to *subsection (1)*, which accord with those contained in *section 12* of the 1859 Act. There is no change of substance, but the provisions have been recast in simpler form.

Release of powers.

CA 1881, s. 52

5.09

26. – (1) Subject to *subsection (2)*, a person to whom any power, whether coupled with an interest or not, is given may release or contract not to exercise the power by deed or in any other way in which the power could be created.

(2) *Subsection (1)* does not apply to a power in the nature of a trust or other fiduciary power.

Section 26 largely reproduces the existing law.

Subsection (1)

Subsection (1) re-enacts without substantial amendment *section 52* of the *Conveyancing Act 1881*.

Subsection (2)

Subsection (2) is declaratory of the existing law and has been added as recommended by the CP (see paras 5.08-5.09 of the CP).

Disclaimer of powers. 27. – (1) A person to whom any power, whether coupled with an interest or not, is given may by deed disclaim the power and, after disclaimer, cannot exercise or join in the exercise of the power.
CA 1881, s.6

5.11 (2) On such disclaimer, the power may be exercised by any other person or persons, or the survivor or survivors of any other persons, to whom the power is given, subject to the terms of the instrument creating the power.

Section 27 reproduces without substantial amendment *section 6* of the *Conveyancing Act 1882*, as recommended by the CP (see paras 5.10-5.11 of the CP).

Validation of 28. – (1) No appointment made in exercise of any appointments. power to appoint any property among two or more objects is invalid on the ground that –

IAA 1830

PAA 1874

5.05

- (a) an insubstantial, illusory or nominal share only is appointed to or left unappointed to devolve on any one or more of the objects of the power, or
- (b) any object of the power is excluded,

but every such appointment is valid notwithstanding that any one or more of the objects is not, or is not in default of appointment, to take any share in the property.

(2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.

Section 28 replaces the provisions currently to be found in the *Illusory Appointments Act 1830* and *Powers of Appointment Act 1874* without substantial amendment. They are, however, consolidated in more straightforward language, as recommended by the CP (see paras 5.02-5.05 of the CP).

PART 6

CO-OWNERSHIP

Part 6 implements various recommendations contained in Chapter 6 of the CP. An exception to this relates to the recommendation concerning equitable co-owners – that is implemented by *section 22* in Part 4 of the Bill.

Some of the recommendations contained in the CP reiterated those contained in earlier Reports and Consultation Papers published by the Law Reform Commission. Those relating to severance of a joint tenancy (so as to convert the co-ownership into a tenancy in common and thereby destroy the right of survivorship) were made in the Commission's *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) (paras 28-29); *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70 - 2003) (Chapter 5) and *Consultation Paper on Judgment Mortgages* (LRC CP 30 - 2004) (paras 6.12 and 6.16). Those relating to *commorientes* (simultaneous deaths of joint tenants) were also made in Chapter 3 of the *Report on Land Law and Conveyancing Law (7)* (LRC 70 – 2003). Those relating to partition were also partly made in para 6.19 of the *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004).

Part 6 does not, however, contain as recommended by the CP (see paras 6.23-6.26) a provision relating to matters which are related to co-ownership situations. The precise position concerning ownership of party structures varies from case to case. They may be co-owned in the strict sense that each neighbour jointly owns an undivided wall or other structure built on the boundary line between the neighbouring properties. But often the structure is, in fact, divided (down the middle) so that each neighbour owns separately the half on the side of his or her property.

This concerns more the relationship between neighbouring landowners and so is dealt with in Part 7 (appurtenant rights).

The other matter referred to in the CP is also concerned with neighbouring landowners. This is the problem which occurs where neighbouring properties are built in very close proximity, close to or practically on the boundary line of the properties. Often in such a situation it is impossible to carry out work (*eg* repairs and maintenance) on one property without using the neighbouring property as the only practical means of access. Since such access has obvious close affinity to appurtenant rights (such as an easement like a right of way) implementation of this part of the CP is also contained in Part 7 of the Bill (see *sections 44 - 49*).

PART 6

CO-OWNERSHIP

- Unilateral severance of a joint tenancy.
- 6.09
- 29.** - (1) From the commencement of this Part, any –
- (a) conveyance, or contract for a conveyance, of land held in a joint tenancy, or
 - (b) acquisition of another interest in such land,

by one joint tenant without the consent referred to in *subsection (2)* is void both at law and in equity.

(2) In *subsection (1)* “consent” means the consent in writing of the other joint tenant or, where there are more than one other, all the other joint tenants.

- (3) From the commencement of this Part,
- (a) the vesting of the estate or interest of an insolvent joint tenant in the Official Assignee or a liquidator, or
 - (b) registration of a judgment mortgage against the estate or interest in land of a joint tenant,

does not sever the joint tenancy.

(4) Nothing in this section affects the jurisdiction of the court to find that joint tenants together by mutual agreement or by their conduct have severed the joint tenancy in equity.

Section 29 implements the various changes in the law governing severance of a joint tenancy recommended by the Law Reform Commission. Severance has very substantial consequences for this form of co-ownership because it converts the joint tenancy into a tenancy in common. This destroys the right of survivorship which is the main distinguishing feature between the two forms of co-ownership. Under the right of survivorship (which cannot be thwarted once a joint tenant dies, so that a will has no effect on it), the surviving joint tenants succeed to the interest of the deceased joint tenant(s). Ultimately the last survivor succeeds to the entire land and becomes sole owner of it. Severance of the joint tenancy and conversion of it into a tenancy in common, therefore, deprives each joint tenant of the hope of being the last survivor and, where there is a substantial age discrepancy, severance deprives the younger or youngest of the expectation of becoming the sole owner. Instead, as tenants in common each becomes entitled to leave his or her share to successors specified in a will. If no effective will is made, the share will go to the intestate successors. These considerations led the Law Reform Commission to recommend that it should no longer be possible for one joint tenant to bring about “unilateral” severance, *ie*, without the consent of the other joint tenants (see LRC CP 70 – 2003, paras 5.03-5.19).

Section 29 does not deal with one other recommendation made by the Commission. This was that the somewhat cumbersome method of severing freehold land, which involves the medieval system of conveying the land to a third party by way of a “use” executed by the *Statute of Uses (Ireland) 1634*, should be replaced by a simple deed of conveyance (without any reference to a “use”). Such a simple deed is effective under current law only where leasehold land is held in a joint tenancy (see LRC 30 – 1989, paras 29 – 29 and LRC 70 – 2003, para 5.02).

In fact this recommendation is implemented elsewhere in the Bill through several provisions. One is the repeal of the 1634 statute and the other is various consequential provisions. These include *sections 66* (conveyances by simple deed only, voluntary conveyances and resulting trusts), *70* (conveyances to oneself) and *72* (reservations without execution by grantee).

Subsection (1)

Subsection (1) prohibits unilateral severance by rendering it ineffective in the two situations where the law currently permits it, *ie*, alienation and acquisition of another interest. Because the right of survivorship cannot be defeated by the will of a deceased joint tenant, alienation in this context means a conveyance of the joint tenant's interest before death to a third party. Involuntary alienation is dealt with by *subsection (3)*. Acquisition involves the acquisition of one of the other joint tenant's interest in the land, *eg*, where land is owned by A, B and C as joint tenants and A then acquires B's interest. Under current law, the one-third interest A acquires from B will be held in a tenancy in common and so C will lose the hope or expectancy of succeeding to it by way of survivorship. *Subsection (1)* implements the Law Reform Commission's recommendation that such a conveyance or acquisition would be void unless done with the consent of the other joint tenant or tenants. It is made clear that this applies both at law and in equity. For this reason *paragraph (a)* renders void also a contract for such a conveyance. Furthermore, *subsection (4)* makes it clear that, while the existing courts' jurisdiction to find that the parties have effected a severance in equity is preserved, this is based upon mutual agreement and not unilateral action.

Subsection (2)

Subsection (2) makes it clear that the consent necessary to render unilateral action by one joint tenant an effective severance means the consent in writing of all the other joint tenants.

Subsection (3)

Paragraph (b) implements the recommendation that it should be made clear that registration of a judgment mortgage against a joint tenant's interest does not effect a severance. Under current law it appears that a severance does occur where the interest is in unregistered land, but probably does not where it is registered land. The Commission took the view that the general policy against unilateral severance should be extended to this situation (LRC CP 30 – 2004, paras 6.09 – 6.16 of the CP). *Paragraph (a)* extends the policy to “involuntary” alienation, *ie*, on the bankruptcy or liquidation of a joint tenant.

Subsection (4)

Subsection (4) preserves the jurisdiction of the court to find that there has been a severance in equity where the circumstances of the case point to a mutual agreement by all the joint tenants to this effect. This is to be distinguished from a case of alleged unilateral severance by one joint tenant and is consistent with the imposition of a requirement of consent in such a case.

Amendment of the Act of 1965, s. 5. **30.** – The following section is substituted for *section 5* of the Act of 1965:

“**5.** – (1) Where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, then, for all purposes affecting title to their property, they are deemed to have died simultaneously.

(2) Where immediately before the death of two or more persons they held any property –

- (a) in a joint tenancy, or
- (b) otherwise in such a way that one of them would become solely entitled to it as the survivor of the other or others,

and they died, or under *subsection (1)* were deemed to have died, simultaneously, they are deemed to have held, immediately before their deaths, the property as tenants in common.

(3) Property deemed under *subsection (2)* to have been held by persons as tenants in common passes on their deaths to their respective successors accordingly.”

Section 30 implements an earlier recommendation of the Law Reform Commission, and reiterated in the CP (see paras 6.08 – 6.09), that the law of *commorientes* (“simultaneous” deaths) set out in *section 5* of the *Succession Act 1965* should be amended in the case of joint tenants. The amendment recommended was that “simultaneous” deaths in circumstances rendering it uncertain which died first should effect a severance of the joint tenancy.

The new provision also covers cases where there are clear simultaneous deaths. In addition, it covers all purposes affecting title, but is confined to cases where all of the joint tenants die. By converting the deceaseds' ownership into a tenancy in common, their shares in the property would go to their respective successors in title. Rather than effect the amendment by inserting wording in *section 5* of the 1965 Act as it stands, *section 30* contains a replacement section. Because *section 5* is being amended substantially this substituted section will operate only from the commencement of Part 6.

Subsection (1)

Subsection (1) largely re-enacts the existing *section 5*, but extends it to cover all purposes affecting title to property.

Subsection (2)

Subsection (2) introduces further amendments providing for severance of the joint tenancy when all of the joint tenants die or are deemed to die simultaneously.

Subsection (3)

Subsection (3) makes it clear that the consequence of the severance is that each former joint tenant's successors succeed to that joint tenant's share derived from treating him or her as a tenant in common.

Court orders. **31.** – (1) Any person having an interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.

6.12 and 6.14
PA 1868
PA 1876

(2) In dealing with an application for an order under *subsection (1)* the court may –

AJA 1707,
s. 23

- (a) dismiss the application without making any order, or
- (b) combine more than one order under this section, or
- (c) attach conditions or other requirements to any such order.

(3) An order under this section includes –

- (a) an order for partition of the land amongst the co-owners,
- (b) an order for sale of the land and distribution of the proceeds of sale as the court directs,
- (c) an order directing that accounting adjustments be made as between the co-owners,
- (d) such other order relating to the land as the court thinks fit in the circumstances of the case.

(4) In this section –

- (a) “person having an interest in land” includes a mortgagee or other secured creditor or a trustee,
- (b) “accounting adjustments” includes –

- (i) payment of an occupation rent by a co-owner who has enjoyed, or is continuing to enjoy, occupation of the land to the exclusion of any other co-owner,
- (ii) compensation to be paid by a co-owner to any other co-owner who has incurred disproportionate expenditure in respect of the land (including its repair or improvement),
- (iii) contributions by a co-owner to disproportionate payments made by any other co-owner in respect of the land (including payments in respect of rates, taxes, and other charges payable in respect of it),
- (iv) redistribution of rents and profits received by a co-owner disproportionate to his or her interest in the land, and
- (v) any other adjustment necessary to achieve fairness between the co-owners.

(5) Nothing in this section affects the jurisdiction of the court under the Act of 1976, the Act of 1995 and the Act of 1996.

Section 31 implements the recommendation in the CP that the complicated and somewhat uncertain provisions of the *Partition Acts 1868* and *1876* should be replaced with substantial amendment (see paras 6.10 – 6.12 of the CP). *Section 31* contains much more straightforward provisions designed to give the court a wide jurisdiction to deal with disputes as between co-owners and to enable an individual co-owner or other person interested in the land to obtain an order to resolve a difficulty which the other co-owners are unwilling to resolve. In view of this much wider and more flexible discretionary jurisdiction it is unnecessary to implement the recommendation made in an earlier Consultation Paper (LRC CP 30 – 2004, para 6.19) that the Partition Acts should no longer apply to judgment mortgages. *Section 31* also implements the recommendation in the CP that the provision in *section 23* of the *Administration of Justice Act (Ireland) 1707* relating to accounts should be replaced without substantial amendment (see paras 6.13 – 6.14 of the CP).

Subsection (1)

Subsection (1) confers the right of any person interested (whether as a joint tenant or tenant in common) in co-owned land (whether the owner of a legal estate or equitable interest) to apply for an order from the court. *Subsection (4)(a)* makes it clear that “person having an interest” includes a mortgagee or other secured creditor and a trustee. “Mortgagee” is defined in *section 3* of this Bill as including any person having the benefit of a charge or lien. Thus an application may be made not only by a co-owner but also by mortgagees, chargees and other persons having a secured interest in a co-owner’s estate or interest in the land. It also includes the Official Assignee of a bankrupt co-owner.

Subsection (2)

Subsection (2) reiterates the wide and discretionary jurisdiction being conferred by *section 31*. *Paragraph (a)* makes it clear that it would remain open to the court to refuse to make an order in a particular case. One reason for this might be that the case would be better dealt with under other legislation such as that saved by *subsection (5)*. *Paragraph (b)* makes it clear that the court may make “combined” orders, *eg*, an order for sale but also directing that the proceeds should be distributed so as to make adjustments designed to compensate a particular co-owner or otherwise redress some imbalance or unfairness which has occurred between the co-owners. *Paragraph (c)* makes it clear that the court may attach conditions or other requirements to particular orders, *eg*, setting a timescale for compensation payments.

Subsection (3)

Subsection (3) lists the typical court orders which would be made, reflecting the provisions of the Partition Acts and *section 23* of the 1707 Act referred to above. However, *paragraph (d)* widens the court’s jurisdiction to make other orders as it thinks fit. This introduces a flexibility which was lacking in the legislation being replaced.

Subsection (4)

Subsection (4) provides various definitions for expressions used in *section 31*. *Paragraph (a)* clarifies “person having an interest” as explained earlier. *Paragraph (b)* defines “accounting adjustments” and refers to the sort of adjustments that the courts have ordered since this jurisdiction was conferred by *section 23* of the 1707 act. *Subparagraph (b) (v)*, however, preserves the wide discretionary jurisdiction to make any other adjustments necessary to achieve fairness between the co-owners.

Subsection (5)

Subsection (5) contains a saving for the court's jurisdiction under legislation which also applies to co-owners. Under the *Family Home Protection Act 1976* the court may be asked to dispense with the consent of a spouse to alienation of the family home by the other spouse who is the legal owner of the home. The spouse whose consent is required may hold an equitable interest in the home, so that the legal owner spouse is holding it on trust for both spouses. The court may also adjourn proceedings by a mortgagee or lessor for possession or sale of the family home. Under the *Family Law Acts 1995* and *1996* the court has wide jurisdiction to make various orders relating to matrimonial property (*eg* property adjustment orders) on judicial separation or divorce of spouses.

Bodies
corporate.

32. – (1) A body corporate may acquire and hold any property in a joint tenancy in the same manner as if it were an individual.

6.1

BC (JT) A
1899

(2) Where a body corporate and an individual or two or more bodies corporate become entitled to any property in circumstances or by virtue of any instrument which would, if the body or bodies corporate had been an individual or individuals, have created a joint tenancy, they are entitled to the property as joint tenants.

(3) On the dissolution of a body corporate which is a joint tenant of any property, the property devolves on the other surviving joint tenant or joint tenants.

Section 32 implements the recommendation in the CP that the *Bodies Corporate (Joint Tenancy) Act 1899* should be replaced without substantial amendment. This was the statute which enabled corporate bodies like banks and other financial institutions to hold property in a joint tenancy, *eg*, as trustees.

Subsection (1)

Subsection (1) re-enacts the basic proposition enabling a corporate body to hold any property in a joint tenancy.

Subsection (2)

Subsection (2) re-enacts the supporting proposition that property acquired by or given by any instrument to a corporate body and an individual or to two or more corporate bodies as joint tenants is so held by them.

Subsection (3)

Subsection (3) makes it clear that in the case of a corporate joint tenant, the right of survivorship which is the hallmark of a joint tenancy operates in the usual way. A corporate body does not die like an individual, but it can be dissolved. *Subsection (3)* provides, therefore, that dissolution should be treated as the equivalent of death of an individual joint tenant. On dissolution the corporate body's interest in the property held on a joint tenancy disappears and the surviving joint tenant or tenants become the owners of the property.

Waste and encroachment on commonages.

- 33.** – (1) Any person who –
- (a) destroys the surface of or otherwise commits waste on, or
 - (b) knowingly encroaches on, whether by inclosure or erection of any building or structure,

6.22
CA 1789
CA 1791

any land held in commonage is guilty of an offence.

(2) Nothing in this Act affects the exercise of any right of pasturage, turbary or similar right which may exist over land held in common.

(3) In this section “land held in commonage” includes land held by two or more persons whether as joint tenants or tenants in common.

Section 33 implements the recommendation in the CP that the provisions in the *Commons Acts (Ireland) 1789* and *1791* should be replaced without substantial amendment (see para 6.22 of the CP). Those Acts prohibit the commission of waste and encroachment on common land. This relates primarily to the commonages which still exist of bog and grazing land on the hills and mountains in the remoter areas of the western counties.

Subsection (1)

Subsection (1) specifies the offences covered by *section 32* and largely coincides with the provisions in the 1789 and 1791 Acts. The penalties for conviction of such an offence are specified in *section 6* of the Bill.

Subsection (2)

Subsection (2) makes it clear that the section does not interfere with legitimate rights which may exist in respect of common land, such as the right to pasture animals or the right to cut turf which are typically enjoyed by various persons over commonages in rural areas.

Subsection (3)

Subsection (3) makes it clear that the section applies to any form of commonage.

PART 7

APPURTENANT RIGHTS

This Part implements the recommendations contained in Chapter 7 of the CP. That incorporated recommendations made in two earlier Reports published by the Law Reform Commission: *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002); *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003), Chapter 1.

Part 7 relates to “appurtenant rights” over land, *ie*, rights which usually exist as between neighbouring landowners and entitle one neighbour to do something in respect of the other neighbour’s land or to stop that other neighbour doing something on the other neighbour’s land. One of the most common categories of such rights is the ancient one of “incorporeal hereditaments”. The two examples of this category which remain in frequent use in modern times are easements (such as rights of way and rights of light) and profits à *prendre* (such as rights to fish or to cut turf). Profits comprise a wide range of rights and can exist without the “appurtenant” characteristic, *ie*, a person can own a profit over someone else’s land without being a neighbouring landowner, or, indeed, without being a landowner of any kind (other than owing the profit). The provisions in Part 7 (sections 34 – 41) contain various amendments to the law governing acquisition of easements and profits, which the CP regarded as defective. This involves the replacement of the pre-1922 statutes dealing with the law of prescription: the *Prescription Act 1832* and the *Prescription (Ireland) Act 1858*.

In view of the likelihood that it will be several years before an eConveyancing system will operate in respect of all land transactions, and that unregistered land conveyancing will continue to operate for some time, the conclusion has been reached that the doctrine of prescription should not be abolished altogether, but rather should be modified. It is much relied upon in modern times.

The CP pointed out that many categories of incorporeal hereditaments have become obsolete, such as tithe rentcharges, former Crown rents and quit rents. It was recommended that various pre-1922 statutes relating to these should be repealed without replacement and the Bill provides for this (*section 8 and Schedule 1*).

The CP also recommended that the future creation of rentcharges be prohibited, as they too have become obsolete, except where created by statute. As regards existing rentcharges, some pre-1922 statutes or provisions have ceased to have any practical significance and are to be repealed without replacement (see *section 8 and Schedule 1*).

Other provisions remain of relevance and are replaced by the provisions in *section 43* of this Bill. However, Part 7 does not implement the recommendations relating to replacement of *section 10* of the *Law of Property Amendment Act 1859*, which relates to partial release of rentcharges. That is dealt with by *section 76* in Part 8, which deals with conveyances of land generally.

As indicated in the introduction to Part 6, Part 7 also implements recommendations relating to two matters dealt with in Chapter 6 of the CP. These concern neighbouring landowners' rights and obligations in respect of party structures and rights of access for the purpose of carrying out work to buildings close to the boundary line (see *sections 44-49*).

The other substantial purpose of Part 7 is to overhaul the law relating to freehold covenants as recommended originally by the Commission's Report LRC 70 - 2003 (Chapter 1) (sections 50 – 53). This corrects what has long been recognised as a major defect in our land law and conveyancing system. In addition to rendering such covenants (which are frequently created as between neighbouring landowners) fully enforceable against successors in title, the Bill also introduces provision to facilitate the discharge or modification of old covenants which have become obsolete or an unreasonable interference with the use and enjoyment of neighbouring land.

Finally it should be noted that Part 7 does not implement two recommendations contained in Chapter 7 of the CP. One related to the need for words of limitation in a grant or transfer of an easement appurtenant to registered land (see CP paras 7.20-7.21). This has been dealt with by *section 41* of the *Registration of Deeds and Title Bill 2004* (amending *section 123 of the Registration of Title Act 1964*). Apart from that *section 71* of this Bill removes the need for words of limitation generally. The other matter relates to the operation of *section 6* of the *Conveyancing Act 1881* with respect to the passing of an easement or profit *à prendre* to a purchaser of neighbouring land. *Section 6* has a much wider scope than this and so this aspect of its application is dealt with by its replacement to be found in Part 8 (see *section 74*).

PART 7

APPURTENANT RIGHTS

Chapter 1

Easements and profits à prendre

Interpretation of *Chapter 1*. **34.** - In this *Chapter*, unless the context otherwise requires –

“dominant land” means land benefited by an easement or profit à *prendre* to which other land is subject, or in respect of which a relevant user period has commenced; and “dominant owner” shall be read accordingly and includes that owner’s predecessors and successors in title;

“foreshore” has the meaning assigned to it by *section 2(1)* of the Act of 1957;

“interruption” means interference with, or cessation of, the use or enjoyment of an easement or profit à *prendre* for a continuous period of at least one year, but does not include an interruption under *section 38(2)*;

“limited interest” means any estate or interest in land vested in possession other than a fee simple estate;

“period of non-user” has the meaning assigned to it by *section 40(2)*;

“relevant user period” has the meaning assigned to it by *section 36(4)*;

“servient land” means land subject to an easement or profit à *prendre*, or in respect of which a relevant user period has commenced; and “servient owner” shall be read

accordingly and includes that person's predecessors and successors in title;

“State authority” means a Minister of the Government or the Commissioners of Public Works in Ireland;

“user as of right” means use or enjoyment of an easement or profit *à prendre* without force, without secrecy and without the oral or written consent of the servient owner.

Section 34 contains various definitions relating to the provisions *Chapter 1* of Part 7. Most of these concern the acquisition of easements and profits *à prendre* by prescription.

Abolition of
certain
methods of
prescription.

7.19

35. - Subject to *section 39*, acquisition of an easement or profit *à prendre* by prescription at common law and prescription by way of the doctrine of lost modern grant is abolished and after the commencement of this Act acquisition by prescription shall be in accordance with *section 36*.

Section 35 implements the recommendation in the CP that the law relating to acquisition of easements and profits by prescription should be much simplified. The earlier Law Reform Commission *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002) recommended that the complicated methods based on the common law and the doctrine of lost modern grant should be abolished (see paras 2.21-2.24). Further simplification was to be achieved by having just one, statutory method of prescription, to replace that introduced by the *Prescription Act 1832* (applied to Ireland by the *Prescription (Ireland) Act 1858*). *Section 36* implements this recommendation.

The abolition of certain methods of prescription does not destroy a prescriptive claim which is in the course of being acquired at the date of commencement of Part 7. Provided the usual conditions relating to such claims are met, such a claim can continue to be made in accordance with the provisions of *section 39*.

Acquisition of easements and profits à prendre by prescription. 36. – (1) Except where the servient owner consents to registration of an easement or profit à prendre over the servient land, an easement or profit à prendre shall be acquired by prescription only on registration, in accordance with subsection (3), of a court order made under this section.

7.19

PA 1832
PA 1858

(2) In an action to establish or dispute the acquisition by prescription of an easement or profit à prendre, the court shall make an order declaring the existence of the easement or profit à prendre if it is satisfied that there was a relevant user period immediately before the commencement of the action.

(3) An order made under subsection (2) shall be registered in the Registry of Deeds or Land Registry, as appropriate.

(4) In this section, “relevant user period” means a period of user as of right without interruption by the person claiming to be the dominant owner or owner of a profit à prendre in gross, for –

- (a) where the servient owner is not a State authority, a minimum period of 12 years, or
- (b) where the servient owner is a State authority –
 - (i) a minimum period of 30 years, or
 - (ii) where the servient land is foreshore, a minimum period of 60 years.

Section 36 implements the recommendations in Report LRC 66 – 2002 that the excessively complicated provisions governing prescription in the *Prescription Act 1832* (as applied to Ireland by the *Prescription (Ireland) Act 1858*) should be replaced by a much simpler scheme (see Chapters 3 and 4). The result is that the provisions in *section 36* do not distinguish between easements and profits nor between different easements and different profits. The only points of distinction concern State land and foreshore in respect of which special considerations apply (see LRC 66 – 2002, paras 3.12-3.14 and 4.04-4.05).

Subsection (1)

Subsection (1) is designed to introduce a single statutory method of acquisition of easements and profits *à prendre* by prescription, based on certain principles enshrined in the 1832 Act. One is that a claimant does not acquire the easement or profit until the claim is brought before the court. Secondly, in order to succeed, the claimant must establish sufficient “user as of right” for the requisite period immediately prior to the date of commencement of the action. What that period is depends on whether the “servient land” (*ie*, the land over which the easement or profit is being claimed) is State land (or foreshore). If it is not, the period is 12 years (as opposed to the 20 – and 40 – year periods for easements, and 30 – and 60 – year periods for profits under the 1832 Act), by way of analogy with the 12 – year limitation period in respect of actions to recover land under the *Statute of Limitations 1957* (see LRC 66 – 2002, paras 3.02 – 3.03). Thirdly, as *subsection (4)* makes clear, the new statutory provision applies equally to a profit in gross (*ie* where the claimant is not the owner of neighbouring land and, therefore, does not come within the definition of “dominant owner” in *section 34*). These provisions, in particular the need to obtain

a court order, do not apply where the servient owner consents to registration.

Subsection (2)

Subsection (2) reiterates the principle in the 1832 Act that a claim to prescription must be based on the period of use or enjoyment immediately before the court action.

Subsection (3)

Subsection (3) makes the substantial change to the current law of requiring the court order declaring the acquisition to be registered. This is designed to facilitate conveyancing by ensuring that future purchasers will become aware of the easement's or profit's existence. The precise method of registration will be prescribed by regulations made in accordance with *section 5(5)*.

Subsection (4)

Subsection (4) provides further clarification of the "relevant user period" which must be established by a claimant. It must be "user as of right" which is defined in *section 34*, in keeping with the long-established view that it must be user or enjoyment of the claimed easement or profit without force, secrecy or consent. That definition also clears up the uncertainty under the 1832 Act as to whether it must be written, as opposed to oral, permission. Either form will defeat a claim under the new legislation. The user or enjoyment must also be "without interruption", but the definition of "interruption" in *section 34* makes it clear that this will only defeat a claim if it is for a continuous period of at least a year. This reflects the position under the 1832 Act. That definition also makes it clear that where the user period is suspended because of the incapacity of the servient owner, this does not constitute an interruption (see *section 38*).

Subsection (4) then goes on to specify the requisite, minimum period of time for such user to establish a claim. Ordinarily it is 12 years, as provided by *paragraph (a)*, but, under *paragraph (b)*, longer periods are prescribed for land owned by the State (30 years or 60 years where it owns the foreshore).

Limited
interests.

7.19

PA 1832, s. 8

37. – (1) Where the dominant owner acquiring an easement or profit *à prendre* under *section 36* owns a limited interest only in the dominant land, the easement or profit *à prendre* attaches to that land and, on termination of the limited interest, passes to the owner of the reversion or remainder.

(2) Where an easement or profit *à prendre* is acquired under *section 36* against a servient owner who owns a limited interest only in the servient land, it terminates on termination of that interest, but if the servient owner enlarges that interest by acquisition of a superior interest the easement or profit *à prendre* attaches to the superior interest.

(3) Nothing in *subsection (2)* prevents the subsequent acquisition of an easement or profit *à prendre* under *section 36* on the basis of a new relevant user period against the owner of the reversion or remainder taking possession of the servient land on termination of the limited interest.

(4) In this section “owner of the reversion or remainder” includes successors in title, or persons deriving title under such owner or successors.

Section 37 recasts provisions in the *Prescription Act 1832* dealing with the operation of prescription where either the dominant owner or the servient owner holds a “limited interest” only (see LRC 66 – 2002, paras 3.30 – 3.31 of the CP). For these purposes *section 34* provides a definition which makes it clear that this covers both a freehold limited interest (like a life interest) and a leasehold estate.

Subsection (1)

Subsection (1) deals with the situation where the person claiming an easement or profit owns a limited interest only in the dominant land. In such a case, that person will obviously enjoy the easement or profit acquired so long as his or her interest in the dominant land lasts. Once it terminates the easement or profit will not end, but will instead pass to the person who is entitled to take possession of the land, *ie*, the owner of the reversion or remainder succeeding on termination of a life interest, or, in the case where the dominant owner had a leasehold estate only in the dominant land, the landlord.

Subsection (2)

Subsection (2) deals with the reverse situation, *ie*, where it is the servient owner, who owns a limited interest only and becomes subject to the easement or profit. In this case the easement or profit will last only for the period of that limited interest. The owner of the reversion or remainder who takes possession of the servient land on termination of the limited interest will not be subject to the easement or profit. However, if no action is then taken by that owner, the dominant owner may eventually succeed in prescribing afresh against that owner under *section 35*.

Subsection (3)

Subsection (3) reiterates the point just made that a dominant owner may prescribe anew against the owner of a reversion or remainder who fails to interrupt continuing use or enjoyment after termination of a limited interest in the servient land.

Subsection (4)

Subsection (4) makes it clear that *section 37* applies also to successors in title or persons deriving title under the owner or successors. Thus on termination of a dominant owner's lease, the easement or profit may pass to a new tenant to whom the landlord relets the land rather than resuming possession himself or herself. Similarly, on termination of a servient owner's lease, the dominant owner may begin prescribing against a new tenant to whom the landlord relets the servient land.

Incapacity. **38.** – (1) In this section, a person’s “incapacity” means that person’s minority or mental incapacity.

7.19 (2) Subject to *subsection (3)*, where the servient owner is incapable, whether at the commencement or during 1832 Act, s. 7 the relevant user period, of management of that owner’s affairs because of an incapacity, the running of that period is interrupted until the incapacity ceases, but in no such case does the relevant user period exceed 30 years.

(3) *Subsection (2)* does not apply where the court considers that it is reasonable, in the circumstances of the case, to have expected some other person, whether as trustee, committee of a ward of court, an attorney under an enduring power of attorney or otherwise, to have acted on behalf of the servient owner during the relevant user period.

Section 38 recasts the provisions in the 1832 Act dealing with cases where the servient owner is subject to some incapacity.

Subsection (1)

Subsection (1) defines “incapacity” as either a person’s minority or mental incapacity. The Law Reform Commission Report LRC 66 – 2002 recommended that minority should no longer affect a prescriptive claim, on the basis that minor will usually have a parent or guardian capable of protecting his or her interests (see paras 3.20-3.23). This would become even more the case under *Section 15* of the Bill, whereby a minor would no longer hold legal title to the servient land, and, instead, it would be held on trust for the minor under Part 4 (see *section 19*). However, the view has been taken that there may be cases where the adult who should protect the minor’s interests fails to do so and the minor should not suffer as a consequence.

Subsection (3) enables the court to review the circumstances of a particular case.

Subsection (2)

Subsection (2) deals with the case of incapacity of the servient owner. In such a case LRC 66 – 2002 recommended that the prescription period should be suspended during such incapacity, but subject to a “long-stop” of 30 years, *ie*, an easement or profit would be acquired after 30 years uninterrupted user whether or not the servient owner recovered from the incapacity. *Subsection (2)* does not, however, cover physical incapacity, since such a person is capable of handling his or her own affairs and of enlisting the aid of others.

Subsection (3)

Subsection (3) enables a court in a particular case of to take the view that there was some other person whom it was reasonable to expect to protect the servient owner’s interests, *eg*, a trustee holding the land for the minor, a committee in control of a ward of court’s property, or an attorney under an enduring power of attorney. In such a case the relevant user period would not be interrupted under *subsection (2)*.

Application 39. – In relation to any claim to an easement or profit of *sections 35 à prendre* made after the commencement of this Chapter, *sections 35 to 38* –

- (a) apply to any claim based on a relevant user period notwithstanding that it is alleged that an additional user period occurred before that commencement,
- (b) do not apply to any claim based on a user period alleged to have commenced prior to that commencement where the action in which the claim is made is brought within three years of such commencement.

Section 39 contains provisions to deal with the situation where a person claims to have commenced user of an easement or profit before the new provisions in *sections 35 to 38* have come into force. They modify the proposals in the Report LRC 66 – 2002, so as to make the new provisions applicable as soon as possible, taking into account what may be regarded as vested rights. They also take into account the fact that, under the law being replaced, the periods of required user are longer and, under, *eg*, the doctrine of lost modern grant (which is being abolished), there is no requirement that the period of user be one immediately before the date of the action in which the claim is made.

Paragraph (a) makes it clear that the new provisions (including the provisions for registration of the court order declaring the existence of the easement or profit) will apply to all claims made at least 12 years after the commencement. Thus, a person who commenced user 5 years before *sections 35 – 38* commenced will be able to make a claim 12 years later (*ie*, after 17 years' user in total), rather than having to wait a further 15 years (to make a total of 20 years for an easement) or

25 years (to make a total of 30 years for a profit) under the old law. Furthermore, since *sections 35 – 38* will apply to such a case, the claimant will not be able to rely upon the old law wherever the claim is made more than 12 years after the commencement of those sections.

Paragraph (b) deals with cases where the period of user required under the old law has already been achieved by the date of commencement of the new law, or is very close to being achieved (no more than an additional 3 years are needed). In such cases the claimant will be able to rely upon the old law provided the action is brought within 3 years of commencement of *sections 35 – 38*. After that transitional period of 3 years any claimant would have to satisfy the requirements of *sections 35 – 38*, such as establishing at least 12 years' use or enjoyment immediately before the date the action is brought.

Extinguishment. **40.** – (1) On the expiry of a 12 year continuous period of non-user of an easement or profit *à prendre* acquired by –

7.19

(a) prescription, or

(b) implied grant or reservation,

the easement or profit *à prendre* is extinguished except where a notice in the prescribed form is registered in the Registry of Deeds or Land Registry, as appropriate.

(2) In *subsection (1)* a “period of non-user” means a period during which the dominant owner ceases to use or enjoy the easement or profit *à prendre*.

(3) This section applies to extinguishment of an easement or profit *à prendre* notwithstanding that it was acquired before the commencement of this Part, provided at least three years of the period of non-user occur after such commencement.

(4) Nothing in this section affects the jurisdiction of the court to declare that an easement or profit *à prendre*, however acquired, has been abandoned or extinguished.

Section 40 modifies the recommendation in Report LRC 66 – 2002 that in the case of easements and profits acquired by prescription, which under *section 36* can be acquired by 12 years’ continuous use or enjoyment, there should be a corresponding presumption of abandonment by a similar period of non-use or enjoyment (see paras 3.38 – 3.40 of the CP). Instead, *section 40* is designed to simplify conveyancing by introducing a rule that such easements and profits will be extinguished by 12 years’ non-user, unless protected by registration in the Land Registry or Registry of Deeds.

Such registration will alert any purchaser of the servient land to the existence of the easement of profit. This provision will apply primarily to easements or profits already acquired before the commencement of Part 7, or acquired within 3 years of that commencement in accordance with *section 39*. Any easements or profits acquired by prescription subsequently will have to be registered under *section 36*.

Section 40 also applies to easements and profits acquired by implied grant or reservation, again in the interests of simplifying conveyancing. The point here is that, like easements or profits acquired by prescription, there is no documentary evidence of the existence of those acquired by implied grant or reservation. If there is no evidence of continuing use or enjoyment by the dominant owner, a purchaser of the servient land may be taken unawares, but nevertheless remain subject to the easement or profit because it is a legal interest in land. Again, 12 years' non-user will result in extinguishment unless the easement or profit has been registered.

Subsection (1)

Subsection (1) contains the new rule that 12 years' non-user of an easement or profit acquired by prescription or implication will result in its extinguishment unless it has been protected by registration. The precise method of protection will be prescribed by regulations made in accordance with *section 5(5)*.

Subsection (2)

Subsection (2) clarifies what is meant by a "period of non-user" – it means the dominant owner ceasing to use or enjoy the easement or profit.

Subsection (3)

Subsection (3) applies the new rule to easements and profits acquired before the commencement of Part 7, but only where at least 3 years' of the period of non-user occur after that commencement. This provides the dominant owner with a 3 year period in which either to recommence use or enjoyment or to protect the easement or profit by registration.

Subsection (4)

Subsection (4) makes it clear that *section 40* does not otherwise affect the law relating to extinguishment of easements and profits, so that it will remain possible for a servient owner to establish in court that there is clear evidence of an intention by the dominant owner to abandon the easement or profit, however it was acquired.

Implied grant. **41.** – (1) The rule known as the Rule in *Wheeldon v. Burrows* is abolished and replaced by *subsection (2)*.

7.23

(2) A conveyance of land creates for the benefit of that land any easement or profit *à prendre* over the land retained by the grantor which it is reasonable to assume, in the circumstances of the case, was within the contemplation of the parties at the date of the conveyance as being included in it, or would have been if they had adverted to the matter.

Section 41 implements the recommendations in the CP to replace the complex rule in *Wheeldon v Burrows* (which relates to acquisition of easements or profits by implied grant, but not by implied reservation) with a new rule based on the principle of non-derogation from grant (see paras 7.22-7.23 of the CP). The rule in *Wheeldon v Burrows* is based upon that principle, but involves various additional glosses which are neither clear nor certain in their application. The CP recommended returning the law to the underlying general principle which has been applied on several occasions by the Irish courts.

Subsection (1)

Subsection (1) abolishes the rule in *Wheeldon v Burrows* and makes it clear that it is being replaced by the new provision in *subsection (2)*.

Subsection (2)

Subsection (2) makes it clear that in future implied grant claims must be grounded on a rule based on the non-derogation principle which was recently reiterated by the Supreme Court in *William Bennett Construction Ltd v Greene* [2004] 2 ILRM 96.

Chapter 2

Rentcharges

Prohibition of certain rentcharges. **42.** - (1) Subject to *subsection (2)*, the creation of a rentcharge at law or in equity is prohibited.

7.12 (2) *Subsection (1)* does not apply to the creation of a rentcharge under –

- (a) a contract entered into before the _ day of _ 200-,
- (b) an order of the court, or
- (c) any statutory provision.

Section 42 implements the recommendation in the CP that in pursuit of the policy of simplifying the law, the future creation of rentcharges should be prohibited (see paras 7.11-7.12 of the CP).

Subsection (1)

Subsection (1) contains the prohibition which prevents creation of both legal and equitable rentcharges.

Subsection (2)

Subsection (2) contains important exceptions to the prohibition in *subsection (1)*. *Paragraph (a)* preserves the rights of parties to a contract already entered into by the _ day of _ 200- (the date of publication of this Bill). *Paragraph (b)* covers rentcharges created under a court order. *Paragraph (c)* covers rentcharges created by statute, of which there have been many examples in the past, *eg*, land improvement and drainage charges and rentcharges or annuities for repayment of advances made under the *Land Purchase Acts*.

Enforcement of rentcharges. **43.** –Subject to any other statutory provision, from the commencement of this Act, a rentcharge is enforceable as a simple contract debt only.

7.16

CA 1881, s.
44

Section 43 does not implement the recommendation in the CP that the provisions in *section 44* of the *Conveyancing Act 1881* relating to enforcement of rentcharges should be replaced without substantial amendment (subject to deletion of references to the right of distress) (see paras 7.15-7.16 of the CP). The view has been taken that the remedies provided by *section 44* are now obsolete and, given the rarity of private rentcharges, should be enforceable as simple contract debts only. This is subject to any other statutory provisions governing rentcharges.

Chapter 3

Party structures

Interpretation 44. – (1) In this *Chapter*, unless the context otherwise of *Chapter 3*. requires –

6.24 “adjoining” includes adjacent;

6.26 “building” includes part of a building;

“building owner” means the owner for the time being of any estate or interest in a building or unbuilt-on land who wishes to carry out works to a party structure;

“the court” means the District Court;

“party structure” means any arch, ceiling, ditch, fence, floor, hedge, partition, shrub, tree, wall or other structure which horizontally, vertically or in any other way –

(a) divides adjoining and separately owned buildings, or

(b) is situated at or on or so close to the boundary line between adjoining and separately owned buildings or unbuilt-on lands that it is impossible or not reasonably practical to carry out works to the structure without access to the adjoining building or unbuilt-on land,

and includes any such structure which is—

- (i) situated entirely in or on one of the adjoining buildings or unbuilt-on lands, or
- (ii) straddles the boundary line between adjoining buildings or unbuilt-on lands and is either co-owned by their respective owners or subject to some division of ownership between them;

“adjoining owner” means the owner of any estate or interest in a building or unbuilt-on land adjoining that of the building owner;

“works” include –

- (a) carrying out works of adjustment, alteration, cutting into or away, decoration, demolition, improvement, lowering, maintenance, raising, renewal, repair, replacement, strengthening or taking down,
- (b) cutting, treating or replacing any hedge, tree or shrub,
- (c) clearing or filling in ditches,
- (d) ascertaining the course of drains, sewers, pipes, wires, cables or other means of conveying material and clearing, renewing, repairing or replacing them;

- (e) carrying out inspections, drawing up plans and performing other tasks requisite for, incidental to or consequential on any works falling within *paragraphs (a) to (d)*;

“works order” means an order under *section 46(1)*.

Section 44 provides important definitions for *sections 45-49*, which implement the recommendations made in the CP relating to neighbouring parties’ rights in respect of party structures dividing their properties and resolving disputes over access. The two key definitions are those concerning “party structures” and “works”. These make it clear that the provisions of *sections 45-49* cover a wide variety of situations where there may be difficulties or disputes about carrying out works to structures dividing a separately owned building, parts of buildings or parcels of unbuilt-on land. The object of *sections 45-49* is to clarify the right of a person interested in a party structure to carry out various works to it and to enable parties in dispute over works to party structures to seek a court order to resolve that dispute. The form of that order would be a “works order” which would, in effect, sanction the carrying out of works to the structure and regulate the position of the parties during the works and after they have been completed. In many cases it is likely that a party, who finds his or her neighbour refusing to allow access to his or her building or land for the purpose of carrying out works to the party structure, will seek a court order to obtain such access.

The definition of “party structure” includes a case not coming within the typical party wall or other structure, *ie*, where the structure is entirely owned by one person, but is so close to the boundary with a neighbour’s land that the only possible or practical way of carrying out works to it is by gaining access to the neighbour’s land.

To some extent Chapter 3 encapsulates, but in a modified form, the provisions of the old *Boundaries Act (Ireland) 1721* (which is being repealed) and extends a modified version of provisions to be found in the *Dublin Corporation Act 1890* throughout the country (see CP, paras 6.23 – 6.26 of CP).

Rights of building owner.

45. – (1) Subject to *subsection (2)*, a building owner may carry out works to a party structure for the purpose of –

- (a) compliance with any statutory provision or any notice or order under such a provision, or
- (b) carrying out development which is exempted development or development for which planning permission has been obtained or compliance with any condition attached to such permission, or
- (c) preservation of the party structure or of any building or unbuilt-on land of which it forms a part, or
- (d) carrying out any other works which –
 - (i) will not cause substantial damage or inconvenience to the adjoining owner, or
 - (ii) if they may or will cause such damage or inconvenience, it is nevertheless reasonable to carry them out.

(2) Subject to *subsection (3)*, in exercising any right under *subsection (1)* the building owner shall –

- (a) make good all damage caused to the adjoining owner as a consequence of the works, or reimburse the adjoining owner the reasonable costs and expenses of such making good,

- (b) pay to the adjoining owner –
 - (i) the reasonable costs of obtaining professional advice with regard to the likely consequences of the works,
 - (ii) reasonable compensation for any inconvenience caused by the works.

(3) The building owner may –

- (a) claim from the adjoining owner a contribution to, or set off against any reimbursement of, the cost and expenses of making good such damage under *subsection (2)(a)*,
- (b) set off against compensation under *subsection (2)(b)(ii)*,

such sum as will take into account the proportionate use or enjoyment of the party structure which the adjoining owner makes or is likely to make.

(4) If -

- (a) a building owner fails within a reasonable time to –
 - (i) make good damage, or to reimburse the costs and expenses, under *subsection 2(a)*, or
 - (ii) pay reasonable costs or compensation under *subsection 2(b)*,

the adjoining owner may recover such cost and expenses or compensation,

- (b) an adjoining owner fails to meet a claim to a contribution under *subsection (3)(a)*, the building owner may recover such contribution,

as a simple contract debt in a court of competent jurisdiction.

Section 45 confers on a landowner interested in a party structure (as defined by *section 44*) the right to carry out works to the structure, subject to the various provisions set out in the section. The kind of works is a very wide one, as defined again in *section 44*.

Subsection (1)

Subsection (1) sets out the purposes which justify exercise of the right to carry out works. A dispute over this may be resolved by seeking a “works order” from the court under *section 46*. *Paragraph (a)* specifies compliance with statutory provisions, or notice or orders made under such provisions, such as the building regulations. *Paragraph (b)* specifies carrying out development for which planning permission has been obtained, or compliance with planning conditions. *Paragraph (c)* specifies preservation of the party structure, such as maintenance and repairs. *Paragraph (d)* specifies cases where no substantial damage or inconvenience will be caused to the adjoining owner or, if there will be such damage or inconvenience, it is nevertheless reasonable to carry out the work. Again a dispute of this can be resolved by the court under *section 46*. Furthermore it is important to read with *subsection (1)* the requirements of *subsection (2)*.

Subsection (2)

Subsection (2) imposes obligations on the building owner to make good damage caused by the works and to compensate the adjoining owner for damage or inconvenience and to reimburse reasonable professional expenses.

Subsection (3)

Subsection (3) enables account to be taken of any “benefit” which may accrue to the adjoining owner from the works to the party structure. The building owner may claim a contribution or right of set-off.

Subsection (4)

Subsection (4) enables claims to reimbursement of costs or to compensation by the adjoining owner or to a contribution by the building owner to be recovered as a civil debt.

Works
orders.

46. – (1) A building owner who is in dispute with an adjoining owner with respect to exercise of rights under *section 45* may apply to the court for an order authorising the carrying out of works (a “works order”).

(2) In determining whether to make a works order and, if one is to be made, what terms and conditions should be attached to it, the court shall have regard to *section 45* and may take into account any other circumstances which it considers relevant.

Section 46 enables a landowner who wishes to exercise the right to carry out works to a party structure conferred on *section 45*, but is obstructed by the adjoining owner, to resolve the dispute by seeking a “works order” from the court.

Subsection (1)

Subsection (1) confers the right to seek a works order.

Subsection (2)

Subsection (2) confers a discretion on the court whether to make a works order and, if it is going to make one, on what terms and conditions. Further provision as to terms and conditions is made by *section 47*. *Subsection (2)* requires the court to have regard to the provisions of *section 45* which govern the right to carry out works to a party structure – it must be exercised for a purpose specified in *section 45* and subject to its provisions as to making good damage and compensation. However, *subsection (2)* also authorises the court to have regard to other circumstances which it considers relevant.

Terms and conditions of works orders. **47.** – (1) Subject to *subsection (3)*, a works order shall authorise the carrying out of the works specified, on such terms and conditions (including those necessary to comply with *section 45*) as the court thinks fit in the circumstances of the case.

(2) Without prejudice to the generality of *subsection (1)*, a works order may –

- (a) authorise the building owner, and that owner’s agents, employees or servants, to enter on an adjoining owner’s building or unbuilt-on land for any purpose connected with the works,
- (b) require the building owner to indemnify or give security to the adjoining owner for damage, costs and expenses caused by or arising from the works or likely so to be caused or to arise.

(3) A works order shall not authorise any permanent interference with, or loss of, any easement of light or other easement or other right relating to a party structure unless it incorporates provision for compensation for such interference or loss.

Section 47 confers a wide jurisdiction on the court as to the terms and conditions which may be contained in a works order.

Subsection (1)

Subsection (1) confers a wide discretion as to the terms and conditions which may be included by the court in a works order. These may, of course, include those which are necessary to ensure that the provisions of *section 45* are complied with.

Subsection (2)

Subsection (2), without prejudice to the general discretion, empowers the court to give the building owner access to the adjoining land in order to carry out the works and to require an indemnity or security to be given to the adjoining owner.

Discharge or
modification
of works
orders.

48. - On the application of any person affected by a works order, the court may discharge or modify the order, on such terms and conditions as it thinks fit.

Section 48 confers jurisdiction to discharge or modify a works order which has already been made and gives the court a discretion as to the terms and conditions upon which this may be done.

Registration of court orders. **49.** – An order under *section 46* or *section 48* shall be registered in the Registry of Deeds or Land Registry, as appropriate.

Section 49 makes provision for registration of works orders, and orders discharging or modifying such orders, in the Registry of Deeds or Land Registry, depending on whether the order relates to unregistered or registered land. The precise method of registration will be prescribed by regulation in accordance with *section 5(5)*.

Chapter 4

Freehold covenants

Interpretation of *Chapter 4*. **50.** – In this *Chapter*, unless the context otherwise requires –

“dominant land” means land benefited by a freehold covenant to which other land is subject; and “dominant owner” shall be read accordingly and includes persons deriving title from or under that owner;

“freehold covenant” means a covenant affecting freehold land entered into after the commencement of this Part;

“scheme of development” means a building or estate scheme created on a subdivision of land and intended to confer the benefit of covenants on subsequent owners of subdivided parts in accordance with the rule sometimes known as the Rule in *Elliston v Reacher*;

“servient land” means land subject to a freehold covenant benefiting other land; and “servient owner” shall be read accordingly and includes persons deriving title from or under that owner.

Section 50 provides important definitions for the provisions in *sections 51 – 53* which overhaul the law relating to freehold covenants. These provisions relate only to covenants entered into after the commencement of this Part.

The definition of “freehold covenant” makes it clear that the new provisions are concerned only with freehold land and not leasehold land, where quite different rules apply. There is no need to refer to fee farm grants in this context (which under existing law are usually governed by leasehold law) because the new provisions apply only to covenants entered into after the commencement of Part 7. The future creation of such grants is prohibited by *section 12* in Part 2.

The definition of “land” in *section 3* of the Bill makes it clear that, unless the covenant or instrument provides otherwise, the benefit and burden of a covenant will attach to both the whole and any part of the dominant and servient land. The definition of “owner” in relation to “dominant land” and “servient land” makes it clear, again subject to a provision to the contrary, that the benefit and burden of a covenant may attach to persons deriving title from or under the dominant and servient owner *eg*, a lessee or mortgagee.

Enforceability
of freehold
covenants.

7.30

CA 1881, ss.
58 and 59

51. - (1) Subject to *subsection (3)*, the rules of common law and equity relating to the enforceability of a freehold covenant (including the rule known as the Rule in *Tulk v Moxhay*) are abolished and replaced by this section.

(2) Subject to *subsection (3)*, any freehold covenant which imposes in respect of servient land an obligation to do or to refrain from doing any act or thing is enforceable –

(a) by –

- (i) the dominant owner for the time being, or
- (ii) a person who has ceased to be that owner, but only in respect of any period when that person was such an owner,

(b) against –

- (i) the servient owner for the time being, or
- (ii) a person who has ceased to be that owner, but only in respect of any period when that person was such owner.

(3) This section –

(a) does not affect the enforceability of –

- (i) a freehold covenant by a person entitled to the benefit of a scheme of development, or
- (ii) a covenant for title under *section 82*,

- (b) takes effect subject to the terms of the covenant or the instrument containing the covenant.
-

Section 51 implements the recommendation in the CP that the Law Reform Commission's earlier recommendations relating to enforcement of positive covenants over freehold land should be implemented (see paras 7.29 – 7.32 of the CP). Those earlier recommendations were contained in Chapter 1 of the *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70 – 2003). The provisions of section 51, which apply unless the instrument containing the covenant provides otherwise, rendered it unnecessary to re-enact the equivalent of *sections 58 and 59* of the *Conveyancing Act 1881*. The CP recommended that their provisions should be consolidated with the new provisions governing freehold covenants.

Subsection (1)

Subsection (1) makes it clear that the provisions in *section 51* are designed to replace the unsatisfactory rules of the common law and equity (including the rule in *Tulk v Moxhay* which confines enforceability of freehold covenants to negative covenants and so excludes important positive covenants, such as, covenants for repair and maintenance). The one exception to this is the special equitable rule usually known as the Rule in *Elliston v Reacher*, which is preserved by *subsection (3)(a)(i)*.

Subsection (2)

Subsection (2) contains the new law, which essentially makes freehold covenants as fully enforceable by and against successors in title as leasehold covenants. *Subsection (2)* makes it clear that the benefit and burden of a covenant will attach to a dominant or servient owner only in respect of the period when he or she was that owner. Thus, once the servient owner has ceased to own the land subject to the covenant, there is no continuing liability for breaches which occur subsequently. The servient owner will, however, still be liable for breaches which occurred while he or she was the owner and which may be pursued subsequently, subject to the statutory limitations period relating to actions to enforce such covenants. In such instances, since that former servient owner no longer occupies the land, enforcement will involve an action for damages, rather than, *eg*, an injunction to restrain a continuing breach. Such an injunction may be sought against the new servient owner.

Subsection (3)

Subsection (3) clarifies the scope of the new provisions. As mentioned earlier, *paragraph (a)(i)* preserves the special rule in *Elliston v Reacher* (see also the definition of “scheme of development” in *section 50*), whereby the benefit of a covenant may be claimed by a person who is not strictly a successor in title to the original covenantee. This relates to cases of subdivision of land (whether freehold or leasehold), where the common vendor (or landlord) who originally creates the scheme (such as a typical housing estate or shopping centre) sells (or leases) subdivided parts to different purchasers (or lessees) who enter into common covenants designed to be enforceable by everyone on the development and their respective successors in title.

What usually occurs is that the parts are sold (or leased) originally over a period of months or years, so that the “dominant land” benefited by covenants entered into in later original sales (or leases) will not include parts previously sold (or leased). Under the general law those purchasing (or leasing) parts sold off later could not claim to succeed to the benefit of covenants entered into by purchasers (or lessees) of parts previously sold (or leased). The special rule of equity enshrined in *Elliston v Reacher* was designed to get round this problem and provides that all purchasers (or lessees) and their successors in title can claim the benefit of covenants throughout the development, whatever the order in which individual parts were originally sold (or leased). *Paragraph (a)(ii)* makes it clear that the new provisions do not apply to covenants for title (the enforceability of which is governed by *Section 82*). *Paragraph (b)* excludes the new provisions where the covenant itself or the instrument containing it makes it clear that, *eg*, the covenant is personal to the original parties and is not intended to benefit or burden their respective successors in title.

Discharge
and
modification.

7.30

52. – (1) A servient owner may apply to the court for an order discharging in whole or in part or modifying a freehold covenant on the ground that continued compliance with it would involve an unreasonable interference with the use and enjoyment of the servient land.

(2) In determining whether to make an order under *subsection (1)* and, if one is to be made, what terms and conditions should be attached to it, the court shall have regard to the following matters–

- (a) the circumstances in which, and the purposes for which, the covenant was originally entered into and the time which has elapsed since then,
- (b) any change in the character of the dominant land and servient land or their neighbourhood,
- (c) the development plan for the area under the Act of 2000,
- (d) planning permissions granted under that Act in respect of land in the vicinity of the dominant land and servient land or refusals to grant such permissions,
- (e) whether the covenant secures any practical benefit to the dominant owner and, if so, the nature and extent of that benefit,

- (f) where the covenant creates an obligation on the servient owner to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous compared with the benefit to be derived from such compliance,
- (g) whether the dominant owner has agreed, expressly or impliedly, to the covenant being discharged or varied,
- (h) any representations made by any person served with notice of the application,
- (i) any other matter which the court considers relevant.

(3) Where the court is satisfied that compliance with an order under *subsection (1)* will result in a loss to the dominant owner or other person adversely affected by the order, it shall include as a condition in the order a requirement by the servient owner to pay the dominant owner or other person such compensation as the court thinks fit.

Section 52 implements the other main recommendation contained in the Commission's earlier Report LRC 70 – 2003 that there should be introduced provisions to facilitate the discharge altogether or variation of freehold covenants which have become obsolete or no longer serve a useful purpose and, as a consequence, impede development of the land subject to them.

It is envisaged that this jurisdiction will apply primarily to covenants restricting use.

Subsection (1)

Subsection (1) creates the jurisdiction to discharge or modify freehold covenants on the ground that compliance involves an unreasonable interference with the use and enjoyment of the servient land.

Subsection (2)

Subsection (2) makes it clear that the court has a wide discretion whether to make an order under *subsection (1)* and then goes on to list a wide range of matters which it may take into consideration in exercising its discretion.

Subsection (3)

Subsection (3) makes it clear that where the court decides that it should make an order, but is also satisfied that compliance with the order will result in a loss to the dominant owner, the servient owner must be required to pay compensation for this.

Registration of court orders. **53.** – An order under *section 52* shall be registered in the Registry of Deeds or Land Registry, as appropriate.

Section 53 makes provision for registration of court orders made under *section 52* in the Registry of Deeds or Land Registry, depending on whether the land affected by the order is unregistered or registered land. The precise method of registration will be prescribed by regulation in accordance with *section 5(5)*.

PART 8

CONTRACTS AND CONVEYANCES

Part 8 implements Chapter 8 of the CP. It deals with contracts relating to land transactions and conveyances. In doing so it also implements various recommendations for reform and simplification of the law contained in several previous reports and consultation papers published by the Law Reform Commission. Although this Bill is designed partly to facilitate introduction of eConveyancing, to some extent it is also intended to deal with practice in the interim period before that new system becomes fully operative. For this reason, as recommended by the Consultation Paper, some provisions will in due course be replaced once a fully effective eConveyancing system is in force (see para 8.04 of the CP).

Part 8 will result in the repeal of some archaic pre-1922 legislation and will also replace, often with substantial amendment, provisions governing contracts and conveyances contained in numerous other pre-1922 statutes.

PART 8

CONTRACTS AND CONVEYANCES

Chapter 1

Contracts relating to land

Evidence in writing.
SF 1695, s.2
8.05

54. – (1) Subject to *subsection (2)*, no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the party to be charged or that party’s authorised agent.

(2) *Subsection (1)* –

- (a) applies to contracts whether made before or after the commencement of this Part,
- (b) does not affect the law relating to part performance or other equitable doctrines.

(3) For the avoidance of doubt, a deposit is not necessary for an enforceable contract.

Section 54 re-enacts the substance of *section 2* of the *Statute of Frauds (Ireland) 1695*, which requires that contracts for the sale or other disposition of land must be evidenced in writing. The Consultation Paper recommended that, until an eConveyancing system comes on stream, it was more appropriate to retain the long-established law (see para 8.03 of the CP). Under an e-conveyancing system the likelihood is that conveyancing contracts will be created without use of paper or other documents, *ie* by instantaneous electronic transmission. This can be facilitated by statutory instrument in accordance with the *Electronic Commerce Act 2000*.

Further powers to make regulations governing conveyancing contracts by statutory instrument are contained in *section 91* of this Bill.

Subsection (1)

Subsection (1) recasts in more simple language the substance of *section 2* of the 1695 Act. It does not refer to “any interest in land” since this is incorporated in the definition of “land” in *section 3*.

Subsection (2)

Subsection (2)(a) makes it clear that *subsection (1)* applies to contracts entered into before the new Act comes into force, because it is preserving the substance of the existing law. *Paragraph (b)* makes it clear that the doctrine of part performance will still operate. This is a long-established equitable doctrine under which a contract not evidenced in writing may nevertheless be enforceable. It also makes it clear that other equitable doctrines may be invoked in order to secure performance of an oral agreement, such as those based upon constructive trusts and estoppel.

Subsection (3)

Subsection (3) clarifies a matter upon which there has been some doubt. Whether or not a deposit payable by the purchaser is a necessary part of a contract relating to land should be up to the parties to decide. Only if they considered it an essential or material term should it have to be specified in the written evidence.

Auctions. **55.** – (1) Where land is offered for sale by auction it may be offered –

SLAA 1867 (a) subject to a reserve price,

8.09 (b) with a right to bid up to that price (but not beyond it) reserved,

and, in either of these events, the fact that it is so offered shall be stated.

(2) Where it is not stated that the land is offered for sale subject to a reserve price, the sale is without reserve.

(3) Where the sale is without reserve –

(a) the vendor shall not bid, or employ any person to bid, at the sale,

(b) the auctioneer shall not knowingly take any bidding from the vendor or any person employed by the vendor,

(c) if the vendor or a person employed by the vendor bids at the sale, the sale is voidable by the purchaser,

(d) the highest bidder shall be deemed to be the purchaser.

(4) Where it is stated that a right to bid up to the reserve price is reserved, the vendor or one (but not more than one) person on the vendor's behalf may bid at the auction up to that price in such manner as may be appropriate, but if more than one person bids as or on behalf of the vendor or any bid is made by or on behalf of the vendor beyond the reserve price, the sale is voidable by the purchaser.

(5) In this section –

“employ” means engage as an agent or servant with or without reward, and cognate words shall be read accordingly;

“stated” means specified in all advertisements, the particulars or conditions of sale and any other publicity relating to the auction and at the time of the auction.

Section 55 re-enacts, as recommended by the Consultation Paper, much of the substance of the *Sale of Land by Auction Act 1867*, but clarifies its operation (see paras 8.08-8.09 of the CP). It does not, however, deal with court sales and the re-opening of biddings in such sales, which the Consultation Paper recommended should be dealt with by rules of court (see para 8.08 of the CP).

Subsection (1)

Subsection (1) re-enacts the rule that the particulars or conditions of sale relating to a land auction must specify whether there is a reserve price or the right to bid is reserved. Usually a reserve price is specified, with a right to bid up to that price reserved (as in the Law Society’s *General Conditions of Sale*). It is rare for a right to bid to be reserved without a reserve price and, arguably, this could operate unfairly on other bidders. *Subsection (1)* accords with standard practice.

Subsection (2)

Subsection (2) re-enacts the corollary that if the particulars or conditions are silent, there is no reserve price.

Subsection (3)

Subsection (3) makes it clear that if the sale is without reserve the vendor, or someone on his or her behalf, must not bid and, if this happens, the purchaser may avoid the purchase. It also prevents the auctioneer from, in effect, imposing an undisclosed reserve by withdrawing the land after the last bid.

Subsection (4)

Subsection (4) re-enacts the rule that where a right to bid up to the reserve price is reserved, only one person (the vendor or another person on his or her behalf) may bid up to that price, but not beyond it, otherwise again the sale may be avoided by the purchaser.

Subsection (5)

Subsection (5) makes it clear that a person acting on behalf of the vendor may be a paid or unpaid agent or servant. It also makes it clear that compliance with the section must be met by express provisions in advertisements, publicity and in the particulars or conditions of the contract for sale. The last has long been done in the Law Society's *General Conditions of Sale*.

Passing of
beneficial
interest.

8.06

56. – (1) Subject to *subsection (2)*, on the making, after the commencement of this Part, of an enforceable contract for the sale or other disposition of land the entire beneficial interest passes to the purchaser.

(2) *Subsection (1)* does not affect –

- (a) the duty of the vendor to maintain the land so long as possession of it is retained, or
- (b) the liability of the vendor for loss or damage under any provision dealing with such risk, or
- (c) the vendor's right to rescind the contract for failure by the purchaser to complete or other breach of the contract, or
- (d) any provisions to the contrary in the contract.

Section 56 implements the recommendation in the Consultation Paper that earlier recommendations contained in previous reports of the Law Reform Commission concerning the Supreme Court's views in *Tempany v Hynes* [1976] IR 101 should be implemented (see para 8.06(i) of the CP). This relates to the aspect of that decision which concerns the position of a purchaser upon the entering into of a contract relating to land. The majority of the Court (Kenny J, O'Higgins CJ concurring) held that the beneficial interest passes only to the extent that the purchase money, or a part of it (*eg*, the deposit), has been paid.

Hitherto the “orthodox” view (given by the dissenting judge, Henchy J) had been that the entire beneficial interest passes to the purchaser upon entering into the contract, regardless of how much of the purchase price is paid. In practice only the deposit (usually 10%) will be paid on entering into the contract and the balance of the purchase price will not be paid until completion. The majority decision has proved to be very controversial and subsequent judicial statements have suggested that it might have to be reviewed. As recommended by the Commission on several occasions, *section 56* restores the orthodox view of the position of the purchaser.

Subsection (1)

Subsection (1) confirms that, in future, the entire beneficial interest should be deemed to pass to the purchaser upon the entering into of the contract for sale or other disposition of the land.

Subsection (2)

Subsection (2) clarifies the effect of *subsection (1)*. *Paragraph (a)* preserves the long-standing rule that, notwithstanding the passing of the beneficial interest, the vendor has a duty to maintain the land so long as he or she retains possession (which usually is until completion). *Paragraph (b)* preserves what has now become the position as a result of a change made in the Law Society standard contract form (which resulted from a recommendation made by the Law Reform Commission: see *Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser* (LRC 39-1991), para 5.7). Under Condition 43 of the *General Conditions of Sale (1995 Edition)* (the same condition is now in the current *2001 Edition*) the risk of loss or damage is retained by the vendor, thereby reversing the common law position.

Paragraph (c) makes it clear that the passing of the beneficial interest is, as was the position under the orthodox view of the law, subject to the “condition subsequent” that it might be lost if the purchaser failed subsequently to complete the purchase or otherwise was guilty of a breach entitling the vendor to rescind the contract. *Paragraph (d)* makes it clear that it would remain open to the parties to agree that the beneficial interest, or some of it, does not pass upon entering into the contract.

Abolition of the Rule in *Bain v. Fothergill*. 57. – (1) The rule of law restricting damages recoverable for breaches of contract occasioned by defects in title to land (known as the Rule in *Bain v. Fothergill*) is abolished.

8.06 (2) *Subsection (1)* applies only to contracts made after the commencement of this Part.

Section 57 implements the recommendation in the Consultation Paper which reiterated an earlier recommendation of the Law Reform Commission that the controversial Rule in *Bain v Fothergill* (1874) LR 7 HL 158, should be abolished (see para 8.06 (ii) of the CP). This Rule restricts a purchaser's right to damages where the vendor cannot make good title to the land.

Subsection (1)

Subsection (1) provides for abolition of the rule.

Subsection (2)

Subsection (2) makes it clear that the abolition operates only in relation to future contracts.

Order for
return of
deposit.

8.43

58. – Where the court refuses to grant specific performance of a contract for the sale or other disposition of land, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of the whole or any part of any deposit, with or without interest.

Section 58 implements the recommendation in the Consultation Paper that it should be made clear that where the court refuses to order specific performance of a contract against a purchaser, it has an unfettered discretion to order a refund of any deposit paid by the purchaser, whether the whole or just a part of the deposit (see para 8.43 in relation to *section 3(11)* of the *Conveyancing Act 1881*). The English courts doubted whether such jurisdiction existed in the absence of clear evidence of fraud or other clear default by the vendor and, although the Irish courts have in the past expressed doubts about this view, uncertainty as to the position here has remained.

Vendor and purchaser summons

8.18

VPA 1874, s. 9

59. – (1) Any party to a contract for the sale or other disposition of land may apply to the court in a summary manner for an order determining a question relating to the contract.

(2) On such an application the court may make such order, including an order as to costs, as it thinks fit.

(3) A question in respect of which an application may be made under *subsection (1)* includes a question relating to any requisition, objection, claim for compensation or other question arising out of or connected with the contract, but does not include a question affecting the existence or validity of the contract.

Section 59 implements the recommendation in the Consultation Paper that the provisions in *section 9* of the *Vendor and Purchaser Act 1874* should be replaced without substantial amendment (see paras 8.17-8.18 of the CP). These govern the commonly used jurisdiction to bring a vendor and purchaser summons in order to determine a question which has arisen in relation to a conveyancing contract.

Subsection (1)

Subsection (1) preserves the jurisdiction. As recommended by the Consultation Paper it does not refer to the procedure for such applications, on the basis that such matters are better dealt with by rules of court.

Subsection (2)

Subsection (2) confirms the wide discretion in the court as to the orders which can be made, including orders as to costs.

Subsection (3)

Subsection (3) retains the restriction on the scope of the jurisdiction, that it cannot be used to question the existence or validity of the contract.

Chapter 2

Title

Root of title. **60.** – (1) Subject to *subsections (2) and (3)*, after the commencement of this Part, a period of at least 20 years commencing with a good root of title is the period for proof of title which the purchaser may require.

8.12

VPA 1874,
s. 1

(2) Where the title originates with a fee farm grant or lease, *subsection (1)* does not prevent the purchaser from requiring production of the fee farm grant or lease.

(3) *Subsection (1)* takes effect subject to the terms of the contract for the sale or other disposition of the land.

Section 60 implements the recommendation in the Consultation Paper that the statutory period of title to be shown on an “open” contract should be reduced from 40 years to 20 years (thereby replacing *section 1* of the *Vendor and Purchaser Act 1874* with substantial amendment) (see paras 8.11-8.12 of the CP).

Subsection (1)

Subsection (1) reduces the period to 20 years, but incorporates the long-standing rule that this is a minimum period, which may be extended so as to ensure that the title begins with a “good root”.

Subsection (2)

Subsection (2) confirms the long-standing rule that where a purchaser is taking a conveyance or assignment of an interest held under a fee farm grant or lease, he or she is entitled to production of the original grant or lease, however long ago it was granted. *Section 12* of the Bill prohibits the future creation of fee farm grants, but existing ones will remain a feature of titles for many years to come. The statutory period of title does not restrict this and instead governs which (if any) subsequent conveyances or assignments of the interest should, in addition, be produced by the vendor.

Subsection (3)

Subsection (3) confirms the rule that the statutory period of title applies only to an “open” contract, *ie*, where there is no express provision in the contract dealing with the matter.

Leasehold titles. **61.** – (1) Subject to *subsections (2) and (5)*, under a contract to grant or assign a lease or sublease of land, the intended grantee or assignee is not entitled to call for the title to –

VPA 1874,
s. 2

(a) the fee simple estate, or

CA 1881,
ss. 3 and 13

(b) any leasehold estate superior to that out of which the sublease is, or is to be, immediately derived.

(2) Subject to *subsection (5)*, under a contract made after the commencement of this Part to grant a lease or sublease for a term exceeding 5 years the intended grantee may call for–

(a) in the case of a lease to be derived immediately out of the fee simple estate, a copy of the conveyance of that estate to the grantor, or

(b) in the case of a sublease, a copy of the superior lease out of which it is to be immediately derived and, if any, the immediate assignment of the superior lease to the grantor,

and, where the lease or sublease is granted for the full market rent, taking into account any premium also paid by, but disregarding any concessions or inducements made to, the intended grantee, that grantee may also call for 20 years' title as a purchaser

CA 1882, s. 4 under *section 60(1)*.

(3) For the purpose of the deduction of title to an intended assignee, no preliminary contract for or relating to the lease forms part of the title, or evidence of the title, to the lease.

Reversal of
the Rule in
Patman v
Harland

(4) Where by reason of *subsection (1)* an intended grantee or assignee is not entitled to call for the title to the fee simple estate or a superior leasehold estate, that person, where the contract is made after the commencement of this Part, is not affected with notice of any matter or thing of which, if the contract had specified that such title should be furnished, that person might have had notice.

(5) *Subsections (1) and (2)* take effect subject to the terms of the contract for the grant or assignment of the lease or sublease.

Section 61 implements the recommendation in the Consultation Paper that the provisions in *section 2* of the *Vendor and Purchaser Act 1874* and *sections 3 and 13* of the *Conveyancing Act 1881* relating to deduction of title in leasehold cases should be modified in accordance with Law Society recommendations (see paras 8.13-8.14 of the CP). It also implements the recommendation that the rule in *Patman v Harland* should be reversed.

Subsection (1)

Subsection (1) re-enacts the general rule in the 1874 and 1881 Acts governing contracts to grant or assign a lease or sublease. In essence the intended grantee or assignee cannot call for the title to the freehold or superior leasehold estate for the purposes of deducing title.

Subsection (2)

Subsection (2) qualifies *subsection (1)* and introduces a change to the statutory rules, as recommended by the Consultation Paper (see para 8.13 of the CP). Where a substantial lease or sublease is being granted after the commencement of Part 8, the new statutory rule will entitle the intended grantee to see more of the lessor's title.

Subsection (3)

Subsection (3) re-enacts the provisions in *section 4* of the *Conveyancing Act 1882*, whereby once a lease has been granted, any prior contract for that lease ceases to be part of the title documentation and a subsequent purchaser cannot call for it.

Subsection (4)

Subsection (4) implements the recommendation that the Rule in *Patman v Harland* be abolished (see para 8.16 of the CP). Under this a purchaser of leasehold property relying upon the statutory rules for deducing title could nevertheless be fixed with constructive notice of matters which the statutory rules would bar him or her from discovering (*ie*, they would be revealed only if there was an investigation of the superior title which the statute bars him or her from calling for). This runs counter to the spirit of the statutory provisions.

Subsection (5)

Subsection (5) again confirms the long-standing rule that the statutory rules apply only to an "open" contract, so that it remains open to the parties to contract out of them.

Other conditions of title. **62.** – (1) Subject to *subsection (2)*, a purchaser of any land is not entitled to require –

8.14

VPA 1874,
s. 2

CA 1881,
s. 3

(a) the production of an instrument dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the instrument creates a power subsequently exercised by an instrument produced to the purchaser, or

(b) any information, or make any requisition, objection or inquiry with respect to any instrument referred to in *paragraph (a)* or the title prior to that time, notwithstanding that any instrument, or that prior title, is recited, agreed to be produced or noticed,

and the purchaser shall assume, unless the contrary appears, that –

(i) the recitals contained in the instruments produced of any instrument forming part of that prior title are correct, and give all the material contents of the instrument so recited, and

(ii) every instrument so recited was duly executed by all necessary parties, and perfected, if and as required, by any act required or permitted by law.

(2) *Subsection (1)* does not deprive a purchaser of the right to require the production of any –

- (a) power of attorney under which any instrument which is produced is executed, or
- (b) instrument creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an instrument which is produced, or a copy of which is produced,
- (c) instrument creating any limitation or trust by reference to which any part of the property is disposed of by an instrument which is produced.

(3) On a sale of land, the purchaser, where the purchaser requires the vendor to carry out such matters, shall bear the expenses (except where such expenses should be borne by the vendor in compliance with the obligation to deduce title) of –

- (a) production and inspection of all instruments, letters of administration, probates, proceedings at courts, records, statutory provisions and other documents not in the possession of the vendor, or the vendor's mortgagee or trustee,

- (b) making, procuring, producing, searching for and verifying all certificates, declarations, evidence and information, and all attested, office, stamped or other copies or abstracts of, or extracts from, any statutory provisions or other documents, not in the possession of the vendor or the vendor's mortgagee or trustee,
- (c) making any copy, whether attested or unattested of any document retained by the vendor, or the vendor's mortgagee or trustee, required to be delivered by the purchaser.

(4) On a sale of land in lots, a purchaser of two or more lots held wholly or partly under the same title is entitled to no more than one abstract of the common title, nor to more than one copy of any document forming part of the common title, except at the purchaser's own expense.

(5) The inability of a vendor to furnish the purchaser with an acknowledgment of the right to production and delivery of copies of documents of title is not an objection to title where the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.

(6) Those acknowledgments and those undertakings for the safe custody of documents as the purchaser requires shall be furnished at the purchaser's expense, and the vendor shall bear the expense of perusal and execution on behalf of or by the vendor, and on behalf of and by necessary parties other than the purchaser.

(7) A vendor may retain a document of title where the

–

- (a) vendor retains any part of the land to which the document relates, or
- (b) document comprises an instrument –
 - (i) creating a trust which still subsists, or
 - (ii) relating to the appointment or discharge of a trustee of a subsisting trust.

(8) This section takes effect subject to the terms of the contract for the sale or other disposition of the land.

(9) Nothing in this section is to be read as binding a purchaser to complete the purchase in any case where, on a contract made independently of this section and containing stipulations similar to any of its provisions, specific performance would not be granted by the court against the purchaser.

(10) In this section –

- (a) “instrument” includes a copy or abstract,
- (b) “production” includes furnishing a copy or abstract and cognate words shall be read accordingly.

Section 62 re-enacts the substance of various other statutory provisions as to title contained in *section 2* of the *Vendor and Purchaser Act 1874* and *section 3* of the *Conveyancing Act 1881*.

Subsection (1)

Subsection (1) re-enacts the substance of *section 3(3)* of the 1881 Act and, in effect, prohibits a purchaser from investigating the “pre-root” title.

Subsection (2)

Subsection (2) specifies a number of exceptions to the rule enshrined in *subsection (1)* which came to be recognised by the courts. These are cases where the validity or effectiveness of an instrument contained in the deduced title depends on some pre-root instrument.

Subsection (3)

Subsection (3) re-enacts the substance of *section 3(6)* of the 1881 Act, which requires the purchaser to bear the expenses of production of certain title documentation by the vendor.

Subsection (4)

Subsection (4) re-enacts the substance of *section 3(7)* of the 1881 Act, which deals with a sale of land in lots.

Subsection (5)

Subsection (5) re-enacts the substance of the Third Rule in *section 2* of the 1874 Act as amended by *section 9(8)* of the 1881 Act. *Section 9* is replaced by *section 87* of this Bill.

Subsection (6)

Subsection (6) re-enacts the substance of the Fourth Rule in *section 2* of the 1874 Act.

Subsection (7)

Subsection (7) re-enacts the substance of the Fifth Rule in *section 2* of the 1874 Act.

Subsection (8)

Subsection (8) re-enacts the rule that the statutory conditions contained in *section 62* take effect subject to the terms of the particular contract, thereby reflecting similar provisions in *section 2* of the 1874 Act and *section 3(9)* of the 1881 Act.

Subsection (9)

Subsection (9) re-enacts the substance of *section 3(11)* of the 1881 Act.

Subsection (10)

Subsection (10) contains definitions designed to simplify the wording of *section 62*, by avoiding repetition of wording which appears in the 1874 and 1881 Acts.

Protection of purchasers.
8.14
VPA 1874,
s.2

63. – (1) Recitals, statements and descriptions of facts, matters and parties contained in instruments, statutory provisions or statutory declarations 20 years old at the date of the contract are, unless and except so far as they are proved to be inaccurate, sufficient evidence of the truth of such facts, matters and parties.

(2) Where land sold is held under a lease (other than a sublease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of the actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

(3) Where land sold is held by a sublease, the purchaser shall assume, unless the contrary appears, that the sublease and every superior lease were duly granted; and, on production of the receipt for the last payment due for rent under the sublease before the date of the actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the sublease have been duly performed and observed up to the date of actual completion of the purchase, and also that all rent due under, and all covenants and provisions of, every superior lease have been paid and duly performed and observed up to that date.

Section 63 re-enacts various statutory provisions designed to protect purchasers in conveyancing transactions.

Subsection (1)

Subsection (1) re-enacts the substance of the Second Rule in *section 2* of the *Vendor and Purchaser Act 1874*.

Subsection (2)

Subsection (2) re-enacts the substance of *section 3(4)* of the 1881 Act.

Subsection (3)

Subsection (3) re-enacts the substance of *section 3(5)* of the 1881 Act.

Fraudulent concealment and falsification.

8.37

LPAA 1859, s.24
LPAA 1860, s.8

64. – (1) Any person disposing of land to a purchaser, or the solicitor or other agent of such a person, who knowingly –

- (a) conceals from the purchaser any instrument or incumbrance material to the title, or
- (b) falsifies any information or matter on which the title may depend in order to induce the purchaser to accept the title offered or produced,

with intent in any such case to defraud, is guilty of an offence under this Act.

(2) Any such person or the person's solicitor or agent is also liable to an action for damages by the purchaser, or persons deriving title under the purchaser, for any loss sustained by reason of –

- (a) the concealment of the instrument or incumbrance, or
- (b) any claim made by a person whose title to the land was concealed by such falsification.

(3) In estimating damages, where the land is recovered from the purchaser or persons deriving title under the purchase, regard shall be had to any expenditure by them on improving the land.

Section 64 re-enacts the substance of *section 24* of *Law of Property Amendment Act 1859*, as recommended by the Consultation Paper (see paras 8.36-8.37 of the CP).

Subsection (1)

Subsection (1) re-enacts the provisions making it a criminal offence to engage in fraud when deducing title to a purchaser.

Subsection (2)

Subsection (2) re-enacts the provisions giving a purchaser, or persons deriving title under the purchaser, a right to bring an action for damages for loss resulting from such fraud.

Subsection (3)

Subsection (3) re-enacts the provisions for inclusion in an award of damages of compensation for improvements made to land before it is recovered by the rightful owner.

Notice of
rights on
common title.

8.43

CA 1911, s.
11

65. – (1) Where land having a common title with other land is conveyed to a purchaser (other than a lessee or mortgagee) who does not hold or obtain possession of the documents forming the common title, the purchaser, notwithstanding a stipulation to the contrary, may require that a memorandum giving notice of any provisions in the conveyance restricting user of or conferring rights over any other land comprised in the common title is, where—

- (a) practicable, endorsed on, or
- (b) impracticable, permanently annexed to,

some document selected by the purchaser but retained in the possession or control of the vendor and being or forming part of the common title.

(2) The title of any person omitting to require an endorsement or annexation under this section is not affected or prejudiced merely by such omission.

(3) This section does not apply to registered land.

Section 65 re-enacts the substance of *section 11* of the *Conveyancing Act 1911*. It entitles a purchaser of part of land held under a common title to require an endorsement or annexation of a notice on one of the title documents retained by the vendor to show restrictive covenants or rights such as easements or profits being conferred on the purchaser over the land retained by the vendor.

Subsection (1)

Subsection (1) confers the right to have an endorsement or annexation, which cannot be contracted out of.

Subsection (2)

Subsection (2) makes it clear that the purchaser has a right to have an endorsement or annexation, not an obligation to require one, so that the omission to require one does not prejudice the purchaser's title.

Subsection (3)

Subsection (3) excludes sales of part of registered land, because the matters covered by this section are dealt with by entries on the relevant folio.

Chapter 3

Deeds and their operation

Conveyances by deed only. **66.** – (1) Subject to *section 67*, a legal estate or legal interest shall be created or conveyed by a deed only.

8.21
8.31
RPA 1845,
ss. 2 and 3

(2) A deed is fully effective for such purposes without the need for any conveyance to uses and passes possession or the right to possession of the land, without actual entry, unless subject to some prior right to possession.

(3) In the case of a voluntary conveyance, a resulting trust for the grantor is not implied merely because the land is not expressed to be conveyed for the use or benefit of the grantee.

(4) It is no longer possible to create or to convey a legal estate or legal interest by a bargain and sale, covenant to stand seised, feoffment with livery of seisin or any combination of these.

Section 66 implements the recommendations in the CP for repeal of the *Statute of Uses (Ireland) 1634*, consequential removal of the need for conveyances “to uses”, abolition of ancient methods of conveyance and substitution of the modern deed as the sole method of conveying legal title to land (see paras 8.20 - 8.21 and 8.29 – 8.31 of the CP). The CP makes it clear that this system will continue to operate until introduction of electronic methods under an eConveyancing system.

Subsection (1)

Subsection (1) substitutes the modern deed as the sole method of conveying legal title to land. This is subject to well-established exceptions set out in *section 67*.

Subsection (2)

Subsection (2) makes it clear that a simple deed is fully effective without having to include the traditional conveyance to uses. This is partly consequential upon the repeal of the *Statute of Uses (Ireland) 1634*. It also makes it clear that the deed passes automatically possession or the right to possession of the land without the need for the grantee to enter into possession. This does not apply where there is some prior right to possession vested in some other person, for then the conveyance is subject to such prior right.

Subsection (3)

Subsection (3) is also consequential on the repeal of the 1634 Statute. Its repeal will remove the need for conveyances to uses and the provision in the subsection is designed to avoid a presumption arising in the case of a voluntary conveyance that the absence of the time-honoured formula “unto and to the use of” creates a resulting trust in favour of the grantor. In future it will be necessary to prove the existence of such a trust without any such presumption.

Subsection (4)

Subsection (4) abolishes the ancient methods of conveying land, mostly based on the old feudal system, which *section 2* of the *Real Property Act 1845* preserved, notwithstanding its introduction of the modern deed as an alternative.

Exceptions
to deeds.

8.31

67. – *Section 66(1)* does not apply to –

- (a) an assent by a personal representative,
- (b) a surrender or other conveyance taking effect by operation of law,
- (c) a disclaimer not required to be by deed,
- (d) a lease or assignment of a leasehold estate not required to be by deed,
- (e) a receipt not required to be by deed,
- (f) a vesting order of the court or other competent authority, or
- (g) any other conveyance which may be prescribed.

Section 67 contains a list of well-established exceptions to the rule enshrined in *section 66* that the creation or conveyance of a legal estate or interest in land must be by deed.

Paragraph (a) refers to an assent by personal representatives, which under *section 52* of the *Succession Act 1965* need be in writing only.

Paragraph (b) refers to conveyances which the courts have long recognised may occur without execution of formal documentation, but instead are based upon the actions of the parties or circumstances concerning the land in question. A typical example is a surrender of a tenancy, which the court may rule has taken place where the tenant vacates the premises and hands the keys back to the landlord, which the landlord accepts. Another example is an implied release of an easement on the basis that it has been abandoned by the owner (see *section 40* of this Bill).

Paragraph (c) refers to disclaimers which also may be inferred from conduct, *eg*, where a beneficiary under a will refuses or renounces the gift or a trustee refuses to take up the office of trustee. Under *section 56* of the *Bankruptcy Act 1988* a disclaimer of onerous property by the Official Assignee need be in writing only. The same applies to a disclaimer by the liquidator of a company under *section 290* of the *Companies Act 1963*.

Paragraph (d) refers to leases and assignments of leases which under *sections 4* and *9* of Deasy's Act (*Landlord and Tenant Law Amendment Act, Ireland, 1860*) may need writing only, or, in some instances, no writing at all.

Paragraph (e) refers to receipts which often may be in writing only. Sometimes they are endorsed on deeds, without themselves being made by deed, *eg*, where a mortgage is discharged (see *section 18* of the *Housing Act 1988*).

Paragraph (f) refers to vesting orders, such as those made by the court under *sections 26 to 33* of the *Trustee Act 1893*.

Paragraph (g) enables additional exceptions to be added by statutory instrument.

Formalities
for deeds.

8.33

68. – (1) Any rule of law which requires –

- (a) a seal for the valid execution of deed by an individual, or
- (b) authority to deliver a deed to be given by deed,

is abolished.

(2) An instrument is a deed if it is –

- (a) described at its head by words such as “Assignment”, “Conveyance”, “Charge”, “Deed”, “Indenture”, “Lease”, “Mortgage”, “Surrender” or other heading appropriate to the deed in question, or it is otherwise made clear on its face that it is intended by the person making it, or the parties to it, to be a deed, by expressing it to be executed or signed as a deed,
- (b) executed in the following manner:
 - (i) if made by an individual, it is –
 - (A) signed by the individual in the presence of a witness who attests the signature, or
 - (B) signed by a person at the individual’s direction given in the presence of a witness who attests the signature, or

- (C) it is acknowledged by the individual in the presence of a witness who attests the signature, or
 - (D) it is signed and sealed by the individual,
- (ii) if made by a company registered in the State, it is executed under the seal of the company in accordance with its Articles of Association,
 - (iii) if made by a body corporate registered in the State other than a company, it is executed in accordance with the legal requirements governing execution of deeds by such a body corporate,
 - (iv) if made by a foreign body corporate, it is executed in accordance with the legal requirements governing execution of the instrument in question by such a body corporate in the jurisdiction where it is incorporated.
- (c) delivered as a deed by the person executing it or by a person authorised to do so on that person's behalf.

(3) A deed has the effect of an indenture although not indented or expressed to be an indenture.

Section 68 overhauls the law governing the formalities for creation of deeds, in accordance with the recommendations made in the Commission's Report LRC 56 – 1998. It is based on the draft legislation included in that Report (see para 2.81).

Subsection (1)

Subsection (1) abolishes the need for sealing by an individual (paragraph (a)), but not in respect of companies which would continue to execute deeds by affixing the corporate seal. *Paragraph (b)* abolishes the rule that authority to deliver a deed has to be given by deed. This has already been done for powers of attorney by *section 15* of the *Powers of Attorney Act 1996*.

Subsection (2)

Subsection (2) sets out the new requirements, following abolition of the need for sealing by an individual. *Paragraph (a)* provides for identification of a document as a deed on the basis that no sealing is used, by using an appropriate description or wording. *Paragraph (b)* provides for execution by different persons or bodies. *Subparagraph (i)* deals with individuals and makes it clear that it would still be open to an individual to use a seal, as at present. *Subparagraphs (ii)* and *(iii)* deal with companies and other corporate bodies and preserve the existing law. *Subparagraph (iv)* deals with foreign corporations executing instruments and is designed to get round the practical problems which arise at present because often they do not use seals as Irish corporations do. It provides that an instrument executed according to the law in the jurisdiction in which the foreign corporation is incorporated will be a deed under *section 66* and recognised as such in this jurisdiction. *Paragraph (c)* preserves the requirement of delivery of a deed and this is amplified by *section 69*.

Subsection (3)

Subsection (3) re-enacts the substance of part of *section 5* of the *Real Property Act 1845*.

Escrows by corporate bodies.

69. – (1) Any rule of law to the effect that the affixing of a corporate seal to an instrument effects delivery by the body corporate is abolished.

(2) An instrument executed by a body corporate in accordance with *section 68(2)(b)* is capable of operating as an escrow in the same circumstances and with the same consequences as an instrument executed by an individual.

Section 69 clarifies the law relating to delivery of deeds in escrow by corporations, as recommended by LRC 56 – 1998 (see paras 2.71).

Subsection (1)

Subsection (1) abolishes the common law rule which suggests that the affixing of a corporate seal to an instrument automatically effects full delivery by the corporation. This had led to the suggestion that a corporation cannot deliver a deed in escrow, which, if it were the rule, would be greatly inconvenient and not accord with practice.

Subsection (2)

Subsection (2) reiterates *subsection (1)* by making it clear that a corporation may deliver a deed in escrow in the same way that an individual can.

Conveyance to oneself. 8.37
8.43

70. – (1) Any property may be conveyed by a person to that person jointly with another person in the same way in which it might be conveyed by that person to another person.

(2) Subject to *subsection (3)* –

LPAA 1859,
s. 21

(a) a person may convey, but not lease, property to that same person in a different capacity,

CA 1881,
s. 50

(b) two or more persons may convey, and have always been capable of conveying, any property vested in them to any one or more of themselves in the same way in which they could convey it to a third person.

(3) *Subsection (2)* does not validate a conveyance made in breach of trust or other fiduciary obligation.

(4) Without prejudice to *section 86*, this section does not affect any rule of law under which a covenant entered into with oneself is unenforceable.

Section 70 consolidates provisions to be found in *Section 21* of the *Law of Property Amendment Act 1859* and *section 50* of the *Conveyancing Act 1881*, as recommended by the CP (see paras 8.36-8.37 and 8.43 of the CP).

Subsection (1)

Subsection (1) re-enacts the statutory rule that a person can convey any property (not just land) jointly to himself or herself and another person. Under *section 86* of this Bill in such a case covenants in the conveyance are enforceable as if entered into with the other person alone.

Subsection (2)

Paragraph (a) extends existing law, under which generally one cannot convey land to oneself. The exception to this general rule which currently exists is contained in *section 52* of the *Succession Act 1965*, under which a personal representative can execute an assent in his or her own favour. *Paragraph (a)* enables other persons to make similar conveyances, such as a trustee conveying property to himself or herself as a beneficiary or the donee of a general power of appointment exercising it in his or her own favour. This provision does not, however, apply to leasing because any purported lease with oneself would create unenforceable covenants, as *subsection (4)* reiterates, and, apart from that, the lease would merge in the lessor's reversion. *Paragraph (b)* confirms what has long been the position at common law, that two or more persons can convey property to a lesser number of themselves.

Subsection (3)

Subsection (3) makes it clear that any conveyances made under *subsection (2)* are voidable if made in breach of trust or other fiduciary obligation.

Subsection (4)

Subsection (4) reiterates the fundamental rule that one cannot covenant with oneself. This is subject to *section 86* which deals with covenants entered into by a person with that person and another person.

Words of
limitation.
8.43
CA 1881,
s. 51

71. – (1) A conveyance of unregistered land without words of limitation, or any equivalent expression, passes the fee simple or the other entire estate or interest which the grantor had power to create or convey, unless a contrary intention is expressed in the conveyance.

(2) A conveyance of unregistered land to a corporation sole by that person's corporate designation without the word "successors" passes to the corporation the fee simple or the other entire estate or interest which the grantor had power to create or convey, unless a contrary intention appears in the conveyance.

(3) Where an interest in land is expressed to be given to –

- (a) the heir or heirs, or
- (b) any particular heir, or
- (c) any class of heirs, or
- (d) issue,

of any person in words which, under the rule known as the Rule in *Shelley's Case*, would have operated to give that person a fee simple, those words operate as words of purchase and not of limitation and take effect in equity accordingly.

(4) Subject *subsections (5) to (7), subsections (1) and (2)* apply to conveyances executed before the commencement of this Part, but without prejudice to any act or thing done or any interest disposed of or acquired before that commencement in consequence of the failure to use words of limitation in such a conveyance.

(5) Such an interest is extinguished unless the person who claims it applies to the court, within 12 years from the commencement of this Part, for an order declaring that that person is entitled to it or has acquired it and registers any order obtained under *subsection (7)*.

(6) On such an application the court may –

- (a) refuse to make an order if it is satisfied that no substantial injustice will be done to any party, or
- (b) in lieu of a declaration in favour of the applicant, order payment by another party of such compensation to the applicant as the court thinks appropriate.

(7) An order under this section shall be registered in the Registry of Deeds or Land Registry as appropriate.

Section 71 implements the recommendation in the CP that *section 51* of the *Conveyancing Act 1881* should be replaced by a provision abolishing the need for words of limitation in conveyances of unregistered land (see para 8.43 of the CP). This was done for transfers of registered land by *section 123* of the *Registration of Title Act 1964*.

Subsection (1)

Subsection (1) contains the general abolition of the requirement for the use of words of limitation in conveyances of unregistered land.

Subsection (2)

Subsection (2) deals with conveyances to a corporation sole such as a bishop or government minister.

Subsection (3)

Subsection (3) gets rid of an arcane rule known as the Rule in *Shelley's Case*. According to this, if land is limited "to A for life, with remainder to A's heirs", the remainder clause was treated as containing words of "limitation" only, *ie*, delimiting A's estate, rather than as words of "purchase", *ie*, designating an estate to pass to A's heirs. The result was that A would be treated as obtaining a fee simple, rather than a life estate only, and the heirs as obtaining no interest at all. Under *subsection (3)* such a limitation will take effect as specified, with A obtaining a life interest and his heirs a fee simple in remainder. Under Part 4 of the Bill this will operate as a trust of land. *Section 15(3)* of the *Succession Act 1965* provides the meaning of "heir" and "heirs" when used nowadays as words of purchase.

Subsection (4)

Subsection (4) applies the provisions in *subsections (1)* and *(2)* so as to cure defects in conveyances executed before the commencement of Part 8, but without prejudice to existing rights.

Subsection (5)

Subsection (5) requires persons claiming such rights to apply within 12 years for a court order confirming them, which must be registered.

Subsection (6)

Subsection (6) gives the court a discretion to refuse an order if no substantial injury will be done, or instead to order compensation.

Subsection (7)

Subsection (7) provides for registration of an order so as to facilitate future conveyancing.

Reservations. 8.43 **72.** – (1) A reservation of a legal estate or interest in a conveyance of land operates, without execution of the conveyance, or any regrant, by the grantee, to –

- (a) vest that estate or interest in the grantor or other person for whose benefit it is made,
- (b) annex it to the land, if any, for the benefit of which it is made.

(2) A conveyance of land expressed to be subject to a legal estate or interest which is not in existence immediately before the date of the conveyance operates as a reservation within the meaning of *subsection (1)*, unless a contrary intention is expressed in the conveyance.

(3) For the purpose of construing the effect of a conveyance of land, a reservation shall not be treated as taking effect as a regrant.

(4) This section applies only to reservations made after the commencement of this Part.

Section 72 simplifies the law relating to reservations made in conveyances in favour of the grantor and removes complications involving the *Statute of Uses (Ireland) 1634*, which is being repealed. It also replaces *section 62* of the *Conveyancing Act 1881*, which had to be enacted to enable easements to be reserved under the 1634 Statute.

Subsection (1)

Subsection (1) provides that in future a reservation will operate fully whether or not the grantee has executed the conveyance. A conveyance is effective to convey or transfer the land so long as the grantor executes it. The necessity for the grantee to execute it also arises largely where the conveyance contains covenants being entered into by the grantee.

Subsection (2)

Subsection (2) states what has long been regarded as the rule, that making a conveyance subject to some new interest in favour of the grantor is a reservation. Where the conveyance is made subject to some interest already in existence, it involves, instead, an exception. The distinction has been important because of the principle that a reservation was, in substance, a regrant of the new interest by the grantee to the grantor. That rule is displaced by *subsections (1) and (3)*.

Subsection (3)

Subsection (3) reiterates the new law contained in *subsection (1)*, that a reservation will, in future, operate without any regrant by the grantee. A consequence of the principle that a reservation operates as a regrant was that, contrary to the general rule of construction of deeds, a reservation was construed against the grantee rather than the grantor. *Subsection (3)* applies the general rule to future reservations, *ie*, like the other provisions of the deed, it will be construed against the grantor in the event of any ambiguities or uncertainties.

Subsection (4)

Subsection (4) makes it clear that the new law applies only to future reservations.

Benefit of deeds. 73. – (1) Where a deed is expressed to confer an estate or interest in land, or the benefit of an agreement, covenant or right relating to land, on a person, that person may enforce the deed whether or not named a party to it.

8.35

RPA 1845, s. 5 (2) Nothing in this section otherwise affects the doctrine of privity of contract.

Section 73 replaces *section 5* of the *Real Property Act 1845* and recasts it in language designed to clarify its operation, which has long been controversial (see CP paras 8.34 – 8.35 of the CP). In essence *section 5* was probably designed to get round the so-called *inter partes* rule, *ie*, that the benefit of a deed *inter partes* (made by more than one party, to be distinguished from a deed poll) could be claimed only by the persons named as parties to it. It is not uncommon for a deed made between A and B to contain, *eg*, a covenant by B for the benefit of A “and the owners for the time being of adjacent lands.” *Section 72* ensures that those owners can also enforce B’s covenants, *ie*, in addition to A.

Subsection (1)

Subsection (1) recasts *section 5* of the 1845 Act so as to make it clear that it applies only (1) where the deed expressly confers an estate or interest or the benefit of a covenant or right on a person not a party to the deed and (2) to deeds relating to land.

Subsection (2)

Subsection (2) makes it clear that the section does not otherwise affect the doctrine of privity of contract.

Features and rights conveyed with land.

7.27

CA 1881, s. 6

74. – (1) A conveyance of land includes, and conveys with the land, all –

(a) buildings, commons, ditches, drains, erections, fences, fixtures, hedges, water, watercourses and other features forming part of the land,

(b) advantages, easements, liberties, privileges, profits *à prendre* and rights appertaining or annexed to the land.

(2) A conveyance of land which has houses or other buildings on it includes, and conveys with the land, houses or other buildings all –

(a) areas, cellars, cisterns, courts, courtyards, drainpipes, drains, erections, fixtures, gardens, lights, outhouses, passages, sewers, watercourses, yards and other features forming part of the land, houses or other buildings,

(b) advantages, easements, liberties, privileges, profits *à prendre* and rights appertaining or annexed to the land, houses or other buildings.

(3) This section –

(a) does not on a conveyance of land (whether or not it has houses or other buildings on it) –

- (i) create any new interest or right or convert any quasi-interest or right existing prior to the conveyance into a full interest or right, or
 - (ii) extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance, or
- (b) does not –
- (i) give to any person a better title to any land, interest or right referred to in the section than the title which the conveyance gives to the land expressed to be conveyed, or
 - (ii) convey to any person any land, interest or right further or other than that which could have been conveyed to that person by the conveying parties.
- (c) takes effect subject to the terms of the conveyance.

Section 74 replaces *section 6* of the *Conveyancing Act 1881* and clarifies its operation as recommended by the CP (see paras 7.24 – 7.27 and 8.43).

Subsection (1)

Subsection (1) re-enacts, with some recasting of the wording, *section 6(1)* of the 1881 Act.

Subsection (2)

Subsection (2) re-enacts, again with some recasting of the wording, *section 6(2)* of the 1881 Act. *Section 6(3)* of the 1881 Act is not re-enacted as it relates to conveyances of “manors”, a feudal concept no longer relevant to Ireland.

Subsection (3)

Subsection (3) contains the recommended clarification.

Subparagraph (a)(i) makes it clear that the section does not create any new interest or right or convert a quasi-interest or right into a full interest or right, such as occurs under the rule in *Wheeldon v Burrows* where land is subdivided. This accords with the view taken by the Supreme Court in the recent case of *William Bennett Construction Ltd v Greene* (25 February 2004) (see CP para 7.25). *Subparagraph (a)(ii)* makes it clear that the section does not extend the scope of or convert an existing interest or right into a new interest or right, *eg*, convert a revocable licence into an easement. This also accords with the views of the Supreme Court in the *William Bennett* case (see CP para 7.26). *Paragraph (b)* re-enacts the substance of *section 6(5)* of the 1881 Act. *Paragraph (c)* re-enacts the substance of *section 6(4)*.

Supplemental instruments. 8.43 CA 1881, s. 53

75. – (1) Any instrument expressed to be supplemental to a previous instrument, or directed to be read as an annex to such an instrument, is, so far as is appropriate, to be read and has effect as if the instrument so expressed or directed –

(a) were made by way of endorsement on the previous instrument, or

(b) contained a full recital of the previous instrument.

(2) This section does not confer on a purchaser any right to an abstract, a copy or production, of any such previous instrument and a purchaser may accept the same evidence that the previous instrument does not affect the title as if it had merely been mentioned in the supplemental instrument.

Section 75 re-enacts the substance of *section 53* of the *Conveyancing Act 1881*, but, as recommended by the CP, extends it to cover all instruments and not just deeds (see para 8.43 of the CP).

Subsection (1)

Subsection (1) re-enacts, with some recasting, *section 53* of the 1881 Act.

Subsection (2)

Subsection (2) states what has long been taken to be the position, that the statutory provision does not affect a purchaser's position as regards title which can be required to be deduced by the vendor.

Partial releases.

7.16

LPAA 1859,
ss. 10 and 11

76. – (1) A release of part of land from a –

- (a) rentcharge does not extinguish the rentcharge, but bars only the right to recover any part of the rentcharge out of the land released,
- (b) judgment charged on the land does not affect the validity of the judgment as regards any of the land not specifically released.

(2) *Subsection (1)* does not –

- (a) prejudice the rights of any person interested in the land unreleased and not concurring in or confirming the release, or
- (b) prevent recovery of the whole of the rentcharge or enforcement of the whole judgment against the land unreleased, unless those interested agree otherwise.

Section 76 re-enacts the substance of *sections 10* and *11* of the *Law of Property Amendment Act 1859*. These sections dealt with the effect of partial releases of rentcharges and judgments on land and reversed the common law rule that a partial release released the entire land.

Subsection (1)

Subsection (1) re-enacts the provisions that a partial release does no more than release the part of the land in question.

Subsection (2)

Paragraph (a) re-enacts the provisions in *sections 10* and *11* of the 1859 Act protecting the interests of parties not joining in the release. *Paragraph (b)* clarifies, as recommended by the CP, the position that, unless the parties agree otherwise, the whole rentcharge or judgment can be enforced against the part of the land unreleased.

Fraudulent dispositions. 8.23 **77.** – (1) Subject to *subsection (2)*, any voluntary disposition of land made with the intention of defrauding a subsequent purchaser of the land is voidable by that purchaser.

CA 1634, ss. 1 to 5, 10, 11 and 14 (2) For the purposes of *subsection (1)*, a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.

VCA 1893 (3) Subject to *subsection (4)*, any conveyance of property made with the intention of defrauding a creditor or other person is voidable by any person thereby prejudiced.

(4) *Subsection (3)* does not –

(a) apply to any estate or interest in property conveyed for valuable consideration to any person in good faith not having, at the time of the conveyance, notice of the fraudulent intention, or

(b) affect the law of bankruptcy.

Section 77 replaces the convoluted, and somewhat confusing, provisions contained in *sections 1 to 5* of the *Conveyancing Act (Ireland) 1634*, as amended by the *Voluntary Conveyances Act 1893*, in accordance with the recommendation in the CP (see paras 8.22 – 8.23 of the CP).

Subsection (1)

Subsection (1) recasts in much simpler form the provisions in *sections 1 to 5* of the 1634 Act.

Subsection (2)

Subsection (2) recasts in much simpler form the provisions of the 1893 Act.

Subsection (3)

Subsection (3) recasts the provisions in *section 10* of the 1634 Act.

Subsection (4)

Paragraph (a) recasts the provisions in section 14 of the 1634 Act. *Paragraph (b)* makes a saving for provisions such as *sections 57 to 59* of the *Bankruptcy Act 1988*.

Chapter 4

Contents of deeds

Construction of instruments.	78. – Particular words and expressions used in any instrument relating to land executed or made after the commencement of this Part, unless the context otherwise requires, -
8.43	
2005, No. -	<p>(a) are subject to the same general rules of construction as are applicable to such words and expressions used in Acts of the Oireachtas under <i>section 00</i> of the <i>Interpretation Act 200-</i>,</p> <p>(b) have the same particular meaning, construction or effect as assigned to such words and expressions used in Acts of the Oireachtas by the Schedule to that Act or by <i>section 3</i> of this Act, whichever is more appropriate.</p>

Section 78 implements the recommendation in the CP, endorsing an earlier recommendation of the Commission, that the definitions of key words and expressions provided for Acts of the Oireachtas by the *Interpretation Act 1937* (to be replaced by a new Act presently before the Oireachtas) should be applicable to private documents relating to land. *Section 77*, therefore, refers to “instruments” rather than “deeds”. This would make available to private documents such useful provisions as the singular including the plural and vice versa, person including a corporation, and definitions of key words like “land” and “month”. *Paragraph (b)* also makes available the definitions in *section 3* of this Bill. Where the same word is defined differently in the 2005 Act and *section 3* of this Bill, the definition which should be relied upon is the one that is more appropriate.

All estate
clause.

8.43

CA 1881, s.
63

79. – (1) Subject to *subsection (2)*, a conveyance of land passes all the claim, demand, estate, interest, right and title which the conveying parties respectively have or have power to convey in, to or on the land conveyed or expressed or intended to be conveyed.

(2) This section takes effect subject to the terms of the conveyance.

Section 79 re-enacts the substance of *section 63* of the *Conveyancing Act 1881*.

Receipts in deeds. 8.43 **80.** – (1) A receipt for consideration in the body of a deed is sufficient discharge for the consideration to the person giving it, without any further receipt being endorsed on the deed.

CA 1881, ss. 54 to 56 (2) A receipt for consideration in the body of a deed is, in favour of a subsequent purchaser (not having notice that the consideration so acknowledged to be received was not, in fact, given wholly or in part), conclusive evidence of the giving of the whole consideration.

(3) Where a solicitor produces a deed which has –

- (a) in its body a receipt for consideration,
- (b) been executed by the person entitled to give a receipt for the consideration,

the deed is conclusive authority to the person liable to give the consideration for giving it to the solicitor, without the solicitor producing any separate or other authority or direction in that behalf from the person who executed or signed the deed or receipt.

(4) In *subsection (3)* “solicitor” includes any employee of a solicitor, and any member or employee of a firm in which the solicitor is a partner, and any such employee or member of another firm acting as agent of the solicitor or firm.

Section 80 re-enacts, with some modifications as recommended by the CP (see para 8.43 of the CP), *sections 54 to 56* of the *Conveyancing Act 1881*. It drops the references to endorsed receipts – such endorsements have ceased to be used in practice.

Subsection (1)

Subsection (1) re-enacts *section 54* of the 1881 Act.

Subsection (2)

Subsection (2) re-enacts *section 55*, but renders the receipt conclusive, rather than, merely sufficient evidence.

Subsection (3)

Subsection (3) re-enacts *section 56*, but again renders the receipt conclusive authority.

Subsection (4)

Subsection (4) clarifies *subsection (3)* by making it clear that it extends to employees and agents, which accords with common practice.

Conditions and covenants not implied. 8.35

81. – (1) An exchange or other conveyance of land does not imply any condition in law.

(2) Subject to any statutory provision, the word “give” or “grant” in any conveyance does not imply any covenant.

RPA 1845,
s. 4

Section 81 implements the recommendation in the CP that *section 4* of the *Real Property Act 1845* should be re-enacted without substantial amendment (see paras 8.34 – 8.35 of the CP). It ensures that conveyances do not have unintended effect, so that conditions and covenants should not be implied where not intended or appropriate.

Covenants for title. **82.** – (1) In a conveyance of any class referred to in *subsection (2)* there are implied the covenants specified in relation to that class in Part II of *Schedule 2*, and those covenants are deemed to be made –

8.43
CA 1881,
s. 7

- (a) by the person or by each person who conveys, as far as regards the estate or interest or share of the estate or interest expressed to be conveyed by such person (“the subject-matter of the conveyance”),
- (b) with the person to whom the conveyance is made, or with the persons jointly and severally, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common,

and have the effect specified in Parts I and II of *Schedule 2*.

(2) The classes of conveyance referred to in *subsection (1)* are –

Class 1: A conveyance for valuable consideration (other than a mortgage) of an estate or interest in land (other than a leasehold estate) made by a person who is expressed to convey “as beneficial owner”;

Class 2: A conveyance for valuable consideration (other than a mortgage) of a leasehold estate made by a person who is expressed to convey “as beneficial owner”;

Class 3: A conveyance comprising a mortgage of land (other than land held for a leasehold estate) made by a person who is expressed to convey “as beneficial owner”;

Class 4: A conveyance comprising a mortgage of leasehold land made by a person who is expressed to convey “as beneficial owner”;

Class 5: A conveyance made by a person who is expressed to convey “as trustee”, “as mortgagee”, “as personal representative” or under an order of the court.

(3) Where a conveyance is made by a person who is expressed to convey by direction of another person who is expressed to direct “as beneficial owner”, then, whether or not that other person is also expressed to convey “as beneficial owner”, the conveyance is for the purposes of this section a conveyance made by that other person expressed to convey “as beneficial owner” to the extent of the subject-matter of the conveyance made by that other person’s direction.

(4) Without prejudice to *section 52(6)* of the Act of 1965, where in a conveyance a person conveying is not expressed to convey “as beneficial owner”, “as trustee”, “as mortgagee”, “as personal representative”, under an order of the court or by a direction of a person “as beneficial owner”, no covenant on the part of the person conveying is implied in the conveyance.

(5) The benefit of a covenant implied under this section is –

- (a) annexed to and passes with the estate or interest of the implied covenantee,
- (b) enforceable by every person, including a lessee, mortgagee and any other person deriving title from or under the implied covenantee, in whom that estate or interest, or any part of it, or an estate or interest derived out of it, is vested from time to time.

(6) A covenant implied under this section may, by the terms of the conveyance, be –

- (a) excluded but not so that a sole covenant or all (as distinct from some only) of the covenants implied in relation to a person expressed to convey as specified in *subsection (2)* are excluded,
- (b) modified and, if so modified, operates as if the modification was included in this section and *Schedule 2*.

(7) Any conveyance implied under this section by reason of a person being expressed to convey “as beneficial owner” may, by express reference to this section, be incorporated, with or without modification, in a conveyance, whether or not for valuable consideration, by a person who is expressed to convey as specified in Class 5 of *subsection (2)*.

Section 82 recasts, as recommended by the CP, the convoluted provisions of *section 7* of the *Conveyancing Act 1881* (see para 8.43).

It contains the operative provisions relating to the statutory covenants for title which are commonly relied upon in practice. The actual covenants themselves are set out in *Schedule 2* to the Bill. As recommended by the CP, *section 82* amends *section 7* to remove some of its flaws, *eg*, by implying the covenants whenever a person is only “expressed” to convey in a particular capacity, *ie*, whether or not he or she actually has it. Otherwise, the covenants would be of little value.

Subsection (1)

Subsection (1) implies the various covenants set out in *Schedule 2* according to the different classes of conveyance specified in *subsection (2)*.

Subsection (2)

Subsection (2) follows *section 7* of the 1881 Act in providing for different covenants to be implied depending upon the type of conveyance and capacity in which the person is expressed to convey.

Subsection (3)

Subsection (3) deals with the situation where a person conveys under the direction of another person, *eg*, where a beneficiary solely entitled to land under a trust directs the trustee to convey the land to a third party. The same covenants are implied as if the beneficiary had conveyed the land.

Subsection (4)

Subsection (4) makes it clear that if a person is not expressed to convey in one of the specified capacities (*eg*, as beneficial owner) no statutory covenants are implied. The one exception to this rule is provided by *section 52(6)* of the *Succession Act 1965*, under which covenants appropriate to Class 5 in *subsection (2)* are

implied in an assent by a personal representative, whether or not the personal representative is expressed to convey as such.

Subsection (5)

Subsection (5) makes it clear that the benefit of implied covenants passes to whoever succeeds to the implied covenantee's estate or interest in the land, including persons deriving title from that covenantee, such as a lessee or mortgagee.

Subsection (6)

Subsection (6) permits express modifications to be made to the implied covenants, but not their entire exclusion since this would be inconsistent with use of the specified capacities in a conveyance.

Subsection (7)

Subsection (7) permits the covenants implied in a conveyance for valuable consideration (Classes 1 to 4 in *subsection (2)*) to be incorporated also in conveyances which may not involve such consideration (Class 5).

Additional covenants for leasehold conveyances. **83.** – (1) In a conveyance of any class referred to in *subsection (2)* there are implied, in addition to the covenants referred to in *section 82(1)*, the covenants specified in relation to that class in Part III of *Schedule 2*, and those covenants are deemed to be made –

- (a) by the person, or by the persons jointly and severally, if more than one, so specified in relation to any class of conveyance,
- (b) with the person, or with the persons jointly and severally, if more than one, who is the other party, or are the other parties, to the conveyance,

and have the effect specified in Parts I and III of *Schedule 2*.

(2) The classes of conveyance referred to in *subsection (1)* are –

Class 6: A conveyance for valuable consideration (other than a mortgage) of –

- (a) the entirety of the land comprised in a lease, or
- (b) part of the land comprised in a lease, subject to part of the rent reserved by the lease which has been, or is by the conveyance, apportioned with the consent of the lessor,

for the residue of the term or interest created by the lease.

Class 7: A conveyance for valuable, consideration, other than a mortgage, of part of the land comprised in the lease, for the residue of the term or interest created by the lease, subject to part of the rent reserved by the lease which has been, or is by the conveyance, apportioned without the consent of the lessor.

(3) Where in a conveyance, other than a mortgage, part of land comprised in a lease is, without the consent of the lessor, expressed to be conveyed –

- (a) subject to the entire rent, then *covenant (1) in paragraph 2 of Part III of Schedule 2* has effect as if the entire rent were the apportioned rent,
- (b) exonerated from the entire rent, then *covenant (2) in paragraph 2 of Part III of Schedule 2* has effect as if the entire rent were the balance of the rent, and “(other than the covenant to pay the entire rent)” were omitted from the covenant.

(4) The benefit of a covenant implied under this section is –

- (a) annexed to and passes with the estate or interest of the implied covenantee,
- (b) enforceable by every person, including a lessee, mortgagee and other person deriving title from or under the implied covenantee in whom that estate or interest, or part of it or an estate or interest derived out of it, is vested from time to time.

(5) Any covenant implied under this section may, by the terms of the conveyance, be –

- (a) modified by the express provisions of the conveyance and, if so modified, operates as if the modification were included in this section and Schedule 2,
- (b) in particular, extended by providing expressly in the conveyance that –
 - (i) the land conveyed, or
 - (ii) the part of the land demised which remains vested in the covenantor,

stands charged with the payment of all money which would otherwise become payable under the implied covenant.

Section 83 provides for additional covenants to be implied on an assignment of a lease. *Section 82* deals with covenants implied in relation to the assignor. *Section 83* deals with covenants implied in relation to the assignee, whether the assignment is of the whole or of part only of the demised land.

Subsection (1)

Subsection (1) provides for the statutory implication of the covenants specified in *subsection (2)* and set out in *Schedule 2*.

Subsection (2)

Subsection (2) specifies the classes of covenant, the numbering following on from those in *section 82(2)*.

Subsection (3)

Subsection (3) adapts the implied covenants where an apportionment of rent without the lessor's consent results in it being loaded entirely on the part of the land conveyed or the part retained.

Subsection (4)

Subsection (4) provides that the benefit of the implied covenants passes to the covenantee's successors in title, including persons deriving title from or under the covenantee or successors.

Subsection (5)

Subsection (5) makes provision for modification and extension of the implied covenants.

Scope of
sections 82
and 83.

84. – In *sections 82 and 83* –

- (a) “conveyance” –
- (i) does not include the granting of a lease,
 - (ii) means a conveyance made after the commencement of this Part,
- (b) any reference to a person being expressed to “convey”, or to an estate or interest or land being expressed to be “conveyed” does not mean that the words “convey” or “conveyed” must be used in the conveyance for the covenant to be implied.

Section 84 clarifies the scope of *sections 82 and 83*. Under *paragraph (a)* they do not apply to the initial grant of a lease, as opposed to a subsequent assignment of an already existing lease. Implied covenants on the initial grant of a lease are covered by *section 41* of Deasy’s Act (*Landlord and Tenant Law Amendment Act, Ireland, 1860*). They also apply only to conveyances made after the commencement of Part 8. *Paragraph (b)* makes it clear that the implied covenants still operate even though a conveyance does not use the words “convey” or “conveyed”, *eg*, an assignment of a lease might use instead “assign” or “assigned”.

Covenants by 85. – (1) Where under a covenant persons are –
or with two
or more
persons. (a) covenantors, the covenant binds them
and any two or more of them jointly
and each of them severally,
8.43 (b) covenantees, the covenant shall be
CA 1881, construed as being also made with each
s. 60 of them.

(2) A covenant made with persons jointly to convey,
pay money or do any other act to them or for their
benefit, implies an obligation to do the act to, or for
the benefit of –

- (a) the survivor or survivors of them,
- (b) any other person on whom the right to
sue on the covenant devolves.

(3) This section takes effect subject to the terms of the
covenant or conveyance in which it is contained or
implied or of any statutory provision implying the
covenant.

(4) In this section “covenant” includes an express or
implied covenant and a bond or obligation contained
in a deed.

Section 85 contains provisions designed to shorten
conveyances and re-enacts the substance of *section 60*
of the *Conveyancing Act 1881*. It implies useful
provisions in conveyances unless they have express
provisions to the contrary.

Subsection (1)

Subsection (1) makes a covenant involving more than one covenantor or covenantee enforceable by or against each separately as well as by or against all of them together.

Subsection (2)

Subsection (2) re-enacts the substance of *section 60* of the 1881 Act, which entitled the survivor or survivors of joint covenantees to the benefit of covenants or other obligations contained in a deed.

Subsection (3)

Subsection (3) makes it clear that the provisions in *section 85* may be excluded by express provision or contrary statutory provisions.

Subsection (4)

Subsection (4) makes it clear, as *section 60* of the 1881 Act does, that the provisions apply to bonds or other obligations contained in a deed.

Covenants by person jointly with others. **86.** – A covenant, whether express or implied, entered into by a person with that person jointly with another person or other persons shall be construed and enforceable as if it had been entered into with that other person or persons alone.

Section 86 gets round the common law rule that a person may not contract with or sue himself or herself. It provides that where a person covenants with himself or herself and another person or other persons, the covenant will be enforceable by the other person or persons. This is the equivalent for covenants of the provision for conveyances contained in *section 70* of the Bill.

Production
and safe
custody of
documents.

8.43

87. – (1) Where a person retains possession of documents and gives to another person in writing an -

- (a) acknowledgment of the right of that other to production of these documents and to delivery of copies of them (“the acknowledgment”),
- (b) undertaking for the safe custody of those documents (“the undertaking”)

the acknowledgment and the undertaking have the effect specified in this section.

(2) The obligations imposed by an acknowledgment are to –

- (a) produce the documents or any of them at all reasonable times for the purpose of inspection and of comparison with abstracts or copies of the documents, by the person entitled to request production or by any person authorised in writing by that person,
- (b) produce the documents or any of them in court or any other place where, or on any occasion when, production may properly be required for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relating to that title or claim,
- (c) deliver to the person entitled to request them such copies or abstracts, attested or unattested, of or from the documents or any of them.

(3) The obligation imposed by an undertaking is to keep the documents complete, safe, uncanceled and undefaced.

(4) The obligations shall be performed from time to time in the case of the –

(a) acknowledgment, at the request in writing of,

(b) undertaking, in favour of,

the person to whom it is given, or any person, not being a lessee at a rent, who has or who claims any estate, interest or right through or under that person interested in or affected by the terms of the document to which the acknowledgment or undertaking relates.

(5) The acknowledgment and undertaking bind the documents to which they relate in the possession or control of the person who retains them, and of every other person having possession or control of them from time to time, but bind each individual possessor or person as long only as that person has possession or control.

(6) Each person having possession or control of such documents is bound specifically to perform the obligations imposed by this section, unless prevented from doing so by fire or other inevitable accident, but all costs and expenses of or incidental to specific performance of the acknowledgment shall be paid by the person requesting performance.

(7) The acknowledgment does not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(8) Any person claiming to be entitled to the benefit of an undertaking may apply to the court for damages for any loss or destruction of, or injury to, the documents or any of them to which it relates.

(9) Upon such application the court may direct such inquiries and make such order as to costs or other matters as it thinks fit.

(10) An acknowledgment or undertaking under this section satisfies any liability to give a covenant for production and delivery of copies of or extracts from documents or for safe custody of documents.

(11) The rights conferred by an acknowledgment or undertaking under this section are in addition to all such other rights relating to production, inspection or obtaining copies of documents as are not satisfied by the giving of the acknowledgment or undertaking.

(12) This section –

- (a) has effect where an acknowledgment or undertaking is given by a person to that same person in different capacities in the same way as where it is given by one person to another,
- (b) takes effect subject to the terms of the acknowledgment or undertaking.

Section 87 recasts the provisions in *section 9* of the *Conveyancing Act 1881* which apply where a landowner conveys only part of land and retains the title documents which relate to the whole land. The purchaser of the part conveyed may need those documents, or copies of them, in future transactions and this is what the acknowledgment and undertaking provided for are designed to secure.

Subsection (1)

Subsection (1) provides for the acknowledgment of the right to production of documents, or copies of them, and undertaking for their safe custody.

Subsection (2)

Subsection (2) sets out the scope of the acknowledgment.

Subsection (3)

Subsection (3) sets out the scope of the undertaking.

Subsection (4)

Subsection (4) states who, from time to time, is obliged to comply with the acknowledgment or the undertaking.

Subsection (5)

Subsection (5) further defines the scope of the acknowledgment and undertaking – they apply to each person who comes into possession or control of the documents.

Subsection (6)

Subsection (6) enables the court to grant specific performance to enforce the obligations, but not where the documents have been accidentally destroyed.

Subsection (7)

Subsection (7) makes it clear that there is no right to damages for loss or destruction if an acknowledgment only is given.

Subsections (8) and (9)

Subsections (8) and (9) provide that such a right to damages will arise where an undertaking for safe custody has been given.

Subsection (10)

Subsection (10) makes it clear that an acknowledgment or undertaking given under the *section 87* satisfies any covenant to give one.

Subsection (11)

Subsection (11) makes it clear that the rights given by *section 87* are in addition to other rights to production of documents, such as those conferred by *section 62(2)* of this Bill.

Subsection (12)

Subsection (12) makes it clear that the section applies where an acknowledgment or undertaking is given by a person to himself or herself in a different capacity, *eg*, as a personal representative or trustee in favour of himself or herself as a beneficiary. It also makes it clear that the statutory provisions may be varied by the express terms of the acknowledgment or undertaking.

Notices.
8.43 **88.** – (1) Subject to *subsection (2)*, where an instrument makes provision for giving or serving a notice it may be given or served as if it were authorised or required to be given or served under this Act.

(2) *Subsection (1)* takes effect subject to the terms of the instrument.

Section 88 implements the recommendation in the CP that the provisions in *section 67* of the *Conveyancing Act 1881* governing service of notices under that Act should be made applicable to notices to be served under private instruments.

Subsection (1)

Subsection (1) makes the appropriate provision by attracting the provisions in *section 4* of the Bill.

Subsection (2)

Subsection (2) makes it clear the provision in *subsection (1)* may be modified by the express terms of the instrument.

Chapter 5

General provisions

Restrictions on constructive notice.

8.43

CA 1882, s. 3

89. – (1) A purchaser is not affected prejudicially by notice of any fact, instrument, matter or thing unless –

(a) it is within the purchaser's own knowledge or would have come to the purchaser's knowledge if such inquiries and inspections had been made as ought reasonably to have been made by the purchaser, or

(b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel, as such, or solicitor or other agent, as such, or would have come to the knowledge of the solicitor or other agent if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent.

(2) Without prejudice to *section 61(4), subsection (1)* does not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, provision or restriction contained in any instrument under which the purchaser's title is derived, immediately or mediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser is not, by reason of anything in this section, affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.

(4) This section applies to all purchases whenever made.

Section 89 re-enacts *section 3* of the *Conveyancing Act 1882*, which is the very important provision governing the doctrine of constructive notice.

Subsection (1)

Subsection (1) restricts constructive notice to matters which would come to light if good conveyancing practice were followed by the purchaser and his or her legal advisers.

Subsection (2)

Subsection (2) confirms that a purchaser is bound by the provisions of instruments which form part of the title required to be deduced by the vendor.

Subsection (3)

Subsection (3) prevents the section from being used in a particular case to expand the scope of constructive notice.

Subsection (4)

Subsection (4) makes it clear that this provision preserves existing law.

Court orders. **90.** – (1) Without prejudice to any ground of appeal
8.43 against any order, an order of the court under any
statutory or other jurisdiction is not invalid as against
a purchaser on the ground of want of –

CA 1881, s.
70

- (a) jurisdiction, or
- (b) any concurrence, consent, notice or service.

(2) This section applies to –

- (a) any lease, sale or other act, under the authority of the court and purporting to be in pursuance of any statutory provision, notwithstanding any exception in that provision,
- (b) all court orders whenever made.

Section 90 re-enacts *section 70* of the *Conveyancing Act 1881*. It has not been qualified as recommended by the CP (see para 8.43 of the CP) on the ground that this might cast doubt on titles which have been settled or accepted on the assumption that a court order is conclusive.

Regulations for Part 8. **91.** – (1) The Minister may make regulations prescribing –

- 8.04 (a) advertisements made in respect of sales
- 8.06 of residential land,
- 8.07 (b) booking or other deposits, including the form of receipt for such deposits, payable in respect of sales of residential land,
- (c) the formalities for creation of, and the conditions of sale applicable to, a contract for the sale or other disposition of an interest in land,
- (d) the terms of building contracts, including stage payments to be made under such contracts,
- (e) the terms of sales by auction or by tender,
- (f) the cost of or other matters relating to surveys of land for sale,
- (g) any other matter designed to protect the interests of purchasers or to facilitate the conveyancing of residential land.

(2) In this section “residential land” includes apartments, flats, houses and any other unit or part of a building used for residential purposes.

Section 91 implements the recommendations in the CP that power should be conferred to make regulations governing various aspects of conveyancing practice (see paras 8.04, 8.06 and 8.07 of the CP).

Subsection (1)

Subsection (1) lists various matters upon which regulations may be made, such as conditions of sales, booking deposits and stage payments in building contracts. *Paragraph (g)* includes a general power exercisable for protection of purchasers or facilitation of purchases. This may become useful in facilitating the introduction in due course of an e-conveyancing system.

Subsection (2)

Subsection (2) makes it clear that the power to make regulations applies to any kind of residential property for sale or purchase.

PART 9

MORTGAGES

Part 9 implements the various recommendations contained in Chapter 9 of the CP for simplification and modernisation of the law of mortgages. In particular it seeks to assimilate the law relating to mortgages of unregistered land with that relating to registered land, where the sole method of mortgaging the land, so as to create a legal mortgage, is by way of a charge. A major portion of Part 9 is concerned with ensuring that the new charge system provides mortgagees (lenders) with the same degree of security as enjoyed under the traditional system of mortgaging by transferring ownership of the land, subject to the mortgagor's (borrower's) right of redemption.

Part 9 does not, in general, interfere with the various methods of creating equitable mortgages (*eg* by deposit of title documents), on the basis that it will be some time before a comprehensive eConveyancing system will become operative. Such a system may render such informal mortgages redundant, but meanwhile the continuance of substantial unregistered land transactions leaves a place for such, albeit now comparatively rare, transactions. Nor does Part 9 interfere with the general equitable jurisdiction of the courts to control unfairness in the way mortgages operate. The courts should remain free to develop long-recognised doctrines such as those relating to "clogs on the equity of redemption" and undue influence (see CP paras 9.09 – 9.10 of the CP). Part 9 does, however, contain various provisions designed to ensure that a mortgagee's rights and remedies are exercised only when this is necessary for the protection or enforcement of its security.

A consequence of Part 9 is that various pre-1922 statutes can be repealed. In addition, various provisions relating to mortgages in the *Conveyancing Acts 1881-1911* are being replaced, often with substantial amendment.

PART 9
MORTGAGES

Chapter 1

Creation of mortgages

Legal mortgages.

9.08

92. – (1) A mortgage of a legal estate or interest in land shall be created in law by a charge by deed only and such a mortgage is referred to in this Part as a “charge by way of legal mortgage”; and “mortgage”, “mortgagor”, and “mortgagee” shall be read accordingly.

(2) From the commencement of this Part, any –

- (a) purported conveyance of a legal estate or interest in land by way of mortgage, or
- (b) purported legal mortgage of land by deed, or
- (c) other transaction which under any instrument or statutory provision would operate otherwise as a legal mortgage of land,

operates as if it were a charge by way of legal mortgage.

(3) From the commencement of this Part, any power, whenever created, to mortgage or lend money on mortgage of a legal estate or interest in land operates as a power to mortgage the legal estate or interest by a charge by way of legal mortgage or to lend money on the security of such a charge.

(4) Subject to *subsection (5)*, this section, and the other provisions of this Part, apply to both unregistered and registered land.

(5) *Section 62(6)* of the *Registration of Title Act 1964* is amended by substitution of “charge by way of legal mortgage within the meaning of Part 9 of the *Land and Conveyancing (Reform) Act 2005*” for “mortgage by deed within the meaning of the *Conveyancing Acts*”.

(6) Nothing in this section affects the creation of equitable mortgages.

(7) From the commencement of this Part, it shall not be possible to create a Welsh mortgage and any purported creation of such a mortgage is void.

(8) For the purposes of *subsection (7)*, a “Welsh mortgage” includes any transaction under which a grantee or chargee of land is entitled to hold possession, and take rents and profits in lieu of interest on a loan, of land without the grantor or chargor being under a personal obligation to repay the loan, but being entitled to redeem.

Section 92 introduces the charge method as the only method of creating a legal mortgage of land. In substance this change operates only in respect of unregistered land, because a charge is already the only method of creating a legal mortgage of registered land (see *section 62* of the *Registration of Title Act 1964*).

Subsection (1)

Subsection (1) introduces the charge method and provides that it is to be referred to as a “charge by way of legal mortgage”. This description is necessary to distinguish such a charge from other types of charge on land which do not create a mortgage, such as rentcharges and annuities. Such charges do not usually confer the extensive rights which a mortgage confers, such as the right to sell the land without a court order.

Subsection (2)

Subsection (2) provides that any attempt in future to create a legal mortgage in any other way will instead create a charge by way of legal mortgage.

Subsection (3)

Subsection (3) provides that in future any power, whenever created, to mortgage land or to lend money on such security will operate as a power to charge the land by way of legal mortgage or to lend money on the security of the charge.

Subsection (4)

Subsection (4) confirms that the charge system will, in future, apply to both registered and unregistered land, so that the one deed of charge may be used for land which comprises both categories.

Subsection (5)

Subsection (5) makes a consequential amendment to *section 62(6)* of the *Registration of Title Act 1964*, which refers to provisions in the Conveyancing Acts which are being replaced by the provisions of Part 9 of this Bill.

Subsection (6)

Subsection (6) confirms, as mentioned earlier, that this Bill does not interfere with the creation of equitable mortgages.

Subsection (7)

Subsection (7) implements the recommendations in the CP that Welsh mortgages (once common but very rarely created in modern times) should be abolished as inconsistent with the true purpose of a mortgage. For example, the right of the mortgagee under such a mortgage to take possession and to retain the rents and profits of the land, without being liable to account to the mortgagor, is totally inconsistent with an ordinary mortgage where strict liability to account exists. The inconsistency would be increased by the provisions of this Bill, under which a mortgagee's remedies (including the right to take possession of the land) could be exercised only where necessary to protect or enforce its security. A mortgagee will no longer be able to take possession of the land "before the ink is dry on the mortgage" (see CP paras 9.13 – 9.15 and *section 100*).

Subsection (8)

Subsection (8) provides a definition of a "Welsh mortgage" for the purposes of *subsection (7)*.

Position of
mortgagor
and
mortgagee.

9.05
9.24

93. – (1) Subject to this Part, where a charge by way of legal mortgage is created after the commencement of this Part the –

- (a) mortgagor has the same powers and rights and the same protection at law and in equity as the mortgagor would have been entitled to,
- (b) mortgagee has the same duties, powers and rights as the mortgagee would have had,

if the mortgagee's security had been created by a conveyance before that commencement of the legal estate or interest in the land of the mortgagor.

(2) Without prejudice to the generality of *subsection (1)(b)* and subject to *subsection (3)*, a first mortgagee under a charge by way of legal mortgage has the same right to possession of title documents as such mortgagee would have had if the security had been created by a conveyance referred to in *subsection (1)*.

(3) A mortgagee who retains possession or control of title documents relating to the mortgaged land is, in addition to being subject to the mortgagor's rights under *section 94*, responsible for their safe custody as if an undertaking for this were given under *section 87*.

Section 93 states the general proposition, as mentioned earlier and reiterated in the CP, that a charge by way of legal mortgage will confer on the mortgagee the same security rights as the traditional method of creating a legal mortgage by conveyance of ownership (which is being abolished). It also confirms that the mortgagor's position is not prejudiced. This is, however, subject to the other provisions of Part 9.

Subsection (1)

Subsection (1), while preserving the general position of the mortgagor and mortgagee, makes it clear that this is subject to the other provisions of Part 9. These introduce numerous changes, largely designed to give further protection to mortgagors by ensuring that a mortgagee's remedies are exercised only where necessary to protect or enforce its security.

Subsection (2)

Subsection (2) deals with one particular matter upon which there might be doubt, *ie*, the position of a first mortgagee who obtains only a charge on the land and not a conveyance of the mortgagor's estate or interest in it. Such a mortgagee will still be entitled to possession of the title documents until the mortgage is discharged.

Subsection (3)

Subsection (3) implements the recommendation in the CP that where a mortgagee retains possession or control of the title documents it should be responsible for their safe custody (see para 9.24 of the CP).

Chapter 2

Powers and rights of mortgagor

Title documents.
9.24
CA 1881,
s. 16

94. – (1) Subject to *subsection (2)*, a mortgagor, as long as the right to redeem subsists, may from time to time, at reasonable times, inspect and make copies or abstracts of or extracts from the title documents relating to the mortgaged property in the possession or power of the mortgagee.

(2) Rights under *subsection (1)* are exercisable on–

- (a) the request and at the cost of the mortgagor,
- (b) payment by the mortgagor of the mortgagee’s reasonable costs in relation to the exercise.

(3) *Subsection (1)* has effect notwithstanding any stipulation to the contrary.

Section 94 re-enacts the substance of *section 16* of the *Conveyancing Act 1881*.

Subsection (1)

Subsection (1) entitles the mortgagor to inspect and take copies of title documents retained by the mortgagee (eg a first mortgagee under *section 93(2)*).

Subsection (2)

Subsection (2) makes it clear that the mortgagor has to meet all costs associated with the right to inspect and take copies.

Subsection (3)

Subsection (3) makes it clear that the mortgagor's rights cannot be excluded expressly.

Abolition of right to consolidate.
9.24

CA 1881, s. 17

95. – (1) A mortgagor is entitled to redeem any mortgage without having to pay any money due under any other mortgage with the same mortgagee, whether that other mortgage is of the same or other property.

(2) Notwithstanding any stipulation to the contrary, a mortgagee may not consolidate two or more mortgages of the same or other property.

Section 95 implements the recommendation in the CP that the mortgagee's right of consolidation should be abolished (see para 9.24 of the CP).

Subsection (1)

Subsection (1) confirms the consequence of *subsection (2)* but, in so doing, makes it clear that a mortgagor is entitled to redeem in all cases of two or more mortgages with the same mortgagee. It has been a matter of some doubt whether the right of consolidation is confined to mortgages of the same property.

Subsection (2)

Subsection (2) abolishes the right to consolidate.

Transfer in lieu of discharge.

96. – (1) A mortgagor who is entitled to redeem may, subject to compliance with the terms on which the mortgagor would be entitled to require a discharge, require the mortgagee, instead of discharging the mortgage, to assign the mortgage debt and transfer the mortgage to any third person, as the mortgagor directs.

(2) On the mortgagor so directing, the mortgagee is bound to assign and transfer accordingly.

(3) The rights conferred by *subsection (1)* belong to and may be enforced by each incumbrancer or the mortgagor notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer prevails over a requisition of the mortgagor and, as between incumbrancers, a requisition of a prior incumbrancer prevails over a requisition of a subsequent incumbrancer.

(4) This section –

- (a) does not apply in the case of a mortgagee being or having been in possession,
- (b) applies notwithstanding any stipulation to the contrary.

Section 96 re-enacts the substance of *section 15* of the *Conveyancing Act 1881*, as amended by *section 12* of the *Conveyancing Act 1882*.

Subsection (1)

Subsection (1) entitles a mortgagor to require a transfer of the mortgage instead of redeeming it.

Subsection (2)

Subsection (2) binds the mortgagee to abide by such a requisition.

Subsection (3)

Subsection (3) deals with priorities where there are several mortgages or incumbrances.

Subsection (4)

Subsection (4) excludes the case where the mortgagee is in possession, because such a mortgagee is liable to account strictly to the mortgagor. Subject to that, it is not possible to contract out of the mortgagor's right to require a transfer.

Court order
for sale.

97. – (1) This section applies to any action brought by a mortgagor, or any other person entitled to redeem the mortgaged property or interested in either the mortgage money or the right of redemption, for –

- (a) redemption, or
- (b) sale, or
- (c) the raising and payment in any manner of mortgage money, or
- (d) any combination of these in the alternative.

(2) In any such action the court may, if it thinks fit, direct a sale of the mortgaged property on such terms as it thinks fit, notwithstanding that any person so entitled or interested dissents or does not enter an appearance.

(3) Without prejudice to the generality of the court's discretion under *subsection (2)*, it may –

- (a) allow any time for redemption or payment of the mortgage money,
- (b) require lodgment in court of a sum to meet the expenses of a sale and to secure a performance of its terms,
- (c) give directions as to costs and require the giving of security for costs,
- (d) direct a sale without previously determining priorities of incumbrances,
- (e) give the conduct of the sale to a particular party,

- (f) make a vesting order conveying the mortgaged property to a purchaser or appoint a person to make such a conveyance,
- (g) in the case of an equitable mortgage of a legal estate or interest in land, confer on a person power to convey that estate or interest in the name of the legal owner.

Section 97 puts in statutory form a jurisdiction which probably has long existed under the court's inherent equitable jurisdiction. A similar statutory jurisdiction was contained in *section 25* of the *Conveyancing Act 1881*, but that section was confined to foreclosure actions and did not apply to Ireland because by the late 19th century foreclosure had ceased to be granted by the Irish courts. However, the jurisdiction may be a useful one on occasion, such as where a mortgagor in financial difficulties wishes to force a sale on the mortgagee in order to reduce mounting debt. It would remain up to the court to decide in its discretion whether such a sale was appropriate.

Subsection (1)

Subsection (1) makes it clear that the mortgagor or any other person entitled to redeem or interested may seek an order in a variety of actions.

Subsection (2)

Subsection (2) gives the court a complete discretion whether to make an order for sale and, if so, on what terms.

Subsection (3)

Subsection (3) amplifies the various directions which the court can make in relation to an order for sale.

Advances on joint account. **98.** – (1) Where –

9.24

CA 1881,
s. 61

(a) money advanced or owing under a mortgage, obligation for payment or transfer of a mortgage is expressed to be advanced by or owing to two or more persons out of money, or as money, belonging to them on a joint account, or

(b) such a mortgage, obligation or transfer is made to two or more persons jointly,

the mortgage money, or other money or money's worth for the time being due to those persons shall, as between them and the mortgagor or obligor, be deemed to belong to them on a joint account.

(2) The receipt in writing of the –

(a) survivors or last survivor of those persons, or

(b) personal representative of the last survivor,

is a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of such joint account.

(3) This section takes effect subject to the terms of the mortgage, obligation or transfer.

Section 98 re-enacts the substance of section 61 of the Conveyancing Act 1881.

Subsection (1)

Subsection (1) facilitates a mortgagor dealing with two or more mortgagees where they advance the money jointly or on the basis of a joint account clause.

Subsection (2)

Subsection (2) enables the mortgagor to obtain a good discharge from the survivor, or personal representatives of the last survivor.

Subsection (3)

Subsection (3) confirms that the terms of the mortgage may vary the statutory provisions.

Chapter 3

Duties, powers and rights of mortgagee

Powers and rights generally.

9.15

9.16

99. – (1) Subject to this Part, the powers and rights of a mortgagee under *sections 100 to 113* –

- (a) apply to any mortgage created by deed after the commencement of this Part,
- (b) vest as soon as the mortgage is created,
- (c) do not become exercisable unless–
 - (i) 28 days’ notice in the prescribed form is given to the mortgagor,
 - (ii) it is for the purpose of protecting the mortgaged property or realising the mortgagee’s security.

(2) A mortgagee’s right of foreclosure is abolished.

(3) Except for *subsection (1)* and as provided elsewhere in this Part, the powers and rights conferred by *sections 100 to 113* take effect subject to the express terms of the mortgage.

Section 99 lays down some general principles governing the mortgagee’s powers and rights, particularly the remedies for enforcement of its security, as recommended by the CP (see paras 9.13 – 15 of the CP).

Subsection (1)

Paragraph (a) preserves the rule under the *Conveyancing Act 1881* that the statutory provisions apply to all mortgages created by deed, *ie*, including equitable mortgages so created. *Paragraph (b)*, however, alters the law by providing that all the mortgagee's remedies, such as the powers to sell and to appoint a receiver, vest as soon as the mortgage is created. *Paragraph (c)* also alters the law in some respects by providing that no remedy, not even the right to take possession, can be exercised unless notice is given to the mortgagor and it is for the purpose of protecting the mortgaged property or realising the mortgagee's security. It is important to note that these provisions are subject to the other provisions of Part 9. Thus *sections 100 to 113*, in dealing with specific remedies, lay down various other provisions as to their exercise, including provisions as to notice to be given to the mortgagor.

Subsection (2)

Subsection (2) abolishes the remedy of foreclosure as recommended by the CP (see para 9.16 of the CP). That remedy has not been granted by an Irish court for over a century, because of the inherent risk of unfairness to the mortgagor.

Subsection (3)

Subsection (3) enables the parties to vary the statutory provisions, except where this is specifically prohibited. Such a prohibition relates to the provisions in *subsection (1)*.

Taking possession.

9.16

100. – (1) Subject to *section 101* and notwithstanding any stipulation to the contrary in the mortgage, a mortgagee shall not take possession of the mortgaged property without a court order granted under this section, unless the mortgagor consented in writing to such taking.

(2) A mortgagee may apply to the court for an order for possession of the mortgaged property and on such application the court may, if it thinks fit, order that possession be granted to the applicant on such terms and conditions, if any, as it thinks fit.

(3) Without prejudice to the generality of *subsection (2)*, if it appears to the court that the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy any other breach of obligation arising under it, the court may –

- (a) adjourn the proceedings, or
- (b) on making an order for possession, or at any time before the enforcement of such an order,
 - (i) stay the enforcement, or
 - (ii) postpone the date for delivery of possession, or
 - (iii) suspend the order,

for such period or periods as it thinks reasonable and, if an order is suspended, the court may subsequently revive it.

(4) Any adjournment, stay, postponement or suspension under *subsection (3)* may be made subject to such terms and conditions with regard to payment by the mortgagor of any sum secured by the mortgage or the remedying of any breach of obligation as the court thinks fit.

(5) The court may revoke or vary any term or condition imposed under *subsection (4)*.

(6) Nothing in this section affects the jurisdiction of the court under –

(a) *section 62(7)* of the Act of 1964, or

(b) *sections 7 and 8* of the Act of 1976.

Section 100 governs the obtaining by a mortgagee of a court order for possession of the mortgaged property. Under *section 98(1)(c)* this cannot generally be sought unless prior notice has been given to the mortgagor and it is for the purpose of protecting the property or realising the mortgagee's security, *eg*, as a preliminary to exercising the power of sale. Where emergency action is necessary, *section 101* may be invoked.

Subsection (1)

Subsection (1) prescribes the general requirement to obtain a court order.

Subsection (2)

Subsection (2) confers a wide discretion on the court as to whether to make an order and, if it does so, as to its terms and conditions.

Subsection (3)

Subsection (3) amplifies the court's discretion to take into account the position of the mortgagor as regards correcting any default by granting an adjournment, stay of enforcement or other order.

Subsection (4)

Subsection (4) amplifies the court's discretion as to the terms and conditions of such supplementary orders.

Subsection (5)

Subsection (5) empowers the court to vary or revoke such terms and conditions.

Subsection (6)

Subsection (6) contains savings for the jurisdiction of the court under *section 62(7)* of the *Registration of Title Act 1964* and *sections 7 and 8* of the *Family Home Protection Act 1976*.

Abandoned property. **101.** – (1) Where a mortgagee has reasonable grounds for believing that –

- 9.16
- (a) the mortgagor has abandoned the mortgaged property,
 - (b) urgent steps are necessary to prevent deterioration of, or damage to, the property or entry on it by trespassers or other unauthorised persons,

the mortgagee may apply to the District Court, or any court already seised of any application or proceedings relating to the mortgaged property, for an order authorising the mortgagee to take possession of the property on such terms and conditions as the court thinks fit.

(2) Without prejudice to the generality of *subsection (1)*, an order under this section may specify –

- (a) the period during which the mortgagee may retain possession of the mortgaged property,
- (b) works which may be carried out by the mortgagee for the purpose of –
 - (i) protecting the mortgaged property, or
 - (ii) preparing it for sale in exercise of the mortgagee’s power under *section 103*, or
- (c) costs and expenses incurred by the mortgagee which may be added to the mortgage debt.

(3) The mortgagee is not liable to account strictly to the mortgagor during a period of possession under an order under this section.

(4) Nothing in this section prejudices the right of a mortgagee to apply to the court for an order for sale of the mortgaged property.

Section 101 implements the recommendation in the CP that a mortgagee should be able to take possession of the mortgaged property in an emergency, without having to give notice to the mortgagor as is generally necessary under *section 99* (see para 9.16 of the CP). The section nevertheless requires the mortgagee to obtain a District Court order in such cases, or an order from any other court already hearing an application or dealing with proceedings relating to the property.

Subsection (1)

Subsection (1) entitles the mortgagee to obtain a District Court order only if it has reasonable grounds for believing that the mortgagor has abandoned the property and that, as a consequence, urgent action is necessary to protect it from, *eg*, deterioration or entry by trespassers. The District Court is given a wide discretion as to the terms and conditions upon which it may grant the order.

Subsection (2)

Subsection (2) amplifies the discretion as to the terms and conditions. These are in addition to the provisions in *section 103* which clarify the position of a mortgagee which takes possession of the mortgaged property.

Subsection (3)

Subsection (3) reverses the general rule where a mortgagee takes possession – the liability to account strictly to the mortgagor is inappropriate in the circumstances which justify an application under *subsection (1)*.

Subsection (4)

Subsection (4) contains a saving for the much-used jurisdiction of the court to grant an order for sale on the basis of a declaration that a sum is “well-charged” on the property.

Mortgagee in possession. **102.** – (1) Subject to the terms of any order under *section 100* or *section 101* and notwithstanding any stipulation to the contrary in the mortgage, a mortgagee in possession shall take steps within a reasonable time to exercise the power to –

9.16

- (a) sell the mortgaged property under *section 103*, or
- (b) if it is not appropriate to sell, lease the property under *section 114* and use the rent and any other income received from the lessee to reduce the mortgage debt, including interest accrued or accruing.

(2) *Section 34* of the Act of 1957 does not apply to a mortgagee who takes possession of land under a court order under *section 100* or *section 101*.

Section 102 implements the recommendation in the CP that a mortgagee should only take possession in order to realise its security or to protect the property (see para 9.16 of the CP). For this reason the Bill does not include an equivalent of the power in *section 19(1)(iv)* of the *Conveyancing Act 1881* of a mortgagee in possession to cut and sell timber on the mortgaged property, without apparently having to use the proceeds to reduce the mortgage debt.

Subsection (1)

Subsection (1) requires the mortgagee in possession either to proceed within a reasonable time to sell the property or, if a sale is not appropriate, to let it and use the income to reduce the debt, including interest.

Subsection (2)

Subsection (2) removes what may be regarded as an anomaly in the law, that a mortgagee in possession, who is usually liable to account strictly to the mortgagor, is also regarded as being in “adverse” possession and so may become the owner of the property by barring the mortgagor’s right to redeem under the *Statute of Limitations 1957*.

Power of sale.

9.16
9.24

CA 1881,
ss. 19(1)(i),
20, 21(4),
21(6) and
21(7)

CA 1911, s.
5(2)

103. – (1) Subject to *sections 104 to 109*, and notwithstanding any stipulation to the contrary in the mortgage or any agreement for the mortgage, a mortgagee or any other person for the time being entitled to receive, and give a discharge for, the mortgage money, may sell, or concur with any other person in selling, the mortgaged property provided -

- (a) following service of notice on the mortgagor, or on one of two or more mortgagors, requiring payment of the mortgage money, default has been made in payment of that money, or part of it, for three months after such service, or
- (b) some interest under the mortgage or, in the case of mortgage money payable by instalments, some instalment representing interest or part interest and part capital is in arrears and unpaid for two months after becoming due, or
- (c) there has been a breach by the mortgagor, or some person concurring in the mortgage, of some other provision contained in the mortgage or any statutory provision, including this Act, other than a covenant for payment of the mortgage money or interest.

(2) A mortgagee is not answerable for any involuntary loss resulting from the exercise or execution of the power of sale under this Part, of any trust connected with it or of any power or provision contained in the mortgage.

(3) Once the power of sale becomes exercisable, the person entitled to exercise it may demand and recover from any person, other than a person having in the mortgaged property an estate or interest in priority to the mortgage, all deeds and documents relating to the property, or its title, which a purchaser under the power of sale would be entitled to demand and recover.

Section 103 specifies when the power of sale can be exercised. It re-enacts the substance of various provisions in the *Conveyancing Acts 1881* and *1911*.

Subsection (1)

Subsection (1) re-enacts the substance of *sections 19(1)(i), 20* and *21(4)* of the 1881 Act.

Subsection (2)

Subsection (2) re-enacts the substance of *section 21(6)* of the 1881 Act, as amended by *section 5(2)* of the 1911 Act.

Subsection (3)

Subsection (3) re-enacts the substance of *section 21(7)* of the 1881 Act.

Incidental powers.

104. – (1) Incidental to the power of sale are the power to –

9.24

(a) sell the mortgaged property –

CA 1881,
s. 19(1)(i)

(i) subject to prior charges or not,

(ii) either together or in lots,

CA 1911, s. 4

(iii) by public auction, tender or private contract,

(iv) with a reserve price or subject to a right to bid up to that price at an auction,

(v) subject to such conditions respecting title, evidence of title, restrictions on user of land or other matter as the mortgagee or other person selling thinks fit,

(b) rescind any contract for sale and to resell,

(c) impose or reserve or make binding by covenant or otherwise, on the sold part of the mortgaged property, or on the unsold part, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, for the purpose of their more beneficial working, or with respect to any other matter,

- (d) sell the mortgaged property, or all or any mines and minerals apart from the surface, with or without –
 - (i) imposing any easement, right or privilege connected with building or other purposes on the sold part of the mortgaged property or the unsold part,
 - (ii) an exception or reservation of all or any of the mines and minerals in or under the mortgaged property and with or without a grant, reservation or imposition of powers of working or other powers for or connected with mining purposes, in relation to or on the sold part of the mortgaged property or the unsold part.

(2) In this section “mortgaged property” includes any part of such property.

Section 104 re-enacts the substance of *section 19(1)(i)* of the *Conveyancing Act 1881* and *section 4* of the *Conveyancing Act 1911*.

Duties in
selling.

9.16

105. – (1) In the exercise of the power of sale conferred by this Part, or any express power of sale, the mortgagee, or any receiver or other person acting on behalf of the mortgagee, shall, notwithstanding any stipulation to the contrary in the mortgage or any agreement for the mortgage, ensure as far as is reasonably practicable that the mortgaged property is sold at the best price reasonably obtainable.

(2) Within 28 days after completion of the sale, the mortgagee shall serve a notice in the prescribed form on the mortgagor containing particulars of the sale.

(3) A mortgagee who, without reasonable excuse, is in breach of the obligation imposed by *subsection (2)* is guilty of an offence.

(4) Nothing in this section affects the operation of any rule of law relating to the duty of a mortgagee to account to a mortgagor.

(5) This section does not apply to a building society within the meaning of the Act of 1989.

(6) In *subsection (2)* “mortgagor” includes a person last known to the mortgagee to be the mortgagor, but does not include a person to whom, without the knowledge of the mortgagee, any of the rights or liabilities of the mortgagor under the mortgage have been assigned.

Section 105 extends to all mortgages, as recommended by the CP, the statutory duty to obtain the best price reasonable obtainable for the mortgaged property on sale imposed on building societies by *section 26* of the *Building Societies Act 1989* (See para 9.16 of the CP)

Subsection (1)

Subsection (1) imposes the statutory duty not only on the mortgagee, but also on any receiver or other person selling on the mortgagee's behalf.

Subsection (2)

Subsection (2) imposes an additional duty on the mortgagee to notify the mortgagor of the outcome of the sale – if the mortgagor considers that there has been a breach of duty resulting in a loss (*eg*, a sale below market value) he or she may sue for damages (see *section 107(2)*).

Subsection (3)

Subsection (3) renders it an offence by the mortgagee not to serve the notice of the completed sale under *subsection (2)*, unless there is a reasonable excuse.

Subsection (4)

Subsection (4) has a saving for the general duty of a mortgagee to account for the proceeds of sale – see *section 109* of the Bill.

Subsection (5)

Subsection (5) excludes application of the section to building societies which are governed by *section 26* of the *Building Societies Act 1989*.

Subsection (6)

Subsection (6) defines “mortgagor” for the purposes of serving the notice of the particulars of completion of the sale.

Conveyance on sale. **106.** – (1) A mortgagee exercising the power of sale conferred by this Part, or an express power of sale, has power to convey the property specified in *subsection (2)* –

9.16
9.24

CA 1881,
s. 21(1)

- (a) freed from all estates, interests and rights in respect of which the mortgage has priority,
- (b) subject to all estates, interests and rights which have priority to the mortgage.

(2) Subject to *subsections (4)(b)* and *(5)*, the conveyance –

- (a) vests the estate or interest which has been mortgaged in the purchaser,
- (b) extinguishes the mortgage, but without prejudice to any personal liability of the mortgagor not discharged out of the proceeds of sale,
- (c) vests any fixtures or personal property included in the mortgage and the sale in the purchaser.

(3) The conveyance may be made in the name of the mortgagor or other person in whom the estate or interest being conveyed is vested immediately before the date of the sale.

(4) This section –

- (a) applies to a sale by a sub-mortgagee so as to enable the sub-mortgagee to convey the head-mortgagor's property in the same manner as the mortgagee,

(b) does not apply to a mortgage of part only of a leasehold estate unless –

(i) there is no rent reserved by the lease or any rent which is reserved,

(ii) any lessee's covenants,

have been apportioned as regards the property mortgaged.

(5) Where the mortgaged property comprises registered land, the conveyance is subject to *section 51* of the Act of 1964.

Section 106 makes provision for giving effect to a sale by the mortgagee, taking account of the fact that under *section 92* the mortgagee will no longer have the mortgagor's estate or interest conveyed to it, but will have a charge only. It provides a power, nevertheless, as recommended by the CP, to vest that estate or interest in the purchaser, without the need for a power of attorney (see para 9.16 of the CP).

Subsection (1)

Subsection (1) provides the power to convey, applicable to both the statutory and an express power of sale.

Subsection (2)

Subsection (2) provides that the mortgagee's conveyance will vest the mortgagor's estate or interest in the purchaser and extinguish the mortgage. It will also vest any fixtures and chattels included in the mortgage and the sale.

Subsection (3)

Subsection (3) enables the conveyance to be made in the name of the mortgagor or other person in whom the estate or interest is vested immediately before the sale.

Subsection (4)

Subsection (4) applies the section to sub-mortgages, but provides that it does not apply to a mortgage of part only of a leasehold estate unless an apportionment of rent and other lessee covenants has been made. This is to ensure that the purchaser takes on obligations confined to the land being purchased.

Subsection (5)

Subsection (5) applies the usual provision relating to registered land, that a conveyance is not effective until registered in the Land Registry.

Protection of purchasers. **107.** – (1) Where a conveyance is made in professed exercise of the power of sale conferred by this Part, the title of the purchaser is not impeachable on the ground that –

9.16
9.24

CA 1881,
s. 21(2)

CA 1911,
s. 5(1)

- (a) no case had arisen to authorise the sale, or
- (b) due notice had not been given, or
- (c) the power was otherwise improperly exercised,

and a purchaser is not, either before or on conveyance, required to see or inquire whether the power is properly exercised.

(2) Any person who suffers loss as a consequence of an unauthorised or improper exercise of the power of sale has a remedy in damages against the person exercising the power.

Section 107 re-enacts the substance of provisions in *section 21(2)* of the *Conveyancing Act 1881*, as amended by *section 5(1)* of the *Conveyancing Act 1911*.

Subsection (1)

Subsection (1) ensures that a purchaser from a mortgagee exercising the statutory power of sale obtains a good title to the property conveyed. It also confirms that a purchaser does not have to make inquiries about its exercise in order to obtain such a title.

Subsection (2)

Subsection (2) provides that the remedy of a person who suffers any loss as a consequence of an improper or irregular exercise of the power (eg a mortgagor who is aggrieved that the property has been sold for well below its market value) is to sue the mortgagee for damages.

Mortgagee's receipts.
9.24
CA 1881,
s. 22

108. – (1) Subject to *subsection (2)*, the receipt in writing of a mortgagee is a conclusive discharge for any money arising under the power of sale conferred by this Part, or for any money or securities comprised in the mortgage, or arising under it, and a person paying or transferring the same to the mortgagee is not required to inquire whether any money remains due under the mortgage.

(2) *Subsection (1)* does not apply where the purchaser has actual knowledge of an impropriety or irregularity in the exercise of the power of sale or knowingly participates in such an exercise.

(3) Subject to *subsection (4)*, money received by a mortgagee under the mortgage or from the proceeds of securities comprised in it shall be applied as *section 109* requires as regards money arising from a sale under the power of sale conferred by this Part.

Section 108 re-enacts the substance of *section 22* of the *Conveyancing Act 1881*, but with one change recommended by the CP (see para 9.24 of the CP).

Subsection (1)

Subsection (1) renders the mortgagee's receipt now a "conclusive" (rather than simply "sufficient") discharge for the purchaser, unless the purchaser has actual knowledge of the improper or irregular exercise of the power of sale, or knowingly participates in it.

Subsection (2)

Subsection (2) reiterates that there is no discharge for a purchaser who knowingly participates in an improper sale by a mortgagee.

Subsection (3)

Subsection (3) provides that money received under the mortgage is to be applied in the same way as the proceeds of a sale by the mortgagee, as prescribed by *section 109*.

Application of proceeds of sale.

109. – (1) Money received by the mortgagee which arises from the sale of mortgaged property shall be applied in the following order –

9.24

CA 1881,
s. 21(3)

- (a) in discharge of prior incumbrances to which the sale was not made subject, if any, or payment into court of a sum to meet any such prior incumbrances,
- (b) in payment of all costs properly incurred by the mortgagee as incident to the sale or any attempted sale or otherwise,
- (c) in discharge of the mortgage money, interest and costs, and other money, if any, due under the mortgage.

(2) Any residue of the money so received shall be held on trust by the mortgagee to be paid to the person, if any, who –

- (a) would, but for the sale, be the mortgagee secured on the property sold next in priority after the mortgagee selling, or
- (b) is otherwise authorised to give receipts for the money so received, or, if there is no such person,
- (c) is the mortgagor.

(3) Where, in accordance with *subsection (2)*, the mortgagee gives effect to the trust of the residue by paying it to a subsequent mortgagee, the latter shall apply it in accordance with *subsections (1)(c) and (2)* and similar duties attach to each subsequent mortgagee who receives any of the residue.

(4) For the purposes of *subsection (1)(b)*, costs payable include the costs properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to the sale.

Section 109 re-enacts the substance of *section 21(3)* of the Conveyancing Act 1881, but amplifies it.

Subsection (1)

Subsection (1) specifies what the mortgagee must do initially with the proceeds of a sale, eg, discharging his or her mortgage and prior mortgages.

Subsection (2)

Subsection (2) specifies what should be done with any residue of the proceeds after compliance with *subsection (1)* – ultimately the mortgagor is entitled to this after all other incumbrancers have been paid.

Subsection (3)

Subsection (3) makes it clear that if the residue is passed on to other mortgagees, each of them must comply with the section.

Subsection (4)

Subsection (4) clarifies what costs may be met out of the proceeds of sale.

Appointment of receiver. **110.** – (1) Subject to the same proviso relating to exercise of the power of sale set out in *section 103(1)(a) to (c)*, the mortgagee or other person may appoint, by writing, such person as the mortgagee or that other person thinks fit to be a receiver of –

9.16
9.24

CA 1881,
ss. 19(i), (iii),
24(1) – (7)

- (a) the income of the mortgaged property, or
- (b) if the mortgaged property comprises an interest in income, or a rentcharge or other annual or other periodical sum, that property.

(2) A receiver appointed under *subsection (1)* is the agent of the mortgagor, who is solely responsible for the receiver's acts or defaults, unless the mortgage provides otherwise.

(3) The receiver may –

- (a) demand and recover all the income to which the appointment relates, by action or otherwise, in the name either of the mortgagor or mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of,
- (b) give effectual receipts accordingly for such income,
- (c) exercise any powers delegated by the mortgagee or other person to the receiver.

(4) Any power delegated to the receiver shall be exercised in accordance with this Part.

(5) A person paying money to the receiver is not concerned to inquire whether any case has happened to authorise the receiver to act.

(6) The receiver may be removed, and a new receiver may be appointed, by the mortgagee or the other person in writing.

(7) The receiver may retain out of any money received, for remuneration and in satisfaction of all costs incurred as receiver, a commission at –

- (a) such rate, not exceeding five per cent on the gross amount of all money received, as is specified in the appointment, or, if no such rate is so specified,
- (b) the rate of five per cent on that gross amount, or
- (c) such other rate as the court thinks fit to allow, on application made by the receiver for that purpose.

(8) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured and keep insured against loss or damage by fire, flood, storm, tempest or other perils commonly covered by a policy of comprehensive insurance, out of the money received, any property comprised in the mortgage, whether affixed to land or not, which is of an insurable nature.

Section 110 re-enacts the substance of *sections 19(1)(iii)* and *24* of the *Conveyancing Act 1881*, which deal with the power to appoint a receiver.

Subsection (1)

Subsection (1) confers a statutory power exercisable on the same basis as the power of sale under *section 103*, *ie*, where notice has been served on the mortgagor and he or she has nevertheless continued in default on mortgage payments or other breach of the mortgage terms.

Subsection (2)

Subsection (2) confirms the long-established rule that, although the receiver is appointed by the mortgagee, he or she is nevertheless regarded as the agent of the mortgagor.

Subsection (3)

Subsection (3) specifies the receiver's powers, including those delegated by the mortgagee.

Subsection (4)

Subsection (4) makes it clear, as recommended by the CP, that any such delegated powers must be exercised in accordance with the statutory provisions. Thus if the receiver sells the mortgaged property on behalf of the mortgagee, the duty to get the best price reasonably obtainable under *section 105* must be complied with (see para 9.16 of the CP).

Subsection (5)

Subsection (5) protects a purchaser dealing with the receiver.

Subsection (6)

Subsection (6) provides for removal of a receiver and appointment of a new one.

Subsection (7)

Subsection (7) deals with the receiver's remuneration.

Subsection (8)

Subsection (8) provides for directions as to insuring the property to be given by the mortgagee.

Application of income received. **111.** – (1) Subject to *subsection (2)* and *section 112(5)*, the receiver shall apply all income received in the following order –

- 9.16
9.24
CA 1881,
s. 24(8)
- (a) in discharge of all rents, taxes, rates and outgoings affecting the mortgaged property,
 - (b) in discharge of all annual sums or other payments, and the interest on all principal sums, which have priority to the mortgage under which the receiver is appointed,
 - (c) in payment of the receiver's commission,
 - (d) in payment of premiums on insurance, if any, payable under this Part or the mortgage,
 - (e) in defraying the cost of repairs as directed in writing by the mortgagee,
 - (f) in payment of interest accruing due in respect of any principal money due under the mortgage,
 - (g) in or towards discharge of the principal sum, if so directed in writing by the mortgagee.

(2) The mortgagee may, by direction in writing –

- (a) waive particular categories of payments, or particular payments to be made under such categories, or
- (b) vary the order of categories of payments,

to be made under *subsection (1)*.

(3) The residue (if any), of any money so received after making the payments specified in *subsection (1)* shall be paid by the receiver to the person who, but for the possession of the receiver, would have been entitled to receive that money or who is otherwise entitled to the mortgaged property.

Section 111 re-enacts the substance of *section 24(8)* of the *Conveyancing Act 1881*, but with some adjustments recommended by the CP (see para 9.24 of the CP).

Subsection (1)

Subsection (1) sets out the order of payments to be made by the receiver and makes it clear that, unless the mortgagee directs otherwise, this order must be followed.

Subsection (2)

Subsection (2) makes it clear, as recommended by the CP (see paras 9.16 and 9.24 of the CP), that it is open to the mortgagee to waive payments or vary their order by giving written directions to this effect.

Subsection (3)

Subsection (3) makes provision for disposal of any surplus left over after making the *subsection (1)* payments.

Insurance. **112.** – (1) A mortgagee may insure and keep insured any building, effects or other property of an insurable nature, whether affixed to the land or not, which forms part of the mortgaged property.

9.24

CA 1881,
ss. 19(1)(ii),
23

(2) The insurance shall be for the full reinstatement cost of repairing any loss or damage arising from fire, flood, storm, tempest and other perils commonly covered by a policy of comprehensive insurance.

(3) The mortgagee may give a good discharge for any money payable under any such insurance, but, subject to *subsection (4)*, so much of such money as exceeds the sums due under the mortgage shall be dealt with by the mortgagee as if it were the proceeds of a sale of the mortgaged property.

(4) The mortgagee may require any money received under such or other insurance of the mortgaged property to be applied –

- (a) by the mortgagor in making good loss or damage covered by the insurance, or
- (b) in or towards the discharge of the mortgage money.

Section 112 re-enacts the substance of *sections 19(1)(i)* and *23* of the *Conveyancing Act 1881*, which deal with insurance of the mortgaged property.

Subsection (1)

Subsection (1) confers on the mortgagee the power to insure, but altered to reflect the modern practice of having cover for full reinstatement cost, as recommended by the CP (see para 9.24 of the CP). This is all subject to the terms of the mortgage or separate agreement with the mortgagor – see *section 99(3)*.

Subsection (2)

Subsection (2) confirms that, unless agreed otherwise, the insurance should be for full reinstatement cost.

Subsection (3)

Subsection (3) provides that the mortgagee can give a good discharge for insurance money and any surplus must be held on trust in the same way as surplus proceeds of a sale under *section 108*.

Subsection (4)

Subsection (4) empowers the mortgagee to require insurance money to be devoted to repairs or put towards the mortgage debt.

Further
advances.
9.18

113. – (1) Where a mortgage is expressed to be created on any property for the purpose of securing (whether with or without present advances) future advances, the mortgagee is entitled, in priority to any subsequent mortgagee, to payment of any sum due in respect of any such future advance, provided –

- (a) the mortgagee had no express notice in writing of the subsequent mortgage when the advance was made, or
- (b) whether or not the mortgagee had such notice, the mortgage imposes an obligation to make such future advances, or
- (c) an arrangement has been made to this effect with the subsequent mortgagee.

(2) In *subsection (1)* “future advances” includes sums from time to time due on a current account and all sums which, by agreement or in the course of business between the parties, are considered to be advances on the security of the mortgage.

(3) From the commencement of this Part and notwithstanding any stipulation to the contrary, tacking in the form commonly known as *tabula in naufragio* is abolished.

(4) This section –

- (a) applies to mortgages made before or after the commencement of this Part,
- (b) does not affect any priority acquired by tacking before that commencement or in respect of advances made in accordance with of *subsection (1)(a)* and *(c)*.

Section 113 amends the law of tacking as recommended by the CP (see para 9.18 of the CP).

Subsection (1)

Subsection (1) states existing law in *paragraphs (a)* and *(c)* but reverses the common law position in *paragraph (b)*, *ie*, where there is an obligation to make further advances, these may still be tacked even though the mortgagee has notice of the subsequent mortgage rather than, as appears to be the situation under existing law, such notice relieving the mortgagee of the obligation.

Subsection (2)

Subsection (2) defines “further advances” in accordance with current banking practice.

Subsection (3)

Subsection (3) abolishes the controversial method known as *tabula in naufragio*, which was abolished by *section 7* of the *Vendor and Purchaser Act 1874*, but restored by *section 73* of the *Conveyancing Act 1881*. It very rarely operates in practice because the Registry of Deeds and Land Registry systems militate against it.

Subsection (4)

Subsection (4) applies the new provisions to all mortgages whenever created, but saves existing priorities where mortgagees have relied upon the areas of law being changed by *section 113*, *ie*, abolition of the form *tabula in naufragio* and *subsection (1)(b)*.

Chapter 4

Leases and surrenders of leases

Leasing powers.
9.24

114. – (1) A mortgagor of land, while in possession, may, as against every other incumbrancer, lease the land with the consent in writing of the mortgagee which shall not be unreasonably withheld.

CA 1881,
s. 18

(2) A lease made without such consent is voidable by a mortgagee who establishes that –

CA 1911,
s. 3

(a) the lessee had actual knowledge of the mortgage at the time of the granting of the lease,

(b) the granting had prejudiced the mortgagee.

(3) A mortgagee of land while in possession or, after the mortgagee has appointed a receiver and so long as the receiver acts, the receiver, may, as against all prior incumbrancers, if any, and the mortgagor, lease the land provided –

(a) it is for the purpose of –

(i) preserving the value of the land,
or

(ii) protection of the mortgagee's security, or

(iii) raising income to pay interest due under the mortgage or otherwise reduce the debt,
or

(b) it is otherwise an appropriate use of the land pending its sale, or

- (c) the mortgagor consents in writing, or
- (d) the court in any action relating to the mortgaged property makes an order permitting such lease.

(4) In this section “mortgagor” does not include an incumbrancer deriving title from or under the original mortgagor.

(5) This section –

- (a) applies only where the mortgage is created after the commencement of this Part,
- (b) takes effect subject to the terms of the mortgage.

Section 114 recasts the provisions of *section 18* of the *Conveyancing Act 1881*, as amended by *section 3* of the *Conveyancing Act 1911*, as recommended by the CP (see para 9.24 of the CP).

Subsection (1)

Subsection (1) now confers a general power of leasing on the mortgagor, but subject to the consent of the mortgagee, which cannot be unreasonably withheld.

Subsection (2)

Subsection (2) clarifies the position where the mortgagor leases without consent. The mortgagee can set it aside only if prejudiced and the lessee was aware of the existence of the mortgage.

Subsection (3)

Subsection (3) now confines the power of a mortgagee in possession (or where the mortgagee's receiver is in possession, the receiver) to lease in the situations listed, such as for the purpose of preserving the value of the land or protecting the security or raising income pending a sale. Otherwise it may be done where the mortgagor consents or the court sanctions it.

Subsection (4)

Subsection (4) re-enacts the provision in *section 3(10)* of the *Conveyancing Act 1911*.

Subsection (5)

Subsection (5) makes it clear that the new provisions apply only to mortgages created after the commencement of the new Act and, even then, subject to variation by the terms of the mortgage.

Exercise of
leasing
powers.

115. – (1) A lease to be granted under *section 114* shall –

- (a) be in writing,
- (b) reserve the best rent which can reasonably be obtained, taking into account any premium or other capital sum paid by the lessee and other relevant circumstances,
- (c) be otherwise granted on the best terms that can reasonably be obtained and accords with good commercial practice,

and execution of the lease by the lessor shall be sufficient evidence of execution and delivery of the lease.

(2) A purported lease which fails to comply with *subsection (1)* is void.

(3) A duplicate of such lease shall be executed by the lessee and delivered to the lessor.

(4) In the case of a lease by the mortgagor, the mortgagor shall, within one month after making the lease, deliver to the mortgagee or, where there are more than one, the mortgagee first in priority, a copy of the lease duly executed by the lessee.

(5) Failure by the mortgagor to comply with *subsection (4)* does not affect the validity of the lease.

(6) Where a premium or other capital sum is paid by the lessee and the lease is granted by the –

- (a) mortgagor, it, or, where it exceeds the mortgage debt, so much of it as is required for the purpose, shall be applied in or towards discharge of that debt, whether or not the date for redemption has arrived,
- (b) mortgagee, it shall be applied as if it comprised the proceeds of a sale in accordance with *section 109*.

Section 115 amplifies *section 114* and again recasts the provisions in the 1881 and 1911 Acts.

Subsection (1)

Subsection (1) requires the lease to be in writing and granted on proper commercial terms. A failure to comply will render the lease void under *subsection (2)*.

Subsection (2)

Subsection (2) confirms that non-compliance with *subsection (1)* renders the purported lease void

Subsection (3)

Subsection (3) requires a duplicate to be executed by the lessee and delivered to the lessor, but the lessor's execution of the lease is sufficient evidence of compliance under *subsection (1)*.

Subsection (4)

Subsection (4) requires the mortgagor to deliver within one month to the mortgagee a copy of any lease the mortgagor grants, but under *subsection (5)* non-compliance by the mortgagor does not invalidate the lease.

Subsection (5)

Subsection (5) confirms that non-compliance with *subsection (4)* does not invalidate the lease.

Subsection (6)

Subsection (6) provides for what is to happen where the lease is granted at a premium or other capital sum is paid by the lessee.

Surrenders.
CA 1911,
s. 3

116. – (1) Subject to *subsection (6)*, the power of accepting surrenders of leases conferred by this section shall be exercised only for the purpose of granting a new lease under *section 114* or as authorised by the terms of the mortgage.

(2) A mortgagor or mortgagee in possession (or a mortgagee who has appointed a receiver who is still acting) may accept a surrender of a lease granted by them, whether the surrender relates to the whole or part only of the land leased.

(3) On such a surrender –

(a) the term of the new lease shall not be less than the unexpired term which would have subsisted under the surrendered lease if it had not been surrendered,

(b) the rent reserved by the new lease shall not be less than the rent which would have been payable under the surrendered lease if it has not been surrendered,

(c) where part only of the land has been surrendered –

(i) the rent reserved by the new lease shall not be less than is required to make the aggregate rents payable under the remaining lease and new lease not less than the rent payable under the surrendered lease if no partial surrender had been accepted,

(ii) any other modifications of the original lease shall comply with *section 115*.

(4) A purported acceptance of a surrender where *subsection (3)* is not complied with is void.

(5) Where a surrender involves payment of a premium or consideration other than the agreement to accept surrender, the surrender is void unless, in the case of a surrender to—

(a) the mortgagor, the consent of incumbrancers, or

(b) a second or subsequent mortgagee, the consent of any prior incumbrancer,

is obtained.

(6) This section takes effect subject to the terms of the mortgage or any separate agreement in writing between the mortgagor and mortgagee.

Section 116 re-casts the provisions in *section 3* of the *Conveyancing Act 1911* dealing with surrender of leases in order to grant new leases.

Subsection (1)

Subsection (1) confines the provisions to surrenders for such purposes, but under *subsection (6)* the parties may vary this in the mortgage or by separate agreement.

Subsection (2)

Subsection (2) confers the power to accept surrenders, including partial ones.

Subsection (3)

Subsection (3) lays down terms for such surrenders designed to ensure that the terms of the new leases are just as good as those in the surrendered lease.

Subsection (4)

Subsection (4) renders a purported acceptance void if *subsection (3)* is not complied with.

Subsection (5)

Subsection (5) requires consents by interested parties where a premium or other consideration is being paid for acceptance of the surrender.

Subsection (6)

Subsection (6) confirms that the parties may modify the statutory provisions.

PART 10

JUDGMENT MORTGAGES

Part 10 implements the recommendation in the CP that the Commission's earlier *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004) should be implemented (see Chapter 10). The result is that the pre-1922 statutes dealing with such mortgages will be replaced with substantial amendment. Because of that replacement, Part 10 also re-enacts the substance of the provisions in those statutes for registration and re-registration of a judgment and registration of a *lis pendens* if it is to bind a purchaser of land. In view of the numerous requirements relating to these matters, the substantive provisions in Part 10 have been drafted on the basis that the detailed requirements as to registration, including forms which should be used in future, will be prescribed by statutory instrument. LRC CP 30 – 2004 drew attention to the many difficulties created by the complicated requirements set out in the substantive provisions of the pre-1922 statutes. It is also much easier to amend regulations to respond to new developments, such as the introduction of eConveyancing.

The one matter referred to in the earlier Consultation Paper which is not dealt with in Part 10 relates to severance of a joint tenancy. This is dealt with by *section 29(3)* of this Bill.

PART 10

JUDGMENT MORTGAGES

Interpretation of Part 10. **117.** – In this Part, unless the context otherwise requires –

“creditor” includes –

10.02

JMA 1858,
ss. 3 and 4

- (a) an authorised agent and any person authorised by the court to register a judgment mortgage on behalf of a judgment creditor,
- (b) one or some only of several creditors who have obtained the same judgment;

“judgment” includes any decree or order of any court of record.

Section 117 re-enacts parts of *sections 3 and 4* of the *Judgment Mortgage (Ireland) Act 1858*. It provides a definition of “creditor” and “judgment” which saves having to repeat, as the *Judgment Mortgage (Ireland) Acts 1850 and 1858* do, references to the different kinds of court order.

Registration of judgments. 10.02 **118.** – A judgment does not bind a purchaser of land for valuable consideration or a creditor unless and until it is registered in the prescribed manner in the Judgments Office within five years before the –

JMA 1850,
s. 4

(a) conveyance to the purchaser, or

(b) debt of the creditor accrued,

and re-registered in the prescribed manner at the expiration of every successive five years.

Section 118 re-enacts the substance of section 4 of the Judgment Mortgage (Ireland) Act 1850. As explained in the introductory note to Part 10, the detailed requirements as to the method of registration will be set out in regulations made under section 5 of this Bill.

Registration
of *lis*
pendens.

JMA 1850,
s. 5

119. – A *lis pendens* does not bind a purchaser of land for valuable consideration, without actual knowledge of it, unless it is registered in the prescribed manner in the Judgments Office within five years before the making of the conveyance to the purchaser.

Section 119 re-enacts the substance of *section 5* of the 1850 Act. Again provision is made for regulations to govern the detailed requirements of registration in the Judgments Office.

Registration of judgment mortgages. **120.** – (1) A creditor who has obtained a judgment against a person may register a judgment mortgage against that person’s land in accordance with this section.

10.02

JMA 1850,
s. 6

(2) A judgment mortgage shall be registered in the Registry of Deeds or Land Registry, as appropriate.

(3) For the avoidance of doubt it is, and always has been, the case that –

1964, No. 16

(a) there is no requirement to re-register a judgment mortgage in order to maintain its validity or enforceability against the land or a purchaser of the land,

(b) a judgment mortgage may be registered –

(i) notwithstanding that the judgment debtor has obtained an order of the court granting a stay of execution, unless the court orders otherwise,

(ii) against the interest of a beneficiary under a trust for sale of land.

Section 120 provides for registration of judgment mortgages against the judgment debtor’s land. It replaces the confusing and convoluted provisions in *section 6* of the *Judgment Mortgage (Ireland) Act 1850*, which have caused much difficulty in practice, as discussed in LRC CP 30 – 2104 (see chapter 2). “Land” is defined by *section 3* of the Bill and includes any estate or interest in land.

Subsection (1)

Subsection (1) confers the general right to register a judgment mortgage, without restriction, other than compliance with the section's formalities. This is as recommended by the Commission (see para 4.08).

Subsection (2)

Subsection (2) simplifies the requirements by making provision for registration in the Registry of Deeds or Land Registry, depending on whether it relates to unregistered or registered land. The precise method of registration will be prescribed by regulation in accordance with *section 5(5)*. It is envisaged that the information and other matters to be included in this form will be simplified in accordance with the various recommendations made by the Commission, especially as regards unregistered land (see paras 2.27, 2.34, 2.40, 4.11, 4.14, 4.16, 4.18 and 4.19 of the CP). Such simplification has already been achieved for registered land by *section 71* of the *Registration of Title Act 1964*. Making provision for regulations also facilitates future adjustments which may be necessary or appropriate for introduction of eConveyancing, again as recommended by the Commission (see para 4.37).

Subsection (3)

Subsection (3) clarifies a number of matters as recommended by the Commission (see paras 2.50, 2.75, 4.21, 4.36 and 4.38 of the CP). *Paragraph (a)* confirms that the provisions in *section 4* of the 1850 Act requiring re-registration of the judgments every five years (see *section 118* of this Bill) do not apply, and never have applied, to judgment mortgages. *Paragraph (b)(i)* confirms that a creditor may still register a judgment mortgage even though the judgment debtor has been granted a stay of execution, unless the court orders otherwise.

Paragraph (b)(ii) confirms that a judgment mortgage may still be registered against the equitable interest of a beneficiary under a trust for sale of land, even though under the doctrine of conversion that interest is deemed to be personalty (*ie*, an interest in the proceeds of sale rather than an interest in land). Until the actual conversion takes place, the trustees are still holding land for the beneficiary and creditors should be able to move against it.

Company
debtor.

121. – The Act of 1963 is amended as follows:

- (a) the insertion after *section 99(2)(i)* of –
 - “(j) a charge created by registration of a judgment mortgage affecting any property of the company.”,
- (b) the substitution in *section 102(1)* of “prescribed form” for “affidavit”.

Section 121 amends the *Companies Act 1963*, as recommended by the Commission (see para 2.73). The consequence of these changes is that a judgment mortgage is treated like other charges which must be notified to the registrar of companies under *section 99* of that Act, *ie*, a failure so to notify renders the charge void against the liquidator and any creditor of the company.

Effect of registration.

10.02

JMA 1850,
ss. 7 and 8

122. – (1) Registration of a judgment mortgage under *section 120* creates in respect of the judgment debtor’s land a mortgage by deed for the purposes of *section 99* and, subject to this Part, confers powers, rights and duties on the judgment creditor as mortgagee accordingly.

(2) The judgment mortgage is subject to any equity or incumbrance affecting the judgment debtor’s land, whether registered or not, at the time of its registration.

10.04

(3) For the purposes of *subsection (2)*, an equity or incumbrance does not include any claim lodged in court against a judgment debtor’s land which is not a family home within the *Family Home Protection Act 1976*, unless the claim seeks an order specifically against that land.

(4) Subject to *section 284(2)* of the Act of 1963 and *section 51* of the Act of 1988, a judgment creditor who has registered a judgment mortgage has the same priority and security as any other mortgagee of land.

JMA 1850,
s. 8

(5) *Section 77* applies to a voluntary conveyance of land made by the judgment debtor before the creditor registers a judgment mortgage against that land under *section 120* as if the creditor were a purchaser for the purposes of *section 77*.

Section 122 replaces *sections 7* and *8* of the 1850 Act and states the effect of registration of a judgment mortgage.

Subsection (1)

Subsection (1) confirms that the registered judgment mortgage creates the equivalent of a mortgage by deed which attracts all the powers, rights and duties of an ordinary mortgage created by deed over the debtor's estate or interest in the land. This automatically attracts the various powers, rights and duties conferred by Chapter 3 of Part 9 of the Bill, as recommended by the Commission in LRC CP 30 – 2004 (see paras 4.27 – 4.30, 4.39, 5.06, 5.17 and 5.21). It also means that the provisions in *sections 7 and 8 of the Family Home Protection Act 1976* apply (see *section 100(6)* of this Bill). The qualification stated in *subsection (1)* concerns provisions like *subsection (2)*, which reflect that there is one important difference from an ordinary mortgage, *ie*, a judgment mortgage is created by the unilateral action of the judgment creditor (mortgagee) and so is, in that respect, more like a voluntary transaction than one created for consideration.

Subsection (2)

Subsection (2) confirms that a judgment mortgage is subject to prior equities or incumbrances, a rule already stated for registered land by *section 71(4)* of the *Registration of Title Act 1964*. Since it has the effect of a mortgage by deed under Part 9 of the Bill, there is no need to state that it has, like such a charge, priority over later mortgages or incumbrances (see LRC CP 30 – 2004, paras 4.22 – 4.25).

Subsection (3)

Subsection (3) implements the recommendation in the CP based on the suggestion in the case of *AS v GS and AIB* as to what should constitute a prior equity to which a judgment mortgage is subject (see paras 10.03 – 10.04). This was that, unless the land is a family home, a claim lodged in court should not constitute such an equity unless it specifically seeks an order against the land.

Subsection (4)

Subsection (4) implements the recommendation in LRC CP 30 – 2004 that a judgment mortgagee should have the same priority as an ordinary mortgagee where the debtor becomes insolvent. This is subject to the general rule that any such security created shortly before the insolvency is void against the Official Assignee or liquidator of a company. Consequential amendments to the legislation governing insolvency are set out in Schedule 1, Part II of this Bill. Such amendments are also necessary as a result of the abolition of the sheriff's right to seize leasehold land contained in *section 124* of this Bill.

Subsection (5)

Subsection (5) re-enacts the substance of *section 8* of the *Judgment Mortgage (Ireland) Act 1850*. That section refers to the provisions in the *Conveyancing Act (Ireland) 1634* which will be replaced by *section 77* of this Bill.

Discharge of judgment mortgages. **123.** – Registration in the Registry of Deeds in the prescribed manner of a certificate of satisfaction of a judgment in respect of which a judgment mortgage has been registered extinguishes the judgment mortgage.

JMA 1850,
s. 9

JMA 1858,
s. 5

Section 123 re-enacts the substance of *section 9* of the *Judgment Mortgage (Ireland) Act 1850* and *section 5* of the *Judgment Mortgage (Ireland) Act 1858*. It relates to unregistered land. Discharge of judgment mortgages on registered land is dealt with by *section 65* of the *Registration of Title Act 1964*.

Abolition of power to seize leasehold estate. **124.** – The power of the sheriff, or of other persons entitled to exercise the sheriff’s powers, to seize a leasehold estate under a writ of *feri facias* or other process of execution is abolished.

10.06 *Section 124* implements the recommendations in the CP that the power of the sheriff to seize leasehold land should be abolished. An earlier report of the Law Reform Commission pointed out that this remedy was rarely invoked, surrounded by uncertainties and of very doubtful efficacy as a method of enforcing debts against land. It was suggested that judgment creditors should be left to use the more appropriate remedy of a judgment mortgage: see *Report on Debt Collection: (1) the Law Relating to Sheriffs* (LRC 27 – 1988) (paras 54 – 57). The CP also pointed out that its abolition would simplify conveyancing by removing the need to make searches in the Sheriff’s Office.

PART 11

LIMITATION OF ACTIONS

Part 11 implements Chapter 12 of the CP, which recommended implementation of the Commission's *Report on Title to Adverse Possession of Land* (LRC 67 – 2002) and various other reports touching on the subject of that doctrine and the application of the *Statute of Limitations 1957* to land transactions.

Part 11 also makes important adjustments to take account of the European Convention on Human Rights, which was incorporated in Irish Law by the *Human Rights Commission Act 2000*. These are designed to preserve the doctrine of adverse possession in its longstanding role of providing a mechanism for resolving disputed claims to ownership of land and uncertainties relating to title. At the same time they attempt to achieve compatibility with Convention principles by preventing loss of ownership through mere oversight or inadvertence, without any compensation or opportunity to retrieve the situation. The provisions in question draw on the analogy of the acquisition of easements and profits *à prendre* by prescription. The provisions governing prescriptive claims set out in Part 7 of this Bill require the claim to be sanctioned by a court order which must be registered in the Registry of Deeds or Land Registry (see especially *section 36*).

It should also be noted that the doctrine of adverse possession is amended by *section 102* of this Bill.

Amendment **125.** – *Section 17(2)* of the Act of 1957 is amended by of s. 17 of the deletion of “, without a lease in writing,” wherever it Act of 1957. appears.

Section 125 implements the recommendation in the Commission’s *Report Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) (para. 55) that the distinction between oral and written periodic tenancies drawn by *section 17(2)* of the 1957 Act should be abolished.

Amendment 126. – *Section 18* of the Act of 1957 is amended by of s. 18 of the addition of the following *subsection*:
Act of 1957.

“(5) For the purposes of this section a person is in adverse possession when exercising physical control of land for that person’s own benefit and in a way which is inconsistent with the right to possession of the owner of the land.”

Section 126 implements the recommendation in LRC 30 – 1989 (para 53) that it should be made clear, as it was in the case of *Murphy v Murphy* [1980] IR 183 (see also *Durack Manufacturing Ltd. v Considine* [1987] IR 677), but then doubted in other cases, that adverse possession should be based upon the physical control and intention to possess of the claimant in a way inconsistent with the “paper” owner’s title, and not on the intention of the paper owner. A similar view has been taken more recently in England by the House of Lords in *J A Pye (Oxford) Ltd v Graham* [2003] All ER 865.

Amendment 127. – *Section 24* of the Act of 1957 is amended by
of s. 24 of the substitution of –
Act of 1957.

- (a) “after” for “at”;
- (b) “vested in any person in whose favour a court order is registered under *section 130* of the *Land and Conveyancing Act 2005*, but not otherwise.” for “extinguished”.

Section 127 amends *section 24* of the 1957 Act to make it accord with the new provisions governing acquisition of title to land by adverse possession contained in *section 130* of this Bill.

Amendment **128.** – *Section 32* of the Act of 1957 is amended by of s. 32 of the the addition of the following *subsection*:
Act of 1957.

“(3) In the case of a judgment mortgage, the right of action accrues from the date the judgment is marked and not when a judgment mortgage is registered on foot of it.”

Section 128 clarifies the operation of *section 32* of the 1957 Act in the case of a judgment mortgage, as recommended in the Commission’s *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004) (see paras 2.51 – 2.52).

Application by adverse possessor for vesting order. **129.** – (1) Subject to *section 130*, any person (“the applicant”) who claims the benefit of the period of limitation relating to an action by the owner (“the owner”) to recover land under the Act of 1957 may apply to the court for an order (a “vesting order”) to vest title to the land in the applicant.

(2) Unless it is proved to the contrary, the court shall assume that the title to be vested in the applicant is the fee simple estate in possession, but without prejudice to any claims to the land which are not barred under the Act of 1957.

(3) Legal title does not vest in the applicant until the vesting order is registered in the Land Registry.

(4) The following section is substituted for *section 49* of the Act of 1964:

“**49.** – Where a court order is made under *section 131* of the *Land and Conveyancing Act 2005* the Registrar shall give effect to it.”

(5) *Section 24* applies to a vesting under *subsection (2)* as if it had been effected by a conveyance.

Section 129 introduces new law to govern a claim by a person to have acquired title to land by adverse possession. In future, as with a claim to an easement or profit *à prendre* by prescription, such a claim will have to be made in court. *Section 130* deals with court applications and the making of a vesting order in favour of the applicant in appropriate cases, which must then be registered in the Land Registry so as to make the state of the title clear as to the future. The view has been taken that since there is a court order for the vesting, this should be registered in the Land Registry even in the case of unregistered land. This will be one way of extending registration of titles.

Subsection (1)

Subsection (1) entitles any person who claims that the limitation period under the 1957 Act has run in his or her favour to apply for a vesting order. This provision for a positive vesting of the title in the adverse possessor, instead of the current purely negative “extinguishment” of the “paper” owner’s title, implements the main recommendation in the Commission’s *Report on Title by Adverse Possession of Land* (LRC 67 – 2002) (Chapter 3).

Subsection (2)

Subsection (2) covers cases where it is not known what title was held by the dispossessed owner. The court is to assume that it is the fee simple, but without prejudice to any claims to the land which are unbarred. Thus if, in fact, the dispossessed owner held a leasehold interest only, it would remain open to the landlord to establish his or her claim to the land.

Subsection (3)

Subsection (3) makes it clear that legal title will not vest in an applicant who obtains a court order until it is registered in the Land Registry. Until that is done, the order will vest as equitable interest only in the applicant.

Subsection (4)

Subsection (4) adjusts the *Registration of Title Act 1964* to the new law.

Subsection (5)

Subsection (5) implements the recommendation in LRC 67 – 2002 to apply *section 6* of the *Conveyancing Act 1881* (replaced by *section 74* of this Bill).

Making of vesting order. **130.** – (1) On an application under *section 129* the court may cause such –

- (a) notices to be displayed or served, or
- (b) inquiries and searches to be made, or
- (c) advertisements to be placed, or
- (d) statutory declarations or other evidence to be furnished,

as to the ownership or possession of the land as it thinks fit.

(2) A vesting order shall be made under *section 129* only if the court is satisfied that –

- (a) the applicant (including a predecessor) has been in adverse possession throughout the period of limitation, and
- (b) either –
 - (i) whether from the lack of response to notices, inquiries, searches or advertisements displayed, served, made or placed, from statutory declarations or other evidence furnished, under *subsection (1)* or otherwise, it is reasonable to assume that the owner has abandoned the land or is unlikely to be found, or

- (ii) owing to a mistaken assumption as to the position of the boundary between the applicant's land and the owner's land, the applicant has, throughout the period of limitation, encroached upon part of the owner's land reasonably believing it to be part of the applicant's land, or
- (iii) where the application relates to land comprised in a deceased person's estate, it is reasonable to assume that an order in favour of the applicant would accord with the deceased's wishes, or
- (iv) in any other case, in the interest of settling the title to land in the fairest manner, it is appropriate to make the order,

subject, in any such case, if the court thinks fit, to payment by the applicant of a sum of money to the owner by way of compensation for loss, defrayment of costs and expenses or otherwise.

Section 130 deals with the making of vesting orders in favour of an adverse possessor.

Subsection (1)

Subsection (1) requires the service of notices, the making of inquiries and searches or the placement of advertisements to ensure, so far as is practicable, that the paper owner is warned of the application for a vesting order. He or she may then make representations to the court and, in particular, argue that the requirements of *subsection (2)* have not been met. This procedure is one way of ensuring compliance with the European Convention. It also requires the furnishing of evidence of the adverse possession, by way of statutory declarations or otherwise.

Subsection (2)

Subsection (2) makes further changes in the current law, again to ensure compliance with the European Convention. *Paragraph (a)* retains the current requirement that a claimant, in order to succeed, must establish adverse possession for the requisite limitation period. Clarification of the concept of adverse possession is provided by the amendment introduced by *section 126* of this Bill.

Paragraph (b) limits the situations in which an adverse possessor will, in future, succeed in acquiring title. *Subparagraph (i)* covers cases where the paper owner has abandoned the land or is unlikely to be found. *Subparagraph (ii)* deals with cases where a genuine mistake has been made over the boundary between properties and encroachment by one neighbour on another's land has occurred. These are both typical and traditional examples of the doctrine of adverse possession being used to "quiet titles". *Subparagraph (iii)* deals another, with the very common case where the doctrine is used to settle ownership of a deceased farmer's land.

Often one member of the family has been left to run the farm, while the others have long since left to pursue their lives elsewhere, sometimes overseas. Frequently no grant of probate or letters of administration are taken out and the one member of the family who has stayed on the farm (often looking after the deceased and the deceased's spouse in their final years) will continue farming it regardless of such formalities. The issue of ownership will only arise when some transaction is sought to be carried out, *eg*, borrowing on the security of the farm or selling off part of the land.

Subparagraph (iv) is a residual category where the court may consider that it is appropriate to apply the doctrine.

However, mindful of Convention principles and, indeed, constitutional ones, the court may, in any case where it intends to make an order vesting title to the land in the adverse possessor, make it subject to payment of compensation, if the court considers this appropriate to the case in question. It would be unlikely to be appropriate in cases coming within *subparagraph (b)(i)*, but might be in other cases.

Leasehold
land.

131. – (1) Where it is established that land vesting under *section 129* was held, immediately before such vesting, for a leasehold estate, the person in whom it vests may serve a notice on the immediate landlord or any superior landlord, requiring such landlord to furnish –

- (a) where the land is held under –
 - (i) a lease, a copy of the lease, or
 - (ii) an oral tenancy, a written statement of its terms,
- (b) particulars of any incumbrance affecting the land,
- (c) the name and address of the person for the time being entitled to the next superior interest in the land and of the owner of any such incumbrance.

(2) Where the existence, identity or whereabouts of any person on whom a notice may be served under *subsection (1)* cannot be established by taking reasonable measures, a notice may be served instead on any person in receipt of any rents in respect of the land.

(3) A notice served under *subsection (2)* may require a recipient of the notice to furnish the name and address of the person to whom any such rent received is paid and any other information within the recipient's possession or procurement which is capable of assisting in the identification of the terms of lease or tenancy.

(4) If any person fails or refuses to comply with a notice served under this section, the person who served it may apply to the court for an order compelling compliance.

(5) If the existence, identity or whereabouts of any person on whom a notice may be served under *subsections (1) or (2)* cannot be established by taking reasonable measures, the person entitled to serve the notice may cause an advertisement in the prescribed form to be published in a daily newspaper circulating in the area in which the land is situated or such other areas, including an area outside the State, as appears to that person to be appropriate in all the circumstances.

(6) Where a person has served a notice or caused an advertisement to be placed under this section, that person's interest in the land is not subject to forfeiture (whether by action or otherwise), ejection or any other proceedings arising out of the lease or tenancy before the expiration of three months after the date of service on that person of a copy of the lease or other information requested in the notice or advertisement.

Section 131 implements the recommendations in LRC 67 – 2002 for dealing with the application of the new law of adverse possession in cases involving leasehold land. The point is that the effect of vesting the lease or tenancy in the adverse possessor is that the latter becomes subject to the terms of the lease or tenancy. It is important, therefore, that he or she knows what those terms are.

Subsection (1)

Subsection (1) makes provision for service of a notice on the landlord in order to discover the terms of the lease or tenancy.

Subsection (2)

Subsection (2) enables a notice to be served on whoever receives the rent, if the landlord is not doing so.

Subsection (3)

Subsection (3) requires the person who receives the rent to furnish what information he or she has.

Subsection (4)

Subsection (4) makes provision for the court to compel compliance with notices served under *subsections (1)* and *(2)*.

Subsection (5)

Subsection (5) makes provision for newspaper advertisements if it is not known on whom a notice could be served.

Subsection (6)

Subsection (6) protects the adverse possessor from action by the landlord until it is known what the terms are which must be complied with.

Liability of
tenant.

132. – Where land vesting under *section 129* was held, immediately before such vesting, for a leasehold estate, then in respect of the period beginning on the date of such vesting -

- (a) the person in whom the title so vested (“the tenant”) is solely liable to the person holding the immediate or superior interest (“the landlord”) in respect of any terms of the lease or tenancy agreement which is capable of running with the title so vested, notwithstanding that no notice was given to, or consent obtained from, the landlord,
- (b) the landlord is solely liable to the tenant in respect of any term of the lease or tenancy agreement in so far as it is capable of benefiting the tenant.

(2) Where the title so vesting relates to part only of the land held under the lease or tenancy agreement, this subsection applies only to such part and any rights and liabilities shall be apportioned among the tenant, landlord and the person holding title to the other part as the parties agree or, in default of agreement, as the court determines.

Section 132 deals with cases where the adverse possessor acquires title to leasehold land only.

Subsection (1)

Subsection (1) treats the vesting in the adverse possessor as the equivalent of an assignment of the lease or tenancy, notwithstanding the lack of notices to or consent by the landlord.

Subsection (2)

Subsection (2) provides for apportionment of rights and liabilities where part only of the land is vested.

Mortgaged
land.

133. – (1) Where land vesting under *section 129* is subject to a mortgage, the person in whom it vests may tender any amount of the money remaining due under the mortgage to the person entitled to receive it and that person is obliged to receive it in satisfaction of the amount due.

(2) *Subsection (1)* does not affect the –

- (a) mortgagee's security under the mortgage for all monies owing under the mortgage,
- (b) personal liability of the dispossessed mortgagor for the mortgage debt.

(3) The person in whom the land vests subject to any mortgage may serve notice on any person entitled to receive the mortgage money, requesting that person, within four weeks of the date of service, to furnish –

- (a) particulars of the terms of the mortgage,
- (b) particulars of any amount of mortgage money already paid,
- (c) the date of the last payment made under the mortgage,
- (d) particulars of any amount outstanding under the mortgage.

(4) If any person fails or refuses to comply with a notice served under *subsection (2)*, the person who served it may apply to the court for an order compelling compliance.

(5) In hearing such an application the court shall have regard to all the circumstances of the case, including any right of confidentiality or privacy of the mortgagor.

Section 133 deals with the situation where the land acquired by the adverse possessor is mortgaged. He may wish to pay off some or all of the debt to avoid repossession by the mortgagee.

Subsection (1)

Subsection (1) entitles the adverse possessor to pay the debt and requires the mortgagee to receive the money in satisfaction of it.

Subsection (2)

Subsection (2) makes it clear that otherwise the mortgage is unaffected and the dispossessed mortgagor remains liable for the debt.

Subsection (3)

Subsection (3) is designed to enable the adverse possessor to obtain information about the mortgage.

Subsection (4)

Subsection (4) enables the court to order compliance with a notice requesting information.

Subsection (5)

Subsection (5), however, requires the court to have regard to any right of confidentiality or privacy of the mortgagor.

SCHEDULE 1

REPEALS

Session or Session and Chapter	Short Title or Subject	Extent of Repeal
1285 13 Edw. 1, c.1	Statute of Westminster II (<i>De Donis Conditionalibus</i>)	The whole Act
1290 18 Edw. 1, cc.1-3	Statute of Westminster III (<i>Quia Emptores</i>)	The whole Act
1634 10 & 11 Chas. 1, c.3	Ecclesiastical Lands Act (Ireland)	The whole Act
1634 10 Chas. 1, sess. 2 c.1	Statute of Uses (Ireland)	The whole Act
1634 10 Chas. 1, sess. 2 c.3	Conveyancing Act (Ireland)	The whole Act
1634 10 Chas. 1, sess. 3 c.15	Maintenance and Embracery Act (Ireland)	Sections 2, 4, 6
1639 15 Chas. 1, sess. 2 c.3	Forfeiture Act (Ireland)	The whole Act

1662 14 & 15 Chas. 2, sess. 4 c.19	Tenures (Abolition) Act (Ireland)	The whole Act
1667 9 Will. 3, c.11	Clandestine Mortgages Act (Ireland)	The whole Act
1695 7 Will. 3, c.8	Life Estates Act (Ireland)	The whole Act
1695 7 Will. 3, c.12	Statute of Frauds (Ireland)	The whole Act
1702 1 Anne, c.25	Crown Lands (Forfeited Estates) Ireland Act	The whole Act
1703 2 Anne, c.8	Plus Lands Act (Ireland)	Section 2
1707 6 Anne, c.10	Administration of Justice Act (Ireland)	Section 23
1717-18 4 Geo. 1, c.8	Public Offices Fees List	The whole Act
1718-19 4 Geo. 1, c.22	Forfeited Estates Claims	The whole Act
1719-20 7 Geo. 1, c.22	Purchase of Ormond Estate	The whole Act
1719-20 7 Geo. 1, c.24	Claims on Forfeited Estates in Ireland	The whole Act
1721 8 Geo. 1, c.5	Boundaries Act (Ireland)	The whole Act

1723 10 Geo. 1, c.5	Mining Leases Act (Ireland)	The whole Act
1735 9 Geo. 2, c.10	Timber Act (Ireland)	The whole Act
1741 15 Geo. 2, c.10	Mining Leases Act (Ireland)	The whole Act
1749 23 Geo. 2, c.9	Mining Leases Act (Ireland)	The whole Act
1761 1 Geo. 3, c.8	Hospitals Act (Ireland)	The whole Act
1765 5 Geo. 3, c.17	Timber Act (Ireland)	The whole Act
1765 5 Geo. 3, c.20	County Hospitals Act (Ireland)	The whole Act
1767 7 Geo. 3, c. 8	County Hospitals Act (Ireland)	The whole Act
1767 7 Geo. 3, c.20	Timber Act (Ireland)	The whole Act
1775 15 & 16 Geo. 3, c.26	Timber Act (Ireland)	The whole Act
1777 17 & 18 Geo. 3, c.15	County Hospitals Act (Ireland)	The whole Act
1777 17 & 18 Geo. 3, c.35	Timber Act (Ireland)	The whole Act

1777 17 & 18 Geo. 3, c.49	Leases for Lives Act (Ireland)	The whole Act
1779 19 & 20 Geo. 3, c.30	Tenantry Act (Ireland)	The whole Act
1781 21 & 22 Geo. 3, c.27	Leases by Schools Act (Ireland)	The whole Act
1783 23 & 24 Geo. 3, c.39	Timber Act (Ireland)	The whole Act
1785 25 Geo. 3, c.55	Leases by Schools Act (Ireland)	The whole Act
1785 25 Geo. 3, c.62	Leases for Corn Mills Act (Ireland)	The whole Act
1789 29 Geo. 3, c.30	Commons Act (Ireland)	The whole Act
1791 31 Geo. 3, c.38	Commons Act (Ireland)	The whole Act
1791 31 Geo. 3, c.40	Timber Act (Ireland)	The whole Act
1795 35 Geo. 3, c.23	Ecclesiastical Lands Act (Ireland)	The whole Act
1800 39 & 40 Geo. 3, c.23	Crown Private Estate Act	The whole Act

1800 40 Geo. 3, c.90	Leases for Cotton Manufacture Act (Ireland)	The whole Act
1806 46 Geo. 3, c.71	Mines (Ireland) Act	The whole Act
1810 50 Geo. 3, c.33	School Sites (Ireland) Act	The whole Act
1819 59 Geo. 3, c.94	Crown Lands Act	The whole Act
1822 3 Geo. 4, c.63	Crown Lands (Ireland) Act	The whole Act
1825 6 Geo. 4, c.1	Crown Lands Acts	The whole Act
1830 11 Geo. 4 & 1 Will. 4, c.46	Illusory Appointments Act	The whole Act
1832 2 & 3 Will. 4, c.71	Prescription Act	The whole Act
1834 4 & 5 Will. 4, c.92	Fines and Recoveries (Ireland) Act	The whole Act
1835 5 & 6 Will. 4, c.74	Tithes Act	The whole Act
1838 1 & 2 Vict., c.62	Renewal of Leases (Ireland) Act	The whole Act
1838 1 & 2 Vict., c.109	Tithe Rentcharge (Ireland) Act	The whole Act

1839 2 & 3 Vict., c.3	Tithe Arrears (Ireland) Act	The whole Act
1841 5 Vict., c.1	Crown Lands Act	The whole Act
1842 5 & 6 Vict., c.89	Drainage (Ireland) Act	The whole Act
1843 6 & 7 Vict., c.23	Copyhold Act	The whole Act
1844 7 & 8 Vict., c.55	Copyhold Lands Act	The whole Act
1845 8 & 9 Vict., c.56	Settled Estates Drainage Act	The whole Act
1845 8 & 9 Vict., c.69	Drainage (Ireland) Act	The whole Act
1845 8 & 9 Vict., c.99	Crown Lands Act	The whole Act
1845 8 & 9 Vict., c.106	Real Property Act	Sections 2-6, 8
1845 8 & 9 Vict., c.112	Satisfied Terms Act	The whole Act
1846 9 & 10 Vict., c.4	Drainage (Ireland) Act	The whole Act
1847 10 & 11 Vict., c.32	Landed Property Improvement (Ireland) Act	The whole Act
1847 10 & 11 Vict., c.46	Settled Land (Ireland) Act	The whole Act

1847 11 & 12 Vict., c.79	Drainage (Ireland) Act	The whole Act
1848 11 & 12 Vict., c.13	Mining Leases (Ireland) Act	The whole Act
1848 11 & 12 Vict., c.80	Tithe Rentcharges (Ireland) Act	The whole Act
1848 11 & 12 Vict., c.102	Crown Lands Act	The whole Act
1849 12 & 13 Vict., c.59	Landed Property Improvement (Ireland) Act	The whole Act
1849 12 & 13 Vict., c.26	An Act for Granting Relief Against Defects in Leases Made under Powers in Leasing, in Certain Cases.	The whole Act
1849 12 & 13 Vict., c.105	Renewable Leasehold Conversion Act	The whole Act
1850 13 & 14 Vict., c.29	Judgment Mortgage (Ireland) Act	The whole Act
1850 13 & 14 Vict., c.31	Drainage Act	The whole Act
1850 13 & 14 Vict., c.113	Improvement of Land (Ireland) Act	The whole Act
1851 14 & 15 Vict., c.7	Leases for Mills Act	The whole Act

1851 14 & 15 Vict., c.20	Fee Farm Rents (Ireland) Act	The whole Act
1851 14 & 15 Vict., c.42	Crown Lands Act	The whole Act
1851 14 & 15 Vict., cxxxviii (Local and Personal Act)	Trinity College Dublin, Leases and Perpetuity Act	The whole Act
1851 15 & 16 Vict., c.34	Landed Property Improvement (Ireland) Act	The whole Act
1852 15 & 16 Vict., c.51	Copyhold Act	The whole Act
1852 15 & 16 Vict., c.62	Crown Lands Act	The whole Act
1853 16 & 17 Vict., c.56	Crown Lands Act	The whole Act
1853 16 & 17 Vict., c.130	Drainage and Improvement of Lands (Ireland) Act	The whole Act
1854 17 & 18 Vict., c.68	An Act to provide for the Application of Certain Stock Purchased with Monies which Arose from the Sale of Part of the Land Revenues of the Crown in Ireland	The whole Act
1855 18 & 19 Vict., c.39	Leasing Powers for Religious Purposes in Ireland	The whole Act

1855 18 & 19 Vict., c.110	Drainage and Improvement of Lands (Ireland) Act	The whole Act
1856 19 & 20 Vict., c.62	Drainage (Ireland) Act	The whole Act
1858 21 & 22 Vict., c.42	Prescription (Ireland) Act	The whole Act
1858 21 & 22 Vict., c.94	Copyhold Act	The whole Act
1858 21 & 22 Vict., c.105	Judgment Mortgage (Ireland) Act	The whole Act
1859 22 & 23 Vict., c.35	Law of Property Amendment Act	Sections 10-13, 21, 23, 24
1860 23 & 24 Vict., c.38	Law of Property Amendment Act	Sections 7, 8, 10
1860 23 & 24 Vict., c.153	Landed Property Improvement (Ireland) Act	The whole Act
1861 24 & 25 Vict., c.123	Landed Estates Court (Ireland) Act	The whole Act
1862 25 & 26 Vict., c.29	Landed Property Improvement (Ireland) Act	The whole Act
1862 25 & 26 Vict., c.37	Crown Private Estates Act	The whole Act
1863 26 & 27 Vict., c.26	Land Drainage (Ireland) Act	The whole Act

1863 26 & 27 Vict., c.88	Drainage and Improvement of Lands (Ireland)	The whole Act
1864 27 & 28 Vict., c.38	Chief Rents Redemption (Ireland) Act	The whole Act
1864 27 & 28 Vict., c.72	Drainage and Improvement of Lands (Ireland)	The whole Act
1864 27 & 28 Vict., c.114	Improvement of Land Act	The whole Act
1865 28 & 29 Vict., c.52	Drainage and Improvement of Lands Amendment (Ireland) Act	The whole Act
1866 29 & 30 Vict., c.26	Landed Property Improvement (Ireland) Act	The whole Act
1866 29 & 30 Vict., c.40	Drainage and Improvement of Lands (Ireland) Act	The whole Act
1866 29 & 30 Vict., c.62	Crown Lands Act	The whole Act
1866 29 & 30 Vict., c.99	Landed Estates Court Act	The whole Act
1867 30 & 31 Vict., c.48	Sale of Land by Auction Act	The whole Act
1867 31 & 32 Vict., c.4	Sales of Reversions Act	The whole Act
1868 31 & 32 Vict., c.40	Partition Act	The whole Act
1868 31 & 32 Vict., c.62	Renewable Leaseholds Conversion (Ireland) Act	The whole Act

1869 32 & 33 Vict., c.72	Drainage and Improvement of Lands Amendment (Ireland)	The whole Act
1870 33 & 34 Vict., c.56	Limited Owners Residences Act	The whole Act
1871 34 & 35 Vict., c.84	Limited Owners Residences Act (1870) Amendment Act	The whole Act
1872 35 & 36 Vict., c.31	Drainage and Improvement of Lands Amendment (Ireland) Act	The whole Act
1873 36 & 37 Vict., c.36	Crown Lands Act	The whole Act
1873 36 & 37 Vict., c.61	Crown Private Estates Act	The whole Act
1874 37 & 38 Vict., c.32	Drainage and Improvement of Lands Amendment (Ireland) Act	The whole Act
1874 37 & 38 Vict., c.37	Powers of Appointment Act	The whole Act
1874 37 & 38 Vict., c.78	Vendor and Purchaser Act	The whole Act
1875 38 & 39 Vict., c.11	Leasing Powers Amendment Act for Religious Purposes in Ireland Act	The whole Act
1876 39 & 40 Vict., c.17	Partition Act	The whole Act
1877 40 & 41 Vict., c.18	Settled Estates Act	The whole Act
1877 40 & 41 Vict., c.31	Limited Owners Reservoirs and Water Supply Further Facilities Act	The whole Act

1877 40 & 41 Vict., c.33	Contingent Remainders Act	The whole Act
1878 41 & 42 Vict., c.59	Drainage and Improvement of Lands (Ireland) Act	The whole Act
1881 44 & 45 Vict., c.41	Conveyancing Act	Sections 2-9, 15- 24, 26-29, 41, 44, 49, 64, 66, 67, 69, 70, 72, 73, 3 rd and 4 th Schedules
1881 44 & 45 Vict., c.65	Leases for Schools (Ireland) Act	The whole Act
1882 45 & 46 Vict., c.38	Settled Land Act	The whole Act
1882 45 & 46 Vict., c.39	Conveyancing Act	Sections 3, 4, 10, 12
1884 47 & 49 Vict., c.38	Settled Land Act	The whole Act
1885 48 & 49 Vict., c.79	Crown Lands Act	The whole Act
1887 50 & 51 Vict., c.30	Settled Land Acts Amendment Act	The whole Act
1887 50 & 51 Vict., c.73	Copyhold Act	The whole Act
1888 51 & 52 Vict., c.37	Timber (Ireland) Act	The whole Act
1889 52 & 53 Vict., c.36	Settled Land Act	The whole Act

1890 53 & 54 Vict., c.69	Settled Land Act	The whole Act
1892 55 & 56 Vict., c.65	Drainage and Improvement of Lands (Ireland) Act	The whole Act
1892 55 & 56 Vict., c.58	Accumulations Act	The whole Act
1893 56 & 57 Vict., c.21	Voluntary Conveyances Act	The whole Act
1894 57 & 58 Vict., c.43	Crown Lands Act	The whole Act
1895 58 & 59 Vict., c.11	Land Clauses (Taxation of Costs) Act	The whole Act
1895 58 & 59 Vict., c.25	Mortgagees Legal Costs Act	The whole Act
1899 62 & 63 Vict., c.18	Congested Districts Board (Ireland) Act	The whole Act
1899 62 & 63 Vict., c.20	Bodies Corporate (Joint Tenancy) Act	The whole Act
1899 62 & 63 Vict., c.46	Improvement of Land Act	The whole Act
1906 6 Edw. 7, c.28	Crown Lands Act	The whole Act
1911 1 & 2 Geo. 5, c.37	Conveyancing Act	Sections 1, 3-6, 9- 11, 13
1913 3 & 4 Geo. 5,c.8	Crown Lands Act	The whole Act

1919 9 & 10 Geo. 5, c.57	Acquisition of land (Assessment of Compensation Act)	The whole Act
1919 9 & 10 Geo. 5, c.82	Irish Land (Provision for Soldiers and Sailors) Act	The whole Act
1922 12 & 13 Geo. 5, c.16	Law of Property Act	The whole Act

SCHEDULE 2

COVENANTS IMPLIED IN CONVEYANCES

PART I

EXTENT OF THE BURDEN OF COVENANTS

Sections 82
and 83.

1. In this Schedule, unless either the context otherwise requires or the contrary is expressed, the covenantor's liability in respect of any covenant extends to the acts or omissions only of persons within any of the following classes:

- (i) the covenantor and any person conveying by the covenantor's direction;
- (ii) any person through whom the covenantor derives title;
- (iii) any person (including a mortgagee) who either holds or has held a derivative title from the covenantor for less than the estate or interest vested in the covenantor or who holds or has held such a derivative title from any predecessor in title of the covenantor;
- (iv) any person who holds or has held in trust for the covenantor.

2. It is not a breach of a covenant contained in this Schedule where the conveyance by the covenantor was made expressly subject to the act, matter or thing which, but for this paragraph, would or might have caused such a breach.

3. The covenantor has no liability for any defect in the title of which it is proved that the covenantee had actual knowledge before the making of the contract to convey or the making of the conveyance (whichever is the earlier).

PART II
IMPLIED COVENANTS

Paragraph 1

Class 1 Conveyances

Covenants implied in a conveyance (other than a mortgage) for valuable consideration of an estate or interest in land (other than a leasehold estate) made by a person who is expressed to convey "as beneficial owner".

- (1) That the covenantor has the right to convey the subject-matter of the conveyance, save that the covenantor's liability is only in respect of any acts or omissions of the covenantor or persons within class (ii) of paragraph 1 of Part I.
- (2) That the person to whom the conveyance is made will quietly enjoy the subject-matter of the conveyance without disturbance from any person within any class in paragraph 1 of Part I.
- (3) That the subject-matter of the conveyance is free from all claims, demands, estates, incumbrances and interests.
- (4) That the covenantor will, at the covenantor's own cost, take such action as may be necessary for the better assuring of the subject-matter of the conveyance as may from time to time be reasonably required by the person to whom the conveyance is made and the persons deriving title under that person.

Paragraph 2

Class 2 Conveyances

Covenants implied in a conveyance (other than a mortgage) for valuable consideration of a leasehold estate made by a person who is expressed to convey "as beneficial owner".

(1) to (4) Covenants (1) to (4) in paragraph 1.

(5) That the lease which created the subject-matter of the conveyance is at the time of the conveyance valid and effectual.

(6) That the rent reserved by the lease has up to the time of the conveyance been paid and the covenants expressly or impliedly contained in the lease have been performed and observed by the lessee.

The covenantor's liability in respect of covenants (5) and (6) is restricted to –

- (a) any acts or omissions of the covenantor or persons within class (ii) of paragraph 1 in Part I, and
- (b) as regards the covenants mentioned in covenant (6), breaches caused by such acts and omissions the consequences of which could not be discovered on reasonable inspection of the property conveyed.

Paragraph 3

Class 3 Conveyances

Covenants implied in a conveyance comprising a mortgage of land (other than land held for a leasehold estate) made by a person who is expressed to convey "as beneficial owner".

(1) to (4) Covenants (1) to (4) in paragraph 1.

Those covenants are subject to the following variations, that is to say, -

- (a) liability in respect of any breach of the covenants extends to the acts or omissions of any person whether or not that person is within the classes of person set out in paragraph 1 of Part I;
- (b) covenant (2) (for quiet enjoyment) is not implied against any mortgagor until the mortgagee has lawfully entered into possession of the property conveyed.

Paragraph 4

Class 4 Conveyances

Covenants implied in a conveyance comprising a mortgage of leasehold land made by a person who is expressed to convey "as beneficial owner".

(1) to (4) Covenants (1) to (4) in paragraph 1, subject to the variations mentioned in paragraph 3.

(5) That the grant or lease which created the estate out of which the subject-matter of the conveyance is created is at the time of the conveyance valid and effectual and that the rent reserved by the grant or lease has up to that time been paid and that the covenants expressed or implied in the grant or lease have been performed and observed.

(6) That the covenantor will from time to time, so long as any money remains owing on the security of the property conveyed, pay the rent reserved by the grant or lease and perform and observe the covenants in it and will indemnify the person to whom the conveyance is made in respect of any consequences of the breach of this covenant.

Paragraph 5

Class 5 Conveyances

Covenant implied in a conveyance made by a person who is expressed to convey "as trustee", "as mortgagee", "as personal representative" or under an order of the court.

That the covenantor has not, by virtue of any act or omission of the covenantor, caused the title to the estate or interest conveyed to be liable to be impeached through the existence of any incumbrance or rendered the covenantor unable to convey that estate or interest in the manner in which it is expressed to be conveyed.

PART III
ADDITIONAL IMPLIED COVENANTS FOR
LEASEHOLDS

Paragraph 1

Class 6 Conveyances

Additional covenants implied in a conveyance (other than a mortgage) for valuable consideration of (a) the entirety of land comprised in a lease, or (b) part of the land comprised in a lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned with the consent of the lessor.

(1) That the assignee, or the person deriving title under the assignee, will at all times, from the date of the conveyance or other date stated in it, duly pay all rent becoming due under the lease creating the estate for which the land is conveyed, or, as the case may be, such part of such rent as has been apportioned to the land conveyed, and observe and perform all the covenants, contained in it and on the part of the lessee to be observed and performed, so far as they relate to the land conveyed.

(2) That the assignee will at all times, from that date, indemnify the conveying parties and their estates from and against all claims, costs and proceedings on account of any omission to pay the rent, or the part of the rent so apportioned, or any breach of any of the covenants, so far as they relate to the land conveyed.

Paragraph 2

Class 7 Conveyances

Additional covenants implied in a conveyance (other than a mortgage) for valuable consideration of part of the land comprised in a lease, subject to a part of the rent reserved by the lease which has been, or is by the conveyance, apportioned without the consent of the lessor.

(1) *In every case* That the assignee will at all times, from the date of the conveyance, or other date stated in it, pay the apportioned rent and observe and perform all the covenants (other than the covenant to pay the entire rent) contained in the lease creating the estate for which the land is conveyed, and on the part of the lessee to be observed and performed, so far as the same relate to the land conveyed; and also will at all times from that date indemnify the conveying parties and their respective estates, from and against all claims, costs and proceedings on account of any omission to pay the apportioned rent or any breach of any of such covenants.

(2) *Where the conveying party is expressed to convey "as beneficial owner"* That the assignor, or the persons deriving title under the assignor, will at all times, from the date of the conveyance, or other date stated in it, pay the balance of the rent (after deducting the said apportioned rent and any other rents similarly apportioned in respect of land not retained) and observe and perform all the covenants (other than the covenant to pay the entire rent) contained in the lease and on the part of the lessee to be observed and performed so far as they relate to the land demised (other than the land comprised in the conveyance) and remaining vested in the assignor; and also will at all times, from that date, indemnify the assignee, and the assignee's estate, from and

against all claims, costs and proceedings on account of any omission to pay the balance of the rent or any breach of any of such covenants.

**APPENDIX C LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harboring of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law – Criminal Conversation, Enticement and Harboring of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27

Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI 3313)	€1.27

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
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