



The Law Reform Commission  
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

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**REPORT**

**ON**

**THE ACQUISITION OF EASEMENTS AND PROFITS  
À PRENDRE BY PRESCRIPTION**

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**(LRC 66 - 2002)**

**IRELAND**

**The Law Reform Commission**

**IPC House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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# 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 to 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 Attorney General under the terms of the Act.

To date the Commission has published sixty four Reports containing proposals for reform of the law; eleven Working Papers; nineteen Consultation Papers; a number of specialised Papers for limited circulation; *An Examination of the Law of Bail*; and twenty three Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in Appendix B 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:

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## NOTE

This Report was prepared on the basis of a reference from the Attorney General dated 6 March 1987, under section 4(2)(c) of the *Law Reform Commission Act 1975*. The subject matter of this Report is also included in the Commission's Second Programme for Law Reform, already referred to, which extends the Commission's involvement in this area.

After extensive research and consultation with practitioners in the field, including members of the Land Law and Conveyancing Law Working Group (described below), the Commission puts forward these proposals for reform.

While these recommendations are being considered by the Department of Justice, Equality and Law Reform, informed comments or suggestions can be made to the Department, by persons or bodies with special knowledge of the subject.



## **The Land Law and Conveyancing Law Working Group**

On the 6th March 1987, the then Attorney General, in pursuance of section 4(2)(c) of the *Law Reform Commission Act 1975* requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was, “*Conveyancing law and practice in areas where this could lead to savings for house purchasers.*” Recognising that a comprehensive review of land law and conveyancing law was not feasible within the limited resources available to it, the Commission established an expert Working Group. Broadly speaking, there are two principal aspects to the work of the expert Group. The first is to concentrate on matters giving rise to unreasonable complication and delays in the completion of conveyancing transactions, and to recommend practical reforms in this regard. Secondly, the Working Group has as its aim the reform, or removal where appropriate, of anomalous or redundant land and conveyancing law rules.

Operating under the Commission, the Working Group draws on its expertise to direct the research of the Commission's staff and to appraise the material which they provide. The current members of the Group, which meets every month or so, are:

Commissioner Patricia T Rickard-Clarke (Convenor)  
George Brady, SC  
John F Buckley, Solicitor (former Judge of the Circuit Court)  
Patrick Fagan, Solicitor  
Ernest Farrell, Solicitor  
Brian Gallagher, Solicitor  
Mary Geraldine Miller, Barrister-at-Law  
Chris Hogan, Land Registry  
Professor David Gwynn Morgan  
Deborah Wheeler, Barrister-at-Law  
Professor JCW Wylie

Brónagh Maher was Secretary and Legal Researcher to the Group until September 2002, when she was replaced by Mark O’Riordan.

The Law Reform Commission wishes to record its appreciation of the indispensable contribution which the members of this Working Group, past and present, have made and continue to make, on a voluntary basis, to the Commission’s examination of this difficult

area of the law. Because of the expertise and involvement of the distinguished members of the Group, we feel justified in following our usual practice in the field of land law and publishing our recommendations straightaway as a Report without going through the usual stage of the Consultation Paper.

The Commission also wishes to record its appreciation of the great assistance given by Dr John Breslin, Barrister-at-Law.

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## INTRODUCTION

1 Prescription is the method by which the law gives legal recognition to the existence of an easement or profit à prendre where it has, over a long period, been *de facto* enjoyed, in the same way as if it had been created by a formal grant. Examples of categories of easements which have been recognised by the courts are rights of way,<sup>1</sup> rights of light,<sup>2</sup> rights of water,<sup>3</sup> and rights of support. In addition, rights which do not seem to come within one of the well-known categories of easements are sometimes claimed and recognised by the courts. Thus, in *Middleton v Clarence*,<sup>4</sup> a right to throw quarry refuse on another person's land was recognised as an easement. The right to use a blacksmith's "shoeing stone" was recognised as an easement in *Calders v Murtagh*.<sup>5</sup> On the other hand, the court in *Cochrane v Verner*<sup>6</sup> refused to recognise a right to "shade and shelter" from a hedge as an easement.

2 The law as to acquisition of easements and profits à prendre by prescription is largely similar and, in the remainder of this Report, "easement" may be read to include profits à prendre, unless the context indicates the contrary.

3 While this area of law seldom surfaces in the form of High Court proceedings, as can be demonstrated by checking the footnotes of Peter Bland's excellent book, *The Law of Easements and Profits à Prendre*,<sup>7</sup> the experience of the members of the Working Group on

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<sup>1</sup> *Gaw v CIE* [1953] IR 232.

<sup>2</sup> *Tisdall v McArthur & Co (Steel and Metal) Ltd* [1951] IR 228.

<sup>3</sup> *McCartney v Londonderry and Lough Swilly Rly Co* [1904] AC 301; *Kelly v Dea* (1966) 100 ILTR 1.

<sup>4</sup> (1877) IR 11 CL 499.

<sup>5</sup> [1939] Ir Jur Rep 19.

<sup>6</sup> (1895) 29 ILT 571.

<sup>7</sup> Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997).

Land Law and Conveyancing Law suggests it is an area of law which often has to be drawn upon in practice. A lot of the cases are settled by agreement or are litigated in the Circuit Court, often in each case as the climax to years of dispute. In terms of bad feeling engendered among parties, this is a significant area of the law and we hope that making it clearer and more definite will assist in resolving disputes within a shorter time. For, discussing the law in England in this area, in the late nineteenth century, Holdsworth commented, "There is no branch of English law which is in a more unsatisfactory state", and "no mere restatement can clear up the muddle which the courts and the Legislature combined to make of the law of prescription".<sup>8</sup> The statutory law remains the same as it was when Holdsworth wrote.

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<sup>8</sup> Holdsworth *A History of English Law* Vol VII (Methuen 1924) at 352.

### Quality of user

1.01 In all three forms of prescription (see paragraph 1.06) the same basic tests must be satisfied. First, **user as of right** must be established, that is, user without force, without secrecy and without mere permission. User will be deemed to be forceful where the servient owner has objected to the use continually and unmistakably.<sup>10</sup> The enjoyment should be of such an open nature that either it has been actually known to the owner of the servient tenement for the time being, or the circumstances are such that he ought reasonably to have known of it. Enjoyment which is permissive or precarious is not enjoyment as of right, as it can be ended at any time by the person upon whose will it depends; this is inconsistent with any right to enjoyment recognisable by the law. The claimant must show that he has enjoyed the easement as if he was entitled to it, and that the servient owner has acquiesced in that enjoyment.<sup>11</sup>

1.02 Second, user must be continuous and not intermittent.

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<sup>9</sup> See generally Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 6.073-6.101, Coughlan *Property Law* (2<sup>nd</sup> ed Gill & McMillan 1998) at 251-259, Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall 2000) at 739-757, Cheshire and Burns *Modern Law of Real Property* (14<sup>th</sup> ed Butterworths 1988) at 514-532, Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed Stevens 1999) paragraphs 18-121 to 18-170. See, further, paragraph 3.34.

<sup>10</sup> *Dalton v Angus* (1881) 6 App Cas 740, *per Fry J* at 773.

<sup>11</sup> See Peter Butt “Implied Permission defeats claim to Prescription” (2002) *Australian Law Journal* 85, where *R v City of Sunderland* [2001] EWCA Civ 1218 is discussed. That case drew a distinction between (a) an owner’s “acquiescence in” or “toleration of” the use of his land by others, and (b) an owner’s giving licence or permission for use of the land. Use which is acquiesced in or tolerated can give rise to a prescriptive right (as use of that kind can be seen as use “as of right”), while a licence or permission does not give rise to a prescriptive right. That case is also authority for the point that the licence or permission may be express or implied.

1.03 Third, the right claimed must be such that it is capable of being an easement. Various requirements flow from this:

- The right must be capable of forming the subject-matter of a grant; there can be no prescriptive claim to a right of privacy, or a right the granting of which would be contrary to public policy.
- There must be a capable grantor and a capable grantee. There can be no prescription for an easement in respect of “a claim in any case in which the only person who could at any relevant time have made a grant lacked capacity to do so – for example, a statutory body for which the making of such a grant would have been *ultra vires*”, or in respect of “a claim by or through a person or body of persons incapable of being grantees at law – for example, a fluctuating body such as the inhabitants of a village.”<sup>12</sup>
- The right must be capable of precise definition. For example, there is no general right to a view.
- The right must belong to the categories of property rights which are regarded as being capable of being conveyed from one person to another.
- The easement must accommodate the dominant tenement. Since it is a right in land and not a personal right, the easement cannot exist **in gross**<sup>13</sup> and cannot constitute a benefit unless it is connected to land.<sup>14</sup> It is not sufficient that the easement benefits the owner of the **dominant tenement**<sup>15</sup> land in his personal capacity; it must improve the land in its amenity, utility or convenience.<sup>16</sup>

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<sup>12</sup> English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 Cmnd 3100) paragraph 15.

<sup>13</sup> A right enjoyed “in gross” means a right enjoyed attaching to a grantee and independent of any land. An easement may not be enjoyed in gross.

<sup>14</sup> For example, there is no general right to a view – see *Phipps v Pears* [1965] 1 QB 76.

<sup>15</sup> The term dominant tenement refers to land benefitted by an easement or profit à prendre.

<sup>16</sup> *Scott v Goulding Properties Ltd* [1972] IR 200.

- However, it is not the case in Ireland,<sup>17</sup> (in contrast to England) that the dominant and **servient tenements**<sup>18</sup> must be held under separate ownership.

1.04 No substantial dissatisfaction of which we know has been expressed at any of these requirements. Moreover, many of them follow directly from the basic characteristics of land law. They are long established and well understood. Accordingly, we believe that there is no need to change them, and, for the remainder of this Report, we shall accept them as they are (with the exception of the issue of the capacity of the grantor and grantee).<sup>19</sup>

### **Profits à Prendre**

1.05 A profit à prendre is a right to take something from another person's land. Two<sup>20</sup> categories of profits à prendre are significant here:

(a) *A profit appurtenant*

A profit may be created **appurtenant**<sup>21</sup> to a dominant tenement, like an easement. Generally, such a profit must

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<sup>17</sup> See paragraph 1.28 below.

<sup>18</sup> The term servient tenement refers to land which is the subject of an easement or profit à prendre.

<sup>19</sup> See paragraphs 3.24-3.27 below.

<sup>20</sup> There are two other categories of profits. The first category is profits appendant, which are profits annexed to land by operation of law. The most common example was the ancient right of common pasturage, whereby the freehold grantee of arable manor land had as appendant to that land a right to pasture certain animals on manor waste land. However, such a grant of freehold land within a manor amounted to subinfeudation, and so no new profits appendant of this nature could be created after Quia Emptores 1290. It is therefore doubtful whether any survive in Ireland today. A further category is identified in Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed Stevens 1999) paragraph 18-084, that is, a profit pur cause de vicinage. This profit arises only in the form of a common of pasture where two adjoining commons are open to each other and the cattle put on one common by the commoners have always been allowed to stray to the other common and vice versa.

<sup>21</sup> Appurtenant means attaching to land. A profit appurtenant is "one which is

comply with the features necessary for creating an easement identified at paragraph 1.03. For instance, the profit must be confined to the needs of the dominant tenement.

(b) *A profit in gross*

This is a profit exercisable by the owner independently of his ownership of land; there is no dominant tenement. But it remains an interest in land which will pass under a will or on intestacy or can be sold or dealt with in any of the usual ways, being an incorporeal hereditament.

1.06 Within each of these categories, there are two classes of profits; those enjoyed by their owner to the exclusion of everybody else, and those enjoyed by him in common with other persons, including, possibly, the owner of the servient tenement. The latter class, referred to as rights of common, may also be classified according to their subject-matter, namely rights of common of pasture, of piscary,<sup>22</sup> of turbary<sup>23</sup> and of estovers.<sup>24</sup>

### Three methods of acquisition

1.07 At present, the law indulges in the “extraordinary luxury”<sup>25</sup> of having not one but three modes of acquiring easements by prescription:

- (a) Prescription at common law
- (b) Prescription under the doctrine of Lost Modern Grant
- (c) Prescription under the *Prescription Act 1832*

We will now consider these three methods by which a prescriptive easement may be acquired.

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attached to a dominant tenement by act of the parties.” – see Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 123.

<sup>22</sup> Piscary is the right to fish in another’s waters.

<sup>23</sup> Turbary is the right to dig and take away turf from another’s land.

<sup>24</sup> Estovers is the right to cut wood, gorse or furze on another’s land.

<sup>25</sup> Law Commission of England and Wales *Land Registration in the Twenty-First Century Law A Consultative Document* (HMSO 1998).

**(a) Prescription at Common Law**

1.08 In order to succeed in a claim to prescription at common law, it is necessary to establish user from “time immemorial” or “time whereof the memory of man runneth not to the contrary.”<sup>26</sup> The date fixed as the beginning of legal memory was 1189.<sup>27</sup> The courts are willing to presume enjoyment has lasted from 1189 so long as proof is given of actual enjoyment for at least twenty years, or from as far back as living witnesses can speak. However, it is a very substantial restriction that this presumption may be rebutted by demonstrating that there was some particular point after 1189, at which the right could not possibly have existed.

**(b) Lost Modern Grant**

1.09 This doctrine was developed, at about the end of the eighteenth century,<sup>28</sup> to counteract the ease with which, as noted in paragraph 1.09, a claim to prescription at common law could be defeated. Under the statute of limitation then in force,<sup>29</sup> twenty years’ occupation of land normally barred an action for ejectment. However, the statute of limitation could not be interpreted to cover actions connected with easements. Eighteenth century judges thought that it was anomalous that, although twenty years’ enjoyment usually sufficed to render a person in adverse possession of a house secure, enjoyment since 1189 had to be shown before the same person could acquire an easement of light in respect of the same house.<sup>30</sup> Judges therefore formulated the doctrine that, where at least twenty years’ user can be established, the court will, by legal fiction, conclude that, at some stage in the past, a formal grant of the right was made by deed which was subsequently lost. The advantage of this doctrine over a claim at common law, from the perspective of the claimant, is

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<sup>26</sup> *Coke on Littleton* (19<sup>th</sup> ed 1832) at 170.

<sup>27</sup> Set by the *Statute of Westminster I 1275*. 1189 was the first year of the reign of King Richard I.

<sup>28</sup> The origin of the doctrine is often attributed to the judgment of Wilmot J in *Price v Lewis* (1761) 2 Wms Saunders 175, where Wilmot J proceeded on the analogy of James I’s statute of limitation in holding that twenty years’ enjoyment would suffice to induce the presumption of lost modern grant.

<sup>29</sup> (1623) 21 Jas I c 16.

<sup>30</sup> See Simpson *A History of the Land Law* (2<sup>nd</sup> ed Clarendon 1986) at 266.

that a claim under it will not be defeated by showing that the right could only have come into existence at some point later than 1189.

1.10 However, there is another essential weakness in the doctrine: it will be defeated where it is shown that during the entire period of user, there was nobody who could lawfully have made the grant. Thus, the courts will refuse to presume a lost grant where the servient owner was under a disability, like mental incapacity, or was a corporation prohibited by its memorandum of association from dealing in land. (The requirement that there be a capable grantor is applicable to all easements, irrespective of the method of prescription relied upon). The only addition, therefore, that the doctrine of lost modern grant made to the law was to establish that a claim will not be defeated by proof that the right could only have come into existence at some point after 1189.<sup>31</sup>

**(c) Prescription Act 1832**

1.11 The *Prescription Act 1832* was introduced following recommendations by the Real Property Commissioners in their First Report,<sup>32</sup> though not all of the recommendations put forward in that Report were adopted by the draftsman.<sup>33</sup> It would appear that the object of the Act was to do away with the need for the fiction of lost modern grant, but to preserve the effect of it, and to render obsolete prescription at common law.<sup>34</sup> If this is the correct interpretation, then the statutory rules for acquisition of easements by a twenty-year prescriptive period represent an attempt to codify the rules governing the lost modern grant doctrine, while the provision for a forty-year period is meant to replace prescription at common law. Whether that was the aim of the Act or not, the fact remains that people continued to rely on prescription at common law after the introduction of the 1832 Act. A claim under the Prescription Act will not be defeated by proof that the easement could not have existed earlier than the

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<sup>31</sup> *Ibid*, Simpson comments that, “The presumption of lost modern grant could, it was said, be rebutted, but it was not quite clear how; nor is it clear today.”

<sup>32</sup> ParlT Papers 1829 Vol X.

<sup>33</sup> One such recommendation was that there should be only one period for the acquisition of easements by prescription, the conclusion reached here two centuries later.

<sup>34</sup> This is the interpretation offered in Simpson *A History of the Land Law* (2<sup>nd</sup> ed. Clarendon 1986) at 267.

relevant prescriptive period provided for in the Act. The *Prescription Act 1832*<sup>35</sup> did not originally apply to Ireland, but was extended to cover this island by the provisions of the *Prescription (Ireland) Act 1858*<sup>36</sup> – this Act commenced on 1 January 1859.

### *Shorter Period*

1.12 The Act provides for a period of twenty years in the case of easements, and thirty years in the case of profits à prendre.<sup>37</sup> Where the easement has been enjoyed without interruption for the requisite period, the claim shall not be defeated by proof that enjoyment commenced later than 1189, but it may be defeated in any other way possible at common law. For example, the claim may be defeated where the right is not the possible subject-matter of a grant.<sup>38</sup>

1.13 Both the doctrine of lost modern grant and the provisions based on the shorter period in the *Prescription Act* prevent a claim being defeated by one of the main defences to a claim at common law, that is, proof that user began after 1189. It is arguable, therefore, that, in this respect, the Act adds little to the doctrine of lost modern grant. The main difference between the two would seem to be that, under the Act, all prescriptive periods must run right up to the proceedings in which the right is questioned, while this is not required under the doctrine of lost modern grant or at common law.<sup>39</sup>

### *Longer Period*

1.14 The English Law Reform Committee observed that the longer periods under the 1832 Act are very rarely invoked.<sup>40</sup> The longer period is forty years for easements and sixty years for profits à prendre. Once the requisite duration is proved, the right is deemed

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<sup>35</sup> 2 & 3 Will 4 c 71.

<sup>36</sup> 21 & 22 Vict c 42.

<sup>37</sup> Sections 1 and 2 of the *Prescription Act 1832*.

<sup>38</sup> See general tests set out at paragraphs 1.01-1.02.

<sup>39</sup> See also discussion of deductions paragraphs 1.16-1.18.

<sup>40</sup> English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 Cmnd 3100) paragraph 41.

“absolute and indefeasible” unless it is enjoyed by some consent or agreement expressly given by deed or writing.<sup>41</sup>

1.15 It is an issue of some controversy as to the difference which it makes if the longer period can be established. The Act uses the words “absolute and indefeasible”. It seems that the chief and possibly only difference where a claim is based on user established for the longer period concerns the issue of consent. In the case of the forty-year period, an oral or written consent given **during** the statutory period will defeat a claim. However, an oral consent, as opposed to a written consent, given at the beginning of the statutory period will not defeat a claim. In relation to the twenty-year period, oral consent will always defeat the claim, whether given at the beginning or during the statutory period.<sup>42</sup>

### *Easements of Light*

1.16 Section 3 applies to easements of light, providing for a prescriptive period of twenty years without interruption. The right shall be deemed “absolute and indefeasible”, unless enjoyed by written consent. It is not necessary to establish user as of right in the context of easements of light.

### *Interruptions*

1.17 The Act requires that the periods specified must run “without interruption”. This phrase is defined by section 4, which provides that an act will be regarded as an interruption only if the claimant submits to or acquiesces in it for one year after acquiring notice of the interference and of the person responsible for it. The interruption must be factual in that the user must actually have been stopped. The one year does not start to run until the claimant is aware of the interruption and of the identity of the person interrupting.<sup>43</sup>

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<sup>41</sup> Sections 1 and 2 of the *Prescription Act 1832*.

<sup>42</sup> Another difference is that period of disability will be deducted from the twenty-year period, while this is not so in the case of the longer period.

<sup>43</sup> Section 4 may thus impose an obligation on the claimant to act swiftly in certain circumstances. Where, for example, the claimant uses his easement for nineteen years and a day, and is then interrupted, he has no right to contest that interruption for the remainder of the twentieth year as he cannot establish twenty year’s user. In order to secure his right, he would have to bring his action on the first day of the twenty-first year, and on that day only.

## *Deductions*

1.18 Section 7 provides that any period during which the servient tenant has been an infant, of unsound mind, or a tenant for life shall automatically be deducted from the shorter periods with the periods before and after the incapacity being added together. The period during which an action is pending and being actively prosecuted will also be deducted.

1.19 In the case of the longer period, section 8 provides that periods will be deducted during which the servient tenement was held for a “term of life, or any term of years exceeding three years from the granting thereof”, provided that the claim is resisted by a reversioner on the term within three years of its determination.

## **Comparison of alternative claims**

1.20 One of the many uncertainties raised by the Act was whether it had abolished the other methods of prescription. It is now clearly settled that it did not.<sup>44</sup> The 1832 Act therefore provides an additional method of claiming easements, and all three methods may be pleaded in the alternative.

1.21 There are two major points of contrast, in each of which the Act is more pro-servient owner than the other two modes of prescription. In claims at common law or under the doctrine of lost modern grant, there is no requirement that the prescriptive period run right up to the proceedings in which it was in issue.

1.22 Secondly, claims at common law or under the doctrine of lost modern grant may still retain importance in that a claim under the Act may fail due to some technicality, for example an interruption, or unity of possession for part of the statutory period.<sup>45</sup>

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If he fails to bring his action on that day, the interruption will have lasted one year, and his claim will be defeated. This problem, though often cited as evidence of the capriciousness of the operation of section 4, necessarily does not arise frequently in practice.

<sup>44</sup> *Healy v Hawkins* [1968] 1 WLR 1967.

<sup>45</sup> In the case of profits, lost modern grant has the advantage that twenty years' user is sufficient as opposed to thirty years under the Act.

1.23 The *Prescription Act 1832* has been the subject of much criticism, being described as “a spectacular failure of legislative reform”,<sup>46</sup> and as having the “unenviable reputation of being one of the worst drafted Acts on the Statute book”.<sup>47</sup> The Ontario Law Reform Commission described it as “a mystery to many a practising lawyer”.<sup>48</sup> The Act was designed to reduce the difficulties and uncertainties of prescription, but instead it has added some further complications to the process of establishing rights by long user. Yet the Act, despite 150 years of criticism, remains the method by which easements are most commonly established.

### ***Extinguishment***

1.24 Once title to an easement has been legally established, whether by grant or by prescription, it can be extinguished by statute, by operation of law, or by release (express or implied). The aspect we are concerned with here as a candidate for reform is extinguishment by release and, in particular, the issue of an implied release in the case of abandonment by the dominant owner.

1.25 Once the title to an easement has been perfected, mere non-user does not extinguish the easement. The failure to make use of the easement must be such as to evidence an unequivocal intention on the part of the dominant owner that he will never use it again or attempt to transfer it to anyone else.<sup>49</sup>

1.26 That said, non-user for a long period may raise a presumption of abandonment. For this purpose, twenty years’ non-user will usually suffice, but even then the presumption is rebuttable where there is some other explanation. In an English case,<sup>50</sup> where the right had not been used for 175 years, the Court of Appeal rejected the

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<sup>46</sup> Bland *Law of Easements and Profits à Prendre* (Round Hall 1997) at 233.

<sup>47</sup> Wylie *Irish Land Law in the Next Century* (TCD 1980); English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 Cmnd 3100) paragraph 40.

<sup>48</sup> Ontario Law Reform Commission *Report on the Limitation of Actions* (1969) at 146.

<sup>49</sup> Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 6.105, Pearce and Mee *Land Law* (2<sup>nd</sup> ed Round Hall 2000) at 243.

<sup>50</sup> *Benn v Hardinge* (1992) NLJ 1534.

argument that non-user for twenty years raised a presumption of abandonment.

1.27 The uncertainty in this area raises difficulties for a purchaser of the servient tenement. An easement which has been legally established at some point in the past, but which has not been used for a considerable period of time, may not be readily discoverable upon an inspection of the land. Notwithstanding this, the purchaser will be bound by that easement.<sup>51</sup>

### **Leasehold Property**

1.28 In England, the doctrine of prescription is generally confined to freehold property, that is, an easement claimed by prescription must be enjoyed by a fee simple owner against a fee simple owner.<sup>52</sup> The theory seems to be that, as prescription involves the notion of a permanent right created at some unspecified date in the past, acquisition in respect of leasehold property would be inconsistent with this notion.

1.29 But the Irish courts have adopted a different approach, probably in light of the fact that so much of the land in Ireland was held subject to long tenancies, often for example, 999 or 10,000 years: it would seem irrational to allow prescription against land if occupied by an owner in fee simple; but not if occupied by a tenant under a long lease.<sup>53</sup>

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<sup>51</sup> Another question which arises in relation to extinguishment is whether an easement by prescription is extinguished by a radical change in the use of the benefited land. The issue arose in the Australian case of *Atwood v Bovis Homes Limited* [2000] 3 WLR 1843 which concerned an easement for drainage of surface water. The case would seem to establish the principle that a change in the nature or use of the benefited land – even a radical change – does not extinguish the easement, or render its exercise impermissible, unless the change involves a substantial, or reasonably substantial, increase in the burden on the servient land. See Peter Butt “Extinguishment of Easement by Prescription” (2001) ALJ 218.

<sup>52</sup> *Bright v Walker* (1834) 1 Cr M & R 211, 221 (prescription at common law); *Wheaton v Maple & Co* [1893] 3 Ch 48, 63 (lost modern grant); *Kilgour v Gaddes* [1904] 1 KB 457, 460 (*Prescription Act 1832*); *Simmons v Dobson* [1991] 1 WLR 720, 723.

<sup>53</sup> It has been observed that the law in Ireland, where prescription against limited owners is allowed, seems more satisfactory: Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed Stevens 1999) paragraph 18-128.

1.30 The views of the Irish courts can be summarised as follows:

(1) Title can be gained by prescription against a limited owner or tenant under the *Prescription Act 1832* in the case of forty years' enjoyment.<sup>54</sup> It can also be claimed under the doctrine of lost modern grant.<sup>55</sup> There is no authority on whether such a claim could be established at common law. However, arguably, the easement acquired may only attach to and last for the term of the servient owner's tenancy, unless the landlord failed to resist the claim within three years of determination of the tenant's tenancy under section 8 of the Act.

(2) In the case of prescription by a tenant, we need to consider three categories (covered in this and the next two paragraphs). A tenant can probably prescribe against other land occupied by his landlord: under the *Prescription Act 1832*,<sup>56</sup> but not under the doctrine of lost modern grant as user as of right in the full sense can not be established. There is no authority on the position at common law, though a claim would probably fail for the same reasons as under the doctrine of lost modern grant.

(3) It is possible for a tenant to prescribe against another tenant of the same landlord under the *Prescription Act 1832* in the case of the longer

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<sup>54</sup> *Wilson v Stanley* (1861) 12 ICLR 345. It appears that the requirement as to forty years' enjoyment is based on the idea that, in the case of twenty years' enjoyment only, the user must be "as of right" under the 1832 Act, and this seems to preclude a claim against the tenant so as to bind his landlord. It has already been observed that the Act is unclear as to whether user as of right must be established in a claim under the longer period. See paragraph 1.13 above.

<sup>55</sup> Provided that the reversioner knew of and acquiesced in the enjoyment of the right, see *Deeble v Linehan* (1860) 12 ICLR 1.

<sup>56</sup> Where forty years' enjoyment is established, see *Fahey v Dwyer* (1879) 4 LR Ir 271.

period,<sup>57</sup> and possibly also under the doctrine of lost modern grant,<sup>58</sup> and at common law.<sup>59</sup>

(4) Where a tenant prescribes against a stranger, we need to note the doctrine of accretion, by which the tenant secures the easement himself first for the length of his tenancy and then the easement enures for the landlord's benefit.<sup>60</sup>

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<sup>57</sup> See *Fahey v Dwyer* (1879) 4 LR Ir 271.

<sup>58</sup> See *Tisdall v McArthur* [1951] IR 228, 240. The grant may be presumed to relate only to the period of the servient owner's tenancy and, therefore, will not bind the landlord. See *O' Kane v O' Kane* (1892) 30 LR Ir 489. Again, the landlord would be bound where he failed to utilise section 8 on the determination of the lease pertaining to the servient tenement.

<sup>59</sup> See *Timmons v Hewitt* (1887) 22 LR Ir 627.

<sup>60</sup> *Wylie Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) at 1092.



## CHAPTER 2 REFORM

2.01 In 1966, the English Law Reform Committee (the predecessor of the Law Commission) undertook an extensive review of the law in this area, and produced its report, entitled *Acquisition of Easements and Profits by Prescription*.<sup>61</sup> It is worth noting that a narrow majority<sup>62</sup> of the Committee voted in favour of the abolition of all forms of prescription.<sup>63</sup>

2.02 In a 1998 Consultation Paper,<sup>64</sup> the Law Commission of England and Wales referred to the English Law Reform Committee's Report, but chose not to adopt its recommendations. However, it should be stressed that, in this Consultation Paper, the Commission adopted a particular focus, namely the adoption of interim measures to accommodate the changes that would result from the introduction of electronic conveyancing, until the reform of the law in this area could be considered more fully. The Law Commission recommended the abolition of prescription arising at common law or under the

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<sup>61</sup> Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 Cmnd 3100).

<sup>62</sup> Eight members of the Committee were in favour of abolition, while six preferred an improved statutory scheme.

<sup>63</sup> Several Canadian provinces have also recommended the abolition of prescription: Ontario Law Reform Commission *Report on Limitations of Actions* (1969); Law Reform Commission of British Columbia *Report on Limitations: Part I – Abolition of Prescription* (1970); Manitoba Law Reform Commission *Report on Prescriptive Easements and Profits à Prendre* (1982).

<sup>64</sup> Law Commission of England and Wales *Land Registration for the Twenty-first Century: A Consultative Document* (HMSO 1998). The Law Commission's final Report *Land Registration in the Twenty-First Century: A Conveyancing Revolution* (HMSO 2001) decided not to take forward the recommendations in its Consultative Document on prescription for various reasons, including the fact that the Law Commission is now undertaking a comprehensive review of easements and land obligations which will include prescription: see paragraph 1.19 of 2001 Report.

doctrine of lost modern grant, while retaining the *Prescription Act 1832*, with amendments.

2.03 Historically, and at present, there is a good deal of similarity between the acquisition of easements by prescription and adverse possession of land. Perception of this analogy has occasionally influenced the development of the law. In the beginning, it seems that the two were distinct. Limitation periods were set by reference to the reign of monarchs, whereas the prescriptive period was based on user since time immemorial. There is a fundamental distinction between the limitation of actions and prescriptive acquisition, in that the former operates only to bar an action relating to land, without affecting the title to land as such. It operates negatively, in that it **extinguishes** rights, whereas, under the law of prescription, one **acquires** rights.

2.04 In the late eighteenth century, the doctrine of lost modern grant appears to have been inspired by a feeling of similarity between the limitation of actions and acquisitive prescription, in that the twenty-year period giving rise to the presumption was the same as that under the Statute of Limitations then in force.<sup>65</sup> So too was the requirement in the 1832 Act that the prescriptive period run up to the initiation of proceedings. Simpson argues that the requirement under the Act of showing twenty years' enjoyment immediately before an action brought indicates that "the draftsman confused the working of a system of limitation of actions with a system of acquisitive prescription and, instead of producing a Prescription Act, he produced a cross between a Prescription Act and a Statute of Limitation".<sup>66</sup> This confusion on the part of the draftsman was understandable in the light of the fact that the doctrine of lost modern grant developed by analogy with the *Statute of Limitations 1623* (as discussed above at paragraph 1.07). As against this, we see good policy reasons why it is useful in the case of prescription for the period to run up to the initiation of proceedings.<sup>67</sup>

2.05 The law on the limitation of actions continued to develop during the nineteenth century, with no corresponding developments in the area of prescription. Under the *Statute of Limitations 1623*, the

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<sup>65</sup> *Statute of Limitations 1623* 21 Jac I c 16.

<sup>66</sup> Simpson *A History of the Land Law* (2<sup>nd</sup> ed Clarendon 1986) at 269.

<sup>67</sup> See paragraphs 3.05-3.06 below.

limitation period for actions to recover land was twenty years.<sup>68</sup> The twenty-year limitation period was retained in the *Real Property Limitation Act 1833*, but was subsequently reduced to twelve years by the *Real Property Limitation Act 1874*, and this remains the period under the current statute of limitations. The main texts on legal history<sup>69</sup> provide little analysis as to why in 1874 the period was reduced from twenty years to twelve in the context of the limitation of actions, or as to why the change did not apply to prescription of easements and profits.

2.06 The doctrine of prescription has been justified on the same policy grounds as the principle of adverse possession: both seek to achieve certainty in relation to the title to land by adjusting rights in favour of those who have made use of the land for a long time.<sup>70</sup> It may be easier to establish that there has been possession adverse to the paper owner's title than it is to establish user of a right that has been exercised only intermittently. Because of the intensity of the use required to establish title to land, it is arguably easier to discover than the use required to establish an easement. Notwithstanding this, it seems to us good policy to align this area of law as far as possible with the law on adverse possession. In this somewhat technical area of the law, there is particular merit, from the point of view of both accessibility and consistency, in bringing together, so far as policy will allow, the law of limitations with the law on prescription. The general policy which underlies the limitation of actions is also relevant in the context of prescription; that is, to discourage plaintiffs (in this case the owners of servient tenements) from unduly delaying the institution of proceedings, and to protect the defendants (the dominant owner) from stale claims. There is some truth in the statement that long-dormant claims have "more of cruelty than justice in them", since the later the claim, the less reliable the memories of witnesses, and the more likely that there will be difficulties in locating witnesses and evidence.<sup>71</sup>

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<sup>68</sup> 21 Jac I c 16.

<sup>69</sup> See, for example, Holdsworth *A History of English Law* Vol VII (Methuen 1924) at 62-72; Simpson *A History of the Land Law* (2<sup>nd</sup> ed Clarendon 1986) at 151-152.

<sup>70</sup> *Dalton v Angus & Co* (1881) 6 App Cas 740, 828 *per* Lord Blackburn.

<sup>71</sup> The English Law Reform Committee recommended in its 1966 Report that the prescriptive period should be twelve years, by analogy with the limitation of actions to recover land; see Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND

## **Abolition or improvement of the law relating to the acquisition of easements by prescription?**

2.07 The first question to be considered is whether prescription of easements in any form should be preserved, or whether prescription should be abolished, subject to suitable transitional arrangements.

2.08 Prescription may be perceived as a process by which the dominant owner gets something for nothing, or gets something by mere accident. It is arguable, therefore, that this form of acquisition lacks any moral justification. Also, the right in question may have originated in the servient owner's neighbourly wish to give a facility to some particular individual; once accorded legal recognition, the right is enjoyed not only by the dominant owner himself, but also by his successors in title forever.

2.09 Alternatively, in the light of the personal nature of the arrangement that may exist between the dominant and servient owner, who are usually not lawyers and are neighbours with varying good or bad relationships, it might be more in accord with the parties' expectations to grant a limited personal right to the owner of the dominant tenement.

2.10 A distinction may be drawn between the acquisition of easements by prolonged enjoyment, and the acquisition of title to land by adverse possession. It is arguable that the policy underlying adverse possession is stronger, because it involves nothing less than ensuring that a piece of land has a certain and enforceable title, as opposed to being sterilised and rendered more or less useless and non-negotiable by uncertainty, doubt and practical difficulties. There is no equivalent public interest in the case of easements. The dominant tenement is not inevitably rendered more useful by virtue of having the benefit of a right of way appurtenant to it. If anything, the creation of easements may limit the use or development of the servient land.

2.11 In addition, an alleged easement should be capable of precise definition, so that it can, if necessary, be described accurately in a

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3100). The Law Commission of England and Wales recommended retaining the twenty-year statutory period: see Law Commission *Land Registration for the Twenty First Century A Consultative Document* (HMSO 1998).

conveyance. This principle may militate against prescription. If the rights and liabilities of the dominant and servient owner were defined in writing, there would be less doubt as to the precise nature and extent of the easement. Therefore, it may be preferable if easements were only capable of being created by grant.

2.12 As against this, it may be argued that some easements are so crucial to the dominant tenement (the obvious example being a right of way servicing an otherwise landlocked plot) that they may be said to be as essential to the utility and value of the plot as a solid title. Also, legal recognition should be given to a situation where a right has been enjoyed openly over a long period of time, and successive servient owners have acquiesced in that enjoyment. It can be argued that long-continued possession in assertion of a right should be presumed to have a legal origin, in accordance with the law's general policy with regard to limitations.

2.13 Indeed, in some cases in which prescription applies, it will happen that there was a grant conferring the easement which has, in fact, been lost.

2.14 The Commission is of the view that there is no less moral justification for the acquisition of easements by prescription than there is for obtaining a title to land by adverse possession. Anyone who has enjoyed a benefit capable of subsisting as a property right, without interruption, for a sufficient period, notwithstanding the actual or constructive knowledge of the person who might otherwise claim to be the true owner, should be allowed to retain the subject-matter (whether corporeal or incorporeal) as his own property, and the other party should be barred from disputing his ownership.

2.15 *The Commission therefore recommends the improvement of the present law on prescription as opposed to abolition thereof.*

### **Abolition of acquisition of profits à prendre by prescription**

2.16 Even if the law is to retain the acquisition of easements by prescription, ought the law be abolished in the case of profits à prendre?

2.17 Both the English Law Reform Committee<sup>72</sup> and the Northern Ireland Land Law Working Group<sup>73</sup> were unanimous that the prescriptive acquisition of profits should be abolished.<sup>74</sup> They pointed out that profits may be differentiated from easements in that there is no requirement that a profit be appurtenant to the dominant land, and it therefore may not contribute to the value or convenience of any other property of its owner. Also, a profit may involve the removal of some part of the physical matter comprised in the servient land, resulting in a permanent impoverishment of that land.

2.18 Arguably, it is less harsh and unfair to deprive a person of a profit à prendre which they have been enjoying, but to which they cannot adduce a documentary title, than is the case where an easement is concerned. The acquisition of a profit à prendre is more akin to a commercial transaction than the acquisition of an easement; the acquisitor should be required to give something in return for the apples or fish they acquire.

2.19 As against this, the argument in support of preserving acquisition of profits by prescription is similar to that in support of prescription in general, that is, the legal recognition of a state of affairs of long standing, in which successive servient owners may have acquiesced.

2.20 *On balance, it is best not to distinguish the acquisition of profits à prendre from the acquisition of easements. It is recommended that profits à prendre be treated in the same way as easements.*

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<sup>72</sup> English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraph 98.

<sup>73</sup> Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 142.

<sup>74</sup> In *Land Registration for the Twenty-First Century: A Consultative Document* (HMSO 1998), the Law Commission of England and Wales, in recommending the abolition of prescription at common law and under the doctrine of lost modern grant, while retaining the *Prescription Act 1832*, did not differentiate between easements and profits à prendre.

## **Prescription at common law and under the doctrine of lost modern grant**

2.21 The existence of three modes of prescription which may all be pleaded in the alternative makes the law in this area unnecessarily complicated. A single, simplified and improved statutory method of prescription would remedy the uncertainties and defects associated with prescription at common law and under the doctrine of lost modern grant.

2.22 The question then arises as to which of the three present methods should be the basis of the new form of prescription? If prescription at common law or under the doctrine of lost modern grant are retained, purchasers of a servient tenement could find themselves bound by rights which they could not have discovered by reasonable enquiries and inspections. This is because it is possible to claim an easement on the basis of prescription at common law, or by lost modern grant, even though the right is not being exercised at the time of the claim, and has not been for many years. Concern for such purchasers would militate in favour of retaining prescription under the *Prescription Act 1832* since, under the Act (as explained in paragraph 1.20), the prescriptive period runs right up to the proceedings in which the right is in issue, and it allows the servient owner to interrupt the user at any point.

2.23 Here, we should note that this policy choice means a considerable substantive change in the law. The *Prescription Act 1832* would seem to be more pro-servient owner than the other two methods. Therefore, by abolishing the other two methods, the law in this area will be moved somewhat in favour of the servient owner over the dominant owner. This is justified, we believe, on the basis of the considerations explained at paragraphs 2.10 and 2.11.

2.24 In light of the desire to simplify and clarify the law in this area, the Commission is of the opinion that there is no virtue in retaining prescription at common law or under the doctrine of lost modern grant, and therefore recommends the abolition of these modes of prescription.

## **New legislation**

2.25 The *Prescription Act 1832* has been described as “one of the worst drafted Acts on the Statute Book.”<sup>75</sup> As originally enacted, the Act did not apply to Ireland, but was extended to cover this island by the *Prescription (Ireland) Act 1858*.<sup>76</sup> The legislation is cumbersome and unclear. In the interests of clarity and in light of the desire to simplify the law, new legislation ought to be enacted to replace the *Prescription Act 1832*.

2.26 *In light of the desire to simplify and clarify the law in this area, the Commission is of the opinion that there is no virtue in retaining the Prescription Act 1832. We therefore recommend the repeal of this Act and of the Prescription (Ireland) Act 1858, and their replacement with new legislation which is set out in Appendix A to this Report.*

## **Profits à prendre in gross**

2.27 It must be noted, in the light of the recommendation to abolish prescription at common law and the doctrine of lost modern grant, that a profit à prendre in gross cannot be established under the 1832 Act, as section 5 provides that claims for statutory rights should be pleaded as of right by the occupiers of the tenement in respect of which the right is claimed.<sup>77</sup> However, it is unlikely that this was intended as a consequence at the time of drafting.

2.28 *The Commission recommends that, under the new legislation, it will be possible to acquire a profit à prendre in gross by prescription.*

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<sup>75</sup> Law Reform Committee *Acquisition of Easements and Profits à Prendre Fourteenth Report* (1966 CMND 3100) at paragraph 40.

<sup>76</sup> Section 9 of the *Prescription Act 1832* said that the Act did not apply to Ireland. The *Prescription (Ireland) Act 1858* applied the provisions of the 1832 Act to Ireland. However, it was not until the *Statute Law Revision Act 1874* that the portion of section 9 of the 1832 Act which disapplied that Act to Ireland was actually repealed.

<sup>77</sup> Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 234.

3.01 What follows should be read as relating only to profits à prendre and easements other than easements of light and of support, as it is proposed to deal with rights of light and support separately.

### **The prescriptive period**

3.02 There is no merit in having two prescriptive periods. It would be preferable to have a single period. The question arises as to what the requisite period should be. In England and Northern Ireland, the Law Reform Committee and the Land Law Working Group each recommended a twelve-year prescriptive period, based on the view that statutory prescription should be assimilated, so far as possible, to the law governing the limitation of actions to recover land. As has been pointed out earlier,<sup>78</sup> the Commission considers it good policy to align this area of law as far as possible with the law on adverse possession, and it would therefore be consistent if the same limitation period - twelve years - applied in both cases.

3.03 *The Commission recommends, in the interests of uniformity, that under the new legislation there be a single prescriptive period (twelve years) for the acquisition of both easements and profits à prendre.*

3.04 As a striking measure of law reform, the *Prescription Act 1832* provided that the relevant prescriptive period must be one next before the commencement of an action in which the claim is in question, for this is not so where the claim is based on common law prescription or the doctrine of lost modern grant.

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<sup>78</sup> See paragraph 2.06 above.

3.05 One of the main reasons why claimants may have recourse to the doctrine of lost modern grant or prescription at common law (rather than proceeding under the *Prescription Act 1832*) is because they cannot show that the right has not been in uninterrupted use during the twenty years prior to the proceedings in which it is in issue.

3.06 Under the Act of 1832, an interruption with the enjoyment of the right for more than twelve months before the bringing of the action would prevent the dominant owner from claiming to be or ever to have been entitled to a prescriptive easement. A situation may arise where the dominant owner has prescribed for the requisite statutory period, and his user is then interrupted for a twelve-month period. If the dominant owner were sued for a trespass alleged to have been committed before the twelve-month interruption commenced, he could not rely on statutory prescription as a defence, because his period of prescription is not deemed to be next before the action brought. Had the action been commenced **before** the interruption had continued for twelve months, he would have had such a defence.

3.07 Until now, where a statutory defence was denied to such a person, he had recourse to prescription at common law and under the doctrine of lost modern grant. If the latter two modes of prescription are abolished, no defence based on prescription would be available, despite the fact that at the time of the alleged trespass he had prescribed for the requisite period and could reasonably have claimed a title by prescription justifying the act complained of. These considerations support the removal of the requirement that the prescriptive period should be next before the commencement of any proceedings.

3.08 On the other hand, however, the advantage of the requirement that the prescriptive period run right up to the commencement of an action is that the evidence before the court is likely to be fresher, making it easier to ascertain the facts.

3.09 Also, if the requirement were abolished, this may result in a purchaser of land discovering that he or she is bound by an easement, already prescribed, that has not been used for many years and the existence of which is not apparent from an inspection of the land.<sup>79</sup> It

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<sup>79</sup> This consideration was of particular concern to the Law Commission of

is a major question of policy that the owner of the servient tenement, and especially a purchaser of the servient tenement, should be aware of the enjoyment which is relied upon to establish an easement; rights acquired or in the course of acquisition under the *Prescription Act 1832* are more readily discoverable by any intending purchaser of the land burdened by them.

3.10 The English Law Reform Committee recommended that the prescriptive period need not be next before the action brought. However, the Law Commission of England and Wales recommended that the right claimed must be asserted up to the time that it is in issue in court proceedings. Rights that were at one time exercised but have ceased to be for more than one year would not ground a claim under the Act.<sup>80</sup>

3.11 *The Commission recommends that the necessary conditions for prescriptive acquisition should still be in existence at the time of the initiation of proceedings. Therefore, the requirement in section 4 of the Prescription Act 1832 that the prescriptive period be “next before some suit or action” wherein the matter is brought into question should remain to be the case in the new legislation.*

### **The Position of the State**

3.12 Under the *Prescription Act 1832*, the same prescriptive periods applied to the State as to all other landowners. In contrast, in the limitation of actions to recover land, a longer limitation period applies to State-owned land.<sup>81</sup> This special provision for the State was contained in the *Real Property Limitation Act 1833* as otherwise, because of the rule of interpretation then in force, the Act would not have bound the State at all. It has been held that this rule of

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England and Wales in their Consultative Document *Land Registration for the Twenty-First Century* (HMSO 1998).

<sup>80</sup> Law Commission of England and Wales Consultative Document *Land Registration for the Twenty-First Century* (HMSO 1998) at 242.

<sup>81</sup> A State authority must commence proceedings within thirty years from the date of the accrual of the right of action: see section 13(1)(a) of the *Statute of Limitations 1957*. In the case of actions to recover foreshore, a State authority can commence proceedings at any time before the expiration of sixty years from the date on which the right of action accrued to it: see section 13(1)(b) of the *Statute of Limitations 1957*.

interpretation no longer applies,<sup>82</sup> and it is therefore no longer necessary specifically to mention the State in legislation in order for its provisions to apply to the State.

3.13 However, the Commission considers that this is an area where the State, while within the Statute, should enjoy different treatment because of its different circumstances. The State cannot be expected to keep a watchful eye over all of its far-flung property. A longer prescriptive period should therefore apply to State-owned property. In the light of the Commission's recommendation to align the prescriptive period with the period under the limitation of actions, it is appropriate that the same periods as apply to the State under the *Statute of Limitations 1957* should apply here.

3.14 *The Commission recommends that there should be a thirty-year prescriptive period in respect of State-owned land, and a sixty-year period where the said land is foreshore.*

### **Interruption**

3.15 The *Prescription Act 1832* requires that the statutory periods run "without interruption". Where such interruption endures for twelve months, it stops the prescriptive period from running. This would appear to be an addition to the law as it existed before the Act, as there was no question of interruptions at common law or under the doctrine of lost modern grant.

3.16 Physical interruption is a very crude method of preventing a prescriptive title accruing, and may involve considerable expense and damage to the servient owner's property, for example, where an easement of support or drainage is involved. This would be especially true in the case of easements of support. Where an easement of support is involved, it is particularly difficult to effect a physical interruption, and thus stop the prescriptive period from running. The law of prescription is based on an inference from acquiescence. The only way in which the servient owner could interrupt a right of support would be by withdrawing the support, that is, by excavating his own land, and thus incurring expense. It would be unreasonable to argue that the servient owner's failure to withdraw support

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<sup>82</sup> See *Howard v Commissioner of Public Works* [1993] ILRM 665.

amounted to acquiescence.<sup>83</sup> The English Law Reform Committee, therefore, recommended that a system of notional interruption should apply to all easements.<sup>84</sup> But, in practice, what should this mean? Possibilities include: registration; advertisement; affixing a notice to the servient tenement or proceedings before a court or some other tribunal. The primary concern is that the notional interruption will be brought to the notice of the owners or occupiers of the land who are likely to be affected and their successors.

3.17 However, advertising or affixing a notice to the servient tenement will not ensure that the interruption is brought to the actual notice of the dominant owner. It might seem then that a system of registration would be a preferable method. Any application for registration would have to be accompanied by a statutory declaration establishing that notice by registered post addressed to the occupier of the dominant tenement has been given, and that an advertisement of the intended application had been placed in an approved newspaper.<sup>85</sup> In the case of registered land, registration could be effected on the register relating to the title to the land itself, whether servient or dominant. As regards unregistered land, the question arises as to where the appropriate place for registration should be.

3.18 Against this it could be said that disputes relating to registration will arise which it would take the court to resolve, so that the case would come before the court in any event. These disputes would arise where the servient owner purports to register an interruption, but the dominant owner refuses to acquiesce in the interruption, as required in the *Prescription Act 1832*, and asserts that he will continue to use the easement. Also, in light of the delays and arrears already experienced in the Land Registry, the establishment of a new register for this purpose might result in further delays. Like a physical interruption, court proceedings will involve expense on the part of the servient owner.

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<sup>83</sup> However, this may not be significant in light of what is said in relation to the servient owner's duty of care in paragraphs 5.07-5.17 below.

<sup>84</sup> English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraph 64-75.

<sup>85</sup> This was recommended by the English Law Reform Committee as a means of ensuring that the dominant owner had every possible opportunity of learning of the notional interruption.

3.19 Accordingly, the Commission does not recommend an alternative system to the ways which are at present open to the servient owner to mark an interruption of user.

### **Deduction of periods of legal incapacity**

3.20 In 1832, infants, persons of unsound mind, married women and tenants for life lacked legal capacity. Therefore, they were not in a position to consent to enjoyment of an easement over land in which they had an interest, or to resist any claim to a right to such an easement. Hence the provisions in section 7 of the 1832 Act as to the deduction of periods of incapacity. Today, married women<sup>86</sup> and life tenants<sup>87</sup> have full capacity, and infants<sup>88</sup> and persons of unsound mind often have representatives invested with full capacity to protect their estates.<sup>89</sup> The provisions contained in section 7 only applied to a claim under the shorter period; periods where the servient tenement was held by a person under a legal incapacity would not be excluded from computation of the longer period.<sup>90</sup> In light of the post-1832 legislation on legal capacity, just noted, and our recommendation (at paragraph 3.03) that there should be a single prescriptive period, the question arises as to whether there should be any special provision for servient owners under a legal incapacity.

3.21 It is notable here that in a recent report relating to the Statute of Limitations, the Law Reform Commission recommended that the limitation period should not be postponed unless the person under a legal incapacity can show that at the time of the incapacity he was not in the custody of a parent or guardian.<sup>91</sup> As there is currently no

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<sup>86</sup> *Married Womens Status Act 1957.*

<sup>87</sup> *Settled Land Acts 1882-1890.*

<sup>88</sup> *Guardianship of Infants Act 1996.*

<sup>89</sup> The other situation in which a deduction may apply is where there has been an action pending which was being actively prosecuted, but subsequently abated by reason of death. This is perhaps a very rare state of affairs and hence no provision should be made for it.

<sup>90</sup> Section 7 excludes cases where the easement is declared to be “absolute and indefeasible”.

<sup>91</sup> Law Reform Commission *The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 2001) paragraph 7.32.

legislation dealing with the guardianship of incapacitated adults, at present that recommendation can only be applied to minors. In the meantime, it was recommended that, in cases where the accrual of the cause of action is postponed under section 49 of the *Statute of Limitations 1957* because the plaintiff is of unsound mind, the claim must nevertheless be brought within thirty years of accrual. If a similar approach were taken in this area, it would mean that where land is held by a person of unsound mind, an easement or profit could be acquired by prescription over a period of thirty years, irrespective of when the landowner recovers.

3.22 In the limitation of actions, it is possible to distinguish between the situation where the plaintiff is under a legal incapacity at the time the cause of action accrues, and the situation where the plaintiff suffers from a legal incapacity which arises after the limitation period has started to run. In this regard, the *Statute of Limitations 1957* operates differently to the *Prescription Act 1832* as, at present under section 49 of the 1957 statute, the limitation period will only be suspended if the legal incapacity occurs **before** the date of accrual. In other words, the period of limitation will not be suspended by some supervening legal incapacity, which occurs after the cause of action accrues. The *Prescription Act 1832*, on the other hand, provides for the exclusion of periods of legal incapacity so that, where the servient owner subsequently becomes of unsound mind or where the servient tenement passes to a minor, time stops running and will only start to run again once the servient owner has recovered or reached majority. In its report on the *Statute of Limitations*, the Law Reform Commission recommended that the limitation period should be suspended, whether the incapacity exists at the time the limitation period starts to run<sup>92</sup> or arises subsequently.

3.23 *The Commission recommends that the provisions of section 7 of the Prescription Act 1832 not be repeated in the new legislation. It is recommended that periods during which the servient tenement is held by a minor should not be excluded from the computation of the prescriptive period, as the parent or guardian of the minor may take action on the minor's behalf. It is recommended that where the*

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<sup>92</sup> Law Reform Commission *The Statute of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 2001) paragraphs 7.14-7.20.

*servient tenement is held by a person who is incapable,<sup>93</sup> whether at the commencement of the prescriptive period or subsequently, the computation of that period will be suspended for the period of incapacity. However, a long stop provision should apply whereby an easement or profit à prendre will be acquired by prescription after thirty years, irrespective of when the servient owner recovers.*

### **For and against whom time should run**

3.24 As discussed earlier,<sup>94</sup> because of the conceptual fiction on which the law is grounded, in order for a right to qualify as an easement, there must be a capable grantor and grantee. The requirement that there be a capable grantor and grantee applied equally to claims under the *Prescription Act 1832*, as section 2 of the Act by its terms only applies to a claim of a kind which “may be lawfully made at common law by custom, prescription or grant”. An example of an incapable grantor would be a statutory body for which the making of the grant would be *ultra vires*; an example of an incapable grantee would be a fluctuating body such as the inhabitants of a village.<sup>95</sup>

3.25 The recommendations made in England<sup>96</sup> may be summarised as follows. The proposed system of prescription would have been assimilated to the limitation of actions, and therefore there was no need to relate it in any way to the presumption of a grant. The basis for the requirement that there be a competent grantor or grantee, as the case may be, would accordingly disappear. It was recommended that it be made clear and express that incapacity of the servient owner

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<sup>93</sup> To be defined as where a person is incapable of the management of his affairs because of disease or impairment of physical or mental condition. See Law Reform Commission *The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury)* (LRC 64 – 2001) at paragraph 7.13.

<sup>94</sup> See paragraph 1.02 above.

<sup>95</sup> As discussed at paragraph 1.02 above.

<sup>96</sup> Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraphs 52 and 53. The Northern Ireland Land Law Working Group made a similar recommendation *The Final Report of the Land Law Working Group* (HMSO 1990) paragraph 2.7.39.

to grant an easement does not prevent a prescriptive easement from being acquired against him. A dominant owner who has not the capacity to acquire a particular easement by grant would not be able to acquire such an easement by prescription, but *de facto* enjoyment by such a person would be available to support a claim by a successor in title. In summary, where, at the expiration of the prescriptive period, the dominant land was owned by a person who did have capacity to acquire an easement by grant, it would be immaterial that, for part of the prescriptive period, the land had been held by a person who did not.

3.26 The conceptual fiction of a lost grant was relevant to prescription at common law and to the doctrine of lost modern grant. As the Commission has recommended (at paragraph 2.24) that these two methods of prescription be abolished and that the law of prescription be aligned with the law on adverse possession, there is no need to relate the statutory scheme to this fiction of a presumed grant and, in turn, the requirement that there be a capable grantor and grantee. The fact that a grant would be *ultra vires* a servient owner would not prevent him from protecting his title either by litigation or by interrupting the dominant owner's enjoyment. Also, it would be rare to find cases where a person or body had the competence to own land, yet lacked competence to grant an easement.

3.27 *The Commission recommends that the servient owner's incompetence to make a grant should not bar a prescriptive claim. The dominant owner's incompetence to acquire an easement by grant should not prevent him from asserting a right to an easement by prescription.*

### **Prescription by or against owners of limited interests**

3.28 Section 8 of the *Prescription Act 1832* provides that periods during which the servient tenement is held subject to a lease will be deducted provided that the claim is resisted by the reversioner within three years of its determination. The section is confined to claims based on forty years' user. The English Law Reform Committee stated that there would be no need for such a provision in the new statutory system which it proposed.<sup>97</sup> Neither the Northern Ireland

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<sup>97</sup> English Law Reform Committee *Acquisition of Easements and Profits* Fourteenth Report (1966 CMND 3100) paragraph 44.

Land Law Working Group nor the Law Commission of England and Wales addressed the question of the deduction of periods of leases from the prescriptive period.

3.29 *The Commission is of the view that, as section 8 of the Prescription Act 1832 is an unnecessary complication, its provisions should not be repeated in the new legislation.*

3.30 The English Law Reform Committee made several recommendations which would, in effect, bring the law in England as regards leasehold property in line with the current position in Ireland.<sup>98</sup> Thus, it would be possible to prescribe against the servient tenement even where it is held subject to a lease, a tenant could prescribe against his landlord, and a tenant could prescribe against a tenant of the same landlord.<sup>99</sup> The English Law Reform Committee recommended that the dominant owner in these situations would acquire the easement for the duration of the term of the lease only. This, too, is presently the case in Ireland, except where the reversioner fails to resist the claim within the three years after the determination of the lease, as provided for in section 8. If the reversioner fails to resist the claim within those three years, the dominant owner is deemed to have prescribed against the reversioner, and will have acquired an easement which is good against him. The recommended repeal of section 8 would mean that the three-year period during which the reversioner could resist the claim would no longer arise. This would mean that a reversioner would not be bound by the easement prescribed for during the term of the lease; instead, the dominant owner would have to begin to prescribe afresh against the reversioner of the servient tenement. The reversioner would have the full twelve years to resist the claim, as opposed to the three years under section 8. This seems to us to be fair, as the reversioner may have been completely unaware of the dominant owner's user during

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<sup>98</sup> English Law Reform Committee *Acquisition of Easements and Profits* Fourteenth Report (1966 CMND 3100) paragraphs 46-51. See paragraphs 1.26-1.27 above.

<sup>99</sup> Under the present law in Ireland, this is only possible where there has been forty years' enjoyment. The recommendation that there be a single prescriptive period of twelve years means that it will be possible where there has been only twelve years' enjoyment. This is justifiable on the basis that there will no longer be the possibility that the easement will bind the reversioner, by virtue of the repeal of section 8 of the *Prescription Act 1832*.

the term of the lease as he was not in occupation of the land, and therefore could not have reasonably discovered the user.

3.31 *It is recommended that, in the new legislation, it should continue to be the case that one can prescribe against the owner of a limited interest. However, the easement so acquired may only attach to and last for the term of the servient owner's interest; when this expires, the dominant owner will have to prescribe afresh. In the opposite direction, the owner of a limited interest should continue to be capable of obtaining a prescriptive easement which will enure for the benefit of the freeholder. A tenant should continue, as at present, to be able to prescribe against his landlord, and vice versa.*

### **Quality of enjoyment by dominant owner – user as of right**

3.32 The requirement at common law that user be *nec vi, nec clam, nec precario* is satisfactory. However, in the interest of clarity, it should be made express in the statute what is meant by user as of right. A simple statement (without definitions) - that there should be user 'without force, without secrecy, and without permission' - would suffice.

3.33 The current position under the Act of 1832 in relation to an absence of consent is unsatisfactory, since, in the context of the longer period, only written consent is referred to, yet the Act assumes that user as of right must be established in all prescriptive claims. The Commission takes the view that, bearing in mind the essential requirement of an absence of consent, enjoyment by express consent should not count towards the required period of enjoyment, whether such consent or agreement is written or oral, and whether such consent is given during or at the beginning of the prescriptive period.

3.34 *It is recommended that, in the new legislation, there be a statutory definition of user as of right in the form of a simple statement without definitions, that is, without force, without secrecy and without permission. It should also be stated that enjoyment by written or oral consent shall not count towards the required period of enjoyment.*

## Character and extent of prescriptive easement

3.35 Under the present law, once an easement has been acquired by prescription, if the character and nature of the user remains constant, then there is no objection to an increase in its intensity. However, prescription is, to a large extent, based on the servient owner's acquiescence. As a matter of policy, there is, therefore, a strong argument in support of the view that the servient owner should be taken not to have acquiesced in any more onerous a burden than he has, in fact, suffered during the prescriptive period. For example, where the servient owner has acquiesced in the dominant land being used as a caravan site for a certain number of caravans, he should not be taken to have acquiesced in its being used for five times that number of caravans.<sup>100</sup>

3.36 However, the problem lies in ascertaining the degree of use of the easement throughout the prescriptive period, and in the definition of the consequent permissible degree of its use for the future. This would make it particularly difficult to draft a concise statutory provision to deal with this.<sup>101</sup>

3.37 *Because of drafting difficulties, it should be left to the courts to determine whether the dominant owner is abusing the rights he has acquired by prescription.*

## Extinguishment by non-user

3.38 The English Law Reform Committee proposed to apply the analogy of the limitation of actions to the cesser of an easement in the same way as they applied it to the prescriptive acquisition of easements.<sup>102</sup> Accordingly, while twelve years of prescriptive

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<sup>100</sup> *British Railways Board v Glass* [1965] Ch 539.

<sup>101</sup> The English Law Reform Committee recommended that there should be a provision to the effect that the easement acquired should be of the like character, extent and degree as the use enjoyed throughout the prescriptive period by the dominant owner, and should not be substantially more burdensome on the servient owner than that enjoyment had been: see Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraph 79.

<sup>102</sup> Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraph 81.

enjoyment would entitle a person to acquire an easement, where there has been no use of such prescriptive easement for a twelve-year period, it should thereupon cease as having been released or abandoned. A generation later, the recommendation of the Law Commission of England and Wales was that there should be a rebuttable presumption of abandonment, if the party asserting the easement or profit could not demonstrate that he or she had exercised the right within the previous twenty years.<sup>103</sup>

3.39 At present, there is no distinction between extinguishment of an easement acquired by prescription and an easement acquired by grant. However, the Commission takes the policy view that, where a right is acquired by deed, grantees have given something in return for that right. They should be at liberty either to exercise their right or not to do so, as they see fit. Prescriptive easements, however, have a different basis. If user for a defined period is sufficient to acquire a right, then non-user for a defined period should suffice to lose that right.

3.40 *It is recommended that, in the new legislation, where the easement or profit à prendre in question has been acquired by prescription, a twelve-year period of non-user should give rise to a rebuttable presumption of abandonment. Where a full twelve-year period of non-user has not elapsed, positive proof of an intention to abandon, accompanied by non-user, should continue to be necessary to establish extinguishment.*

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<sup>103</sup> Law Commission *Land Registration for the Twenty-First Century A Consultative Document* (HMSO 1998) at 243.



## CHAPTER 4            RIGHTS OF LIGHT

4.01 The *Prescription Act 1832* treats easements of light, that is, “the right to the access of light to a defined aperture or window,”<sup>104</sup> differently from other easements and profits. This was perhaps because easements of light were the most difficult to establish at common law, as it can usually be shown that the building to which the light comes has not been standing since 1189. The Act provides that where the access of light to a building has been enjoyed without interruption for twenty years next before some suit or action, the right becomes “absolute and indefeasible”. Therefore, it is easier to acquire an easement of light under the *Prescription Act 1832* than to acquire any other kind of easement. A claim will only be defeated where consent was given in writing or by deed. Bland summarises the differences between a claim under the *Prescription Act* for a right to light and a claim for another easement as follows:

- “1     Enjoyment for twenty years of light establishes an absolute and indefeasible right to light, but enjoyment for forty years is required to establish any other absolute and indefeasible easement.
  
- 2     Enjoyment under section 3 is not required to be “as of right”. For this reason, even the English courts have been prepared to permit a tenant to acquire an easement of light against his own landlord,<sup>105</sup> or against another tenant of the same landlord.<sup>106</sup>
  
- 3     A right to light cannot be acquired under the Act over land which is in the ownership of the State or in the ownership of any public department on behalf of the State.

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<sup>104</sup> Pearce and Mee *Land Law* (2<sup>nd</sup> ed Round Hall 2000) at 238.

<sup>105</sup> *Foster v Lyons & Co Ltd* [1927] 1 Ch 219, 227.

<sup>106</sup> *Morgan v Fear* [1907] AC 425.

- 4 The disabilities which can be pleaded against other easements under sections 7 and 8 do not apply to rights of light. This is because section 7 excepts cases where the easement is declared to be absolute and indefeasible, and section 8 is confined to claims based on forty years' user.<sup>107</sup>

Wylie also points out that, since section 3 negatives any presumption of a grant in the case of easements of light, at least to the extent that it does not require user as of right, such an easement may be acquired against a corporation with no power to grant such a right.<sup>108</sup>

4.02 The English Law Reform Committee felt there was no reason for treating easements of light differently from other easements by requiring any consent or agreement relating to the enjoyment of the easement of light to be in writing.<sup>109</sup> It was recommended that easements of light should be assimilated to other easements in this respect, that is, either oral or written consent would defeat a claim to a prescriptive easement of light.<sup>110</sup> The twelve-year prescriptive period would apply to easements of light as it did to all other easements.<sup>111</sup> It seems to the Commission, too, that the difficulty which justified differential treatment of easements of light at common law (paragraph 4.01) does not apply under the legislation which we propose. Accordingly, there is no need to treat these easement differently

4.03 *The Commission recommends, in the interests of consistency and of simplifying the law, that easements of light be treated in the same manner as all other easements; an easement of light will, therefore, be capable of being acquired by prescription in the same manner as other easements and profits à prendre.*

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<sup>107</sup> Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 244.

<sup>108</sup> Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 6.099.

<sup>109</sup> English Law Reform Committee *Acquisition of Easements and Profits* Fourteenth Report (1966 CMND 3100) paragraph 63.

<sup>110</sup> English Law Reform Committee *Acquisition of Easements and Profits* Fourteenth Report (1966 CMND 3100) paragraphs 61-63.

<sup>111</sup> The Northern Ireland Land Law Working Group also recommended that the twelve year prescriptive period should apply to easements of light; see *The Final Report of the Land Law Working Group* (HMSO 1990) at 145.

## Easements of light and the State

4.04 Section 3 of the 1832 Act does not refer expressly to “the Crown”, and therefore, under the former law,<sup>112</sup> it was not possible to prescribe for an easement of light against the State under the Act. The Commission sees no reason why it should not be possible to acquire a prescriptive easement of light against the State in the same way as it is possible against anyone else. However, for the same reasons as outlined above,<sup>113</sup> the same thirty-year period that applies in respect of other easements over State-owned land should also apply here.

4.05 *The Commission recommends that it should be possible to acquire a prescriptive easement of light against the State after thirty years’ user as of right.*

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<sup>112</sup> We are referring here to the rule of law which states that, if a statute does not expressly provide that the State is bound by its provisions, the statute will not apply to the State. This rule of interpretation was held not to be part of Irish law in the relatively recent case of *Howard v Commissioners of Public Works* [1993] ILRM 665.

<sup>113</sup> See paragraph 3.13.



**Rights of Support**

5.01 Rights of support are of vital importance to property owners. On one side, in many cases, the extent of the detriment suffered by the dominant owner if he could not establish a right of support would arguably be greater than in the case of any other easement, in that he would be forced to look on helplessly as his building collapsed because it has been deprived of support. On the other side, if a right of support is established, it represents a substantial restriction on the use the servient owner can make of his own land, in that he cannot excavate or develop his land in any way which would undermine the support it provides to the neighbouring land.

In approaching this subject, there are three distinct areas which must be considered:

**1            *Support of land by land***

5.02 In the first place, we must mark a distinction: any landowner has a right, which is incidental to his ownership of his land and not an easement, to have his land in its natural state supported by adjacent or subjacent land. It is a natural right, and may be contrasted with an easement in that an easement must be acquired, whereas a natural right exists automatically in respect of the land. The natural right of support is confined to support for land in its natural state. It does not extend to a right of support in respect of buildings on the land; a right in respect of buildings may be acquired only as an easement.<sup>114</sup>

**2            *Support of buildings by land***

5.03 A building, being an artificial imposition on the land, cannot command a natural right to its support, as otherwise an owner of land

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<sup>114</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 6.039.

could compel his neighbour to support whatever buildings he chose to erect.<sup>115</sup> The erection of buildings on land will not extinguish the land's natural right to support, but it cannot increase the burden of the right upon the neighbour. Consequently, the neighbour remains obliged only to support the land in its natural state. This raises difficulties where damage actually occurs, as it must be established whether such damage would have occurred to the land in the absence of the building.<sup>116</sup>

5.04 However, an easement of support of a building by land may be created by grant, express or implied, or by prescription. The decision of the House of Lords in *Dalton v Angus*<sup>117</sup> confirms that the general law regarding prescription applies to easements of support of a building: twenty years' enjoyment of support to a building, whether from the adjacent or subjacent land, being peaceable, open and as of right, will confer the right to have the support continued.

5.05 In many cases, it is likely that the servient owner will not voluntarily restrict his user of his own land, and will refuse to grant an easement of support. But where an owner has enjoyed the support of his building by his neighbour's land for twenty years, he can acquire a right to have that support continued. However, subject to what is said in paragraphs 5.07-5.17 on negligence, during the twenty-year period after building his house, the dominant owner is in a very precarious position, as he cannot claim to have any right of support. During that time, the servient owner may carry out whatever excavations he likes within the boundaries of his own land, thereby causing the dominant owner's house, which was deriving support from the soil which was removed, to collapse. The servient owner could easily block a development which might be of considerable value to the dominant owner, and also in the public interest, while the interference with the servient owner's property might only be slight. If one looks at the situation from the other direction, any change of

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<sup>115</sup> See Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 70-71.

<sup>116</sup> Where land subsides due to loss of support and not from the additional weight of buildings erected, the landowner may recover damages for injury to the building in addition to damages for damage to the land: Tang Hang Wu "The Right of Lateral Support of Buildings from the Adjoining Land" [2002] 66 *Conv* 237.

<sup>117</sup> (1881) 6 App Cas 740.

law which assisted the developer might mean his neighbour would be barred from using his land as he sees fit, and may even be obliged to spend his own money to provide support to the developer.<sup>118</sup>

### 3 *Support of buildings by buildings*

5.06 As in the case of support of buildings by land, there is no natural right to support of buildings by buildings, but the right to support can be acquired by express or implied grant or reservation or by prescription.

#### (i) *Implied grant or reservation*

A particular feature here is that where, as is often the case, buildings are built at the same time and keep each other standing, mutual rights of support will usually be implied. Such implied rights are referred to as intended easements, that is, easements which are necessary to carry out the common intention of the parties to the grant. The most frequently-cited example is the sale of one of two attached houses, where there will usually be an implication of an easement of support for the house sold by the house retained.<sup>119</sup> The right to support may also be described as an easement of necessity, without which the land or buildings granted or retained could not be enjoyed at all. While there is some overlap between intended easements and easements of necessity, it has been suggested that intended easements may include a wider category.<sup>120</sup> In the High Court case of *Todd v Cinelli*,<sup>121</sup> which involved the

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<sup>118</sup> Gray and Gray argue that the confinement of the natural right to support to undeveloped land is incompatible with the high intensity of user of land in crowded urban areas. They assert that most common law jurisdictions have indicated that the natural right of support is now over-ripe for reversal by supreme appellate tribunals. They refer to the decision of the Singapore Court of Appeal in *Xpress Pring Pte Ltd v Monocrafts Pte Ltd and L & B Engineering (S) Pte Ltd* [2000] 3 SLR 545, which suggests that a building can enjoy a natural right of support from adjacent land; Gray and Gray *Elements of Land Law* (3<sup>rd</sup> ed Butterworths 2001) at 13-14. For further commentary on the Singapore Court of Appeal decision see Tang Hang Wu "Lateral Support of Buildings from Adjoining Land?" [2002] 66 *Conv* 237.

<sup>119</sup> *Gogarty v Hoskins* [1906] 1 IR 173.

<sup>120</sup> *Wylie Irish Land Law* (Butterworths 3<sup>rd</sup> ed 1997) paragraph 6.02.

<sup>121</sup> High Court (Kelly J) 5 March 1999. The judgment does not discuss the nature of the right of support in question as liability, and therefore, the

demolition in a “sub-standard way” of one of two semi-detached houses built as one, it was held that this constituted tortious activity on the part of the defendant, and that the plaintiffs had suffered loss and damage as a result. The plaintiffs had lost their right of support as a result of the defendant’s activity and were entitled to damages.

In the conveyance of apartments, mutual rights of support are granted and reserved by implication.<sup>122</sup> In addition, the grantee of part of an existing building acquires all rights of support necessary for the reasonable enjoyment of his part of the building and hitherto enjoyed by that part, either by implied grant,<sup>123</sup> under section 6 of the *Conveyancing Act 1881*, or under the doctrine that a grantor must not derogate from his grant. The grantor himself would have to rely on an intended easement or an easement of necessity.

Intended easements or easements of necessity differ from prescriptive easements in that they arise immediately. In other words, there is no period of vulnerability during which a right of support may not be claimed, as is the case where the owner of the dominant tenement may be prescribing for an easement. We now turn to this situation.

(ii) *Prescription*

By contrast with the situation where two buildings are built at the same time, if a landowner builds against his neighbour’s existing building or alters the use of his own building so as to increase the burden on his neighbour’s building, he may have to rely on prescription to secure his right to support of his building by his neighbour’s building.<sup>124</sup> The enjoyment of

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existence of the right was not in issue.

<sup>122</sup> The mutual rights of apartment owners are currently under consideration by the Law Reform Commission in the context of the freehold ownership of multi-unit developments.

<sup>123</sup> *Wheeldon v Burrows* (1879) 12 Ch D 31.

<sup>124</sup> The latter scenario arose in *Dalton v Angus* (1881) 6 App Cas 740. One of two adjoining houses was converted into a coach factory which threw more pressure upon the second house, and was so used for twenty years. The House of Lords held an action lay for demolishing the second house and so causing part of the factory to collapse.

support must be open, so that where a prescriptive easement of support is claimed by the owner of one of two adjoining houses against the owner of the other, it must be shown that the owner of the servient tenement knew or had means of knowing that his house was affording support to the other. Again, subject to what is said about negligence in paragraphs 5.07-5.17, until the easement has been established through twenty years of user, the neighbour can take down his building without any responsibility to shore up the adjoining house.<sup>125</sup>

### **Negligence and nuisance**<sup>126</sup>

5.07 There is a general rule that an easement cannot impose a positive duty on a servient owner. This means that a right of support can exist only as a negative right not to have the support removed without replacement, as opposed to a positive right to have the support maintained.<sup>127</sup> However, this general rule must now be considered in the light of recent developments in the law of negligence which are sketched out in paragraphs 5.08-17. (It is commonplace that legal problems do not come neatly tied up in parcels labelled “Tort”, “Contract” or “Property”). However, the preliminary point which we wish to note in this paragraph is that, while many of the early cases on support were often framed in negligence, the Supreme Court in *Carroll v Kildare County Council*<sup>128</sup> stated that it is well established that an easement of support does not depend on negligence. In other words, strict liability applies. Therefore, if there is an easement of support, even if the owner of the servient tenement exercises reasonable and proper care in the removal of a wall, it is irrelevant, since the act itself is unlawful.<sup>129</sup> But the servient owner who remains passive as his house descends into ruin by natural decay or circumstances beyond his control incurs no liability in damages by virtue of the easement. Leaving negligence aside, the only remedy which may be available to the dominant owner

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<sup>125</sup> *Kempston v Butler* (1861) 12 ICLR 516.

<sup>126</sup> See generally McMahon & Binchy *Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) Chapters 5 and 24.

<sup>127</sup> See *Gale on Easements* (15<sup>th</sup> ed Sweet & Maxwell 1986) Chapter 10.

<sup>128</sup> [1950] IR 258, 273.

<sup>129</sup> See discussion in Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 74-76.

in this situation is that of abatement arising out of the law of nuisance. This would mean that the dominant owner could enter the servient tenement and take all necessary steps to ensure the continuance of his right of support.<sup>130</sup> The abatement must be of a nuisance by which the dominant owner's easement is disturbed, and notice of the abatement is required, except where a speedy remedy is required.<sup>131</sup> Though Bland accepts without discussion that there is a right of abatement in this jurisdiction,<sup>132</sup> there appears to be a dearth of Irish authorities on the point.

5.08 The obverse side of the coin is whether an action in negligence lies irrespective of whether there is an easement. Bland suggests that "the relentless progress of *Donoghue v Stevenson*<sup>133</sup> may impact upon this area of the law."<sup>134</sup> The New South Wales Law Reform Commission takes the view that the principles laid down in *Dalton v Angus* have little relevance to the reality of modern urban conditions, and were formulated prior to the major developments in this century in the law of negligence.<sup>135</sup> Bland refers to two recent English decisions which may support the proposition that if the servient owner can reasonably foresee the damage to the dominant tenement, he is under a duty to take such steps as could reasonably be taken to prevent the damage occurring.<sup>136</sup>

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<sup>130</sup> Abatement has been described as a remedy, which the law does not favour: *Lagan Navigation Company v Lambeg Bleaching, Dyeing and Finishing Company* [1927] AC 226, 244. However, this statement has been described as too strong, as the law should not encourage litigation to deal with such trivial nuisance as overhanging branches: see *Salmond & Heuston on the Law of Torts* (21<sup>st</sup> ed 1996) at 574-575.

<sup>131</sup> *Lagan Navigation Company v Lambeg Bleaching, Dyeing and Finishing Company* [1927] AC 226, 244-246 per Lord Atkinson.

<sup>132</sup> Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 74.  
<sup>133</sup> [1932] AC 562.

<sup>134</sup> Bland *The Law of Easements and Profits à Prendre* (Round Hall 1997) at 74.

<sup>135</sup> New South Wales Law Reform Commission *The Right to Support from Adjoining Land* (NSWLRC 1997) at 3.

<sup>136</sup> *Bradburn v Lindsay* [1983] 2 All ER 408; *Leakey v National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17. The reasoning in the latter case was adopted by Buckley J in *Daly v McMullan* [1997] 2 ILRM 232. Arguments premised on negligence have also succeeded in other jurisdictions. For example, in Canada (see *Wilson v Hansen* [1969] 4 DLR (3d) 167) and New Zealand (*Bognuda v Upton & Shearer Ltd* [1972] NZLR 741), the courts recognised a general duty of care by the neighbour, and held

5.09 The first of these cases was *Leakey v National Trust for Places of Historic Interest or Natural Beauty*.<sup>137</sup> In that case, the Court of Appeal had to decide whether the law as set by the Privy Council in *Goldman v Hargrave*<sup>138</sup> was the law in England. *Goldman* did not involve rights of support, but did hold that a landowner may be held liable in negligence for damage arising from a natural hazard on his lands. The defendant was held to be negligent when a tree on his land was struck by lightning, and the resulting fire spread to his neighbour's land. It was foreseeable that the fire would spread, and the defendant did not take steps to prevent this, such as to douse the burning or smouldering sections of the tree with water. In the *Leakey* case, there was extensive spillage from a large mound onto the property of the defendants, situated at the foot of the mound. The defendant was unanimously held to be under an obligation to prevent foreseeable damage to his neighbour's premises caused by landfall. Thus, the well-established proposition that an action will not succeed where the damage has been caused by nature was not followed.<sup>139</sup> The reason for this was based on the Privy Council's review (in *Goldman*) of the development of the law which resulted in the imposition of "a general duty on occupiers in relation to hazards occurring on their land, whether natural or man-made".<sup>140</sup>

Megaw LJ also commented:

"That change in law, in its essence and in its timing, corresponds with, and may be viewed as being part of, the change in the law of tort which achieved its decisive victory in *Donoghue v Stevenson*, though it was not until eight years

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that it was possible to hold the neighbour accountable if he had conducted an excavation without due care.

<sup>137</sup> [1980] 1 All ER 17.

<sup>138</sup> [1966] 2 All ER 989, 992.

<sup>139</sup> The pleadings in the case referred only to nuisance. Megaw LJ was indifferent as to whether the case was nuisance or negligence; to have confined it to one or the other would have been "a regrettable modern instance of the forms of action successfully clanking their spectral chains": [1980] QB 485, 514. Megaw LJ's approach has been the subject of criticism: Gearty, "The Place of Private Nuisance in a Modern Law of Torts" (1989) *Camb LJ* 214, 240-241.

<sup>140</sup> [1966] 2 All ER 989, 992.

later, in the House of Lords decision in *Sedleigh-Denfield v O'Callaghan* [1940] 3 All ER 349, that the change as affecting the area with which we are concerned was expressed or recognised in a decision binding on all English courts.”<sup>141</sup>

5.10 The nature of the duty of care was described thus by Megaw LJ:

“The duty is a duty to do that which is reasonable in all the circumstances, and no more than what, if anything, is reasonable, to prevent or minimise the known risk of damage or injury to one’s neighbour or to his property.”<sup>142</sup>

Megaw J sets out in detail the considerations to be taken into account in deciding whether there has been a breach of duty. These include: the extent of the risk; the foreseeability of damage occurring; whether it is practicable to prevent, or to minimise, the happening of the damage; and the degree of difficulty of the measures which would have to be taken, and the probable cost of such works.<sup>143</sup> It is difficult to differentiate this duty from a general duty in the law of negligence to take reasonable care. Moreover, this would seem to impose a positive duty on the landowner. Yet, traditionally, the law of negligence did not impose positive, or affirmative, duties. The courts have recognised “a basic difference between doing something and merely letting something happen”.<sup>144</sup> Whilst there is no general duty to act, specific relationships may give rise to a particular affirmative duty, for example, the relationship of occupier and entrant. It appears that, in *Leakey*, the principles of negligence have been extended so as to impose an affirmative duty where the relationship of neighbouring landowners exists.<sup>145</sup>

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<sup>141</sup> [1980] 1 All ER 17, 26.

<sup>142</sup> [1980] 1 All ER 17, 35.

<sup>143</sup> *Ibid.*

<sup>144</sup> Smith and Burns ‘*Donoghue v Stevenson – The Not so Golden Anniversary*’ 46 *MLR* 147 at 154. See McMahon & Binchy *Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) at 169-170.

<sup>145</sup> One commentator, arguing for a natural right of lateral support of buildings by adjoining land, criticises negligence as a basis for liability in this context. He states that it is not difficult to foresee situations where a neighbour would have no recourse against a builder who caused damage to his building in the course of construction because negligence could not be proved against the builder. This situation, he argues, is highly undesirable as it fails to

5.11 In *Leakey*, the defendant had argued unsuccessfully that the approach in *Goldman v Hargrave* was inconsistent with the decision in *Rylands v Fletcher*,<sup>146</sup> in which the imposition of liability on a landowner for escapes from his land had been carefully limited to situations involving “non-natural use” of that land. However, Megaw LJ<sup>147</sup> rejected this argument, stating that *Rylands* was distinguishable in that it involved strict liability, and the limitations on the extent of that liability were not relevant to a situation in which the defendant had full knowledge of the dangerous condition, and was being held liable on principles akin to those of negligence. He stated:

“I find nothing in *Rylands v Fletcher*, or at least in its *ratio decidendi*, which could properly be used to justify the suggestion that the House of Lords in 1940 in *Sedleigh-Denfield* departed, consciously or unconsciously from the law as laid down in *Rylands v Fletcher* or which is inconsistent with the extension, if it be an extension, of the *Sedleigh-Denfield* decision to defects naturally arising on land which constitute nuisances and give rise to damage to the land of neighbours.”<sup>148</sup>

5.12 Liability for natural hazards was also imposed in *McMahon v Royal Borough of Kensington and Chelsea*.<sup>149</sup> In that case, the local authority was successfully sued when the plaintiff slipped and fell on pigeon droppings which regularly accumulated on the footpath in a

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acknowledge the actual insurance position of the parties. Contractors invariably take out Contractor’s All Risk/Public Liability policies so that the landowner whose neighbour’s property is injured by construction works on his land has an indemnity under the insurance policy for his contractor’s wrongdoing. See Tang Hang Wu “Lateral Support of Buildings from Adjoining Land?” (2002) *Conv* 237, 255 and 258.

<sup>146</sup> [1868] LR 3 HL 330.

<sup>147</sup> With whom Cumming-Bruce LJ agreed.

<sup>148</sup> [1980] 1 All ER 17, 31-32. The *Sedleigh-Denfield* case concerned injury to a neighbour when trespassing young boys moved boulders on the defendant’s land. Although it concerned damage cause by human rather than natural agencies, the Court of Appeal in *Leakey* said the decision had established that there could be fault-based liability upon landowners for situations which did not involve non-natural use. In *Leakey*, Shaw LJ agreed with Megaw LJ at 38-39.

<sup>149</sup> Queen’s Bench Division (Raymond Kidwell QC) 8 November 1984.

tunnel under a railway bridge. The risk of injury was foreseeable, and the defendant should have taken reasonable steps to prevent the pigeons roosting in the bridge and to keep the footpath clear of droppings. Although the principle on which the case was decided, that is, that the defendant was negligent in not taking positive steps to prevent the foreseeable injury, is similar to that in *Leakey*, the latter case was not referred to.

5.13 The decision in *Leakey* was adopted and applied in *Bradburn v Lindsay*,<sup>150</sup> which involved easements of support. The defendant in that case had neglected her house, which adjoined the plaintiff's, to such an extent that the local authority demolished the defendant's house. It was held that since the defendant should reasonably have appreciated the danger to the adjoining house from the lack of repair of her own house, and since there were steps which she could reasonably have taken to prevent the damage occurring, she owed a duty to the plaintiffs to take those steps. The defendant was not freed from liability by the existence of the right of abatement, or by the fact that the actual demolition was performed by the local authority. The dominant owner was held to be entitled to buttress support for the party wall.<sup>151</sup>

5.14 The reasoning in *Leakey* has, however, been the subject of criticism. In a strong statement of traditional principle, the English writer, Buckley stated that it blurs the distinction between nuisance and negligence.<sup>152</sup> He comments:

“In what may be regarded as the classical sphere of nuisance action, that of the mutual obligations of neighbouring landowners with respect to their properties, the common law evolved over the years a body of principle which was ‘relatively clear in its application and served in broad terms to

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<sup>150</sup> [1983] 2 All ER 408.

<sup>151</sup> *Bradburn v Lindsay* was cited in argument in *Treacy v Dublin Corporation* [1993] 1 IR 305, where decay had also led to a notice of demolition, but the plaintiff chose to proceed against the authority rather than the neighbour. The Supreme Court found against the local authority, and was silent as to the possible liability in negligence of the plaintiff's neighbour in allowing his house to fall into disrepair.

<sup>152</sup> Buckley “Liability for Natural Processes: Nuisance and Negligence?” (1980) 96 *LQR* 185.

do justice between the parties concerned' (*per* Shaw LJ [1980] 1 All ER 17 at 39)."<sup>153</sup>

Buckley emphasised the importance of certainty in matters affecting land, and stated that, while cases of nuisance necessarily do not allow the same degree of predictability as those concerning title, "it is nevertheless far from obvious that it is either necessary or desirable for the distinctive and fairly specific principles of tortious liability in this area to be dismantled in favour of the general solvent of negligence analysis".<sup>154</sup>

5.15 Notwithstanding this criticism, the English courts have continued to follow *Leakey*. Most recently, the Court of Appeal applied *Leakey* in *Rees v Skerrett*.<sup>155</sup> That case involved similar facts to *Bradburn v Lindsay*, that is, demolition of terraced property and the consequent loss of support for a party wall. Approving the decision in *Leakey*, the Court of Appeal held that, not only was there a right of support, but there was also a duty to protect a neighbour's property against weather forces.<sup>156</sup> Following the demolition of the defendant's property, there was damage to the claimant's property as a result of damp penetration. Referring to *Leakey*, the Court of Appeal said that if a landowner can be called upon to rectify problems that he has not caused, the law must surely require him to rectify those that result directly from works he has chosen to carry out. It was entirely reasonable to expect the defendant to provide

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<sup>153</sup> Buckley "Liability for Natural Processes: Nuisance and Negligence?" (1980) 96 *LQR* 185, 187. However, the New South Wales Law Reform Commission is critical of nuisance as a basis of liability, as it is an area of law which is "rife with confusion": see New South Wales Law Reform Commission *The Right to Support from Adjoining Land* (NSWLRC 1997) at 18-28. The Report recommends the abolition of the right of any person to bring a common law action in nuisance in respect of a reduction in support for any land.

<sup>154</sup> Buckley "Liability for Natural Processes: Nuisance and Negligence?" (1980) 96 *LQR* 185, 187.

<sup>155</sup> [2001] 1 WLR 1541.

<sup>156</sup> This case may be contrasted with the earlier case of *Phipps v Pears* [1965] 1 QB 76, where Lord Denning held that the claimant had no right to protection from weather damage, since this would impose an intolerable restriction upon the right of his neighbour to demolish and rebuild his own property. The Supreme Court confirmed that there was "no separate easement" of "wind or weather protection" in *Treacy v Dublin Corporation* [1983] 2 All ER 408.

weatherproofing for the dividing wall once he had caused it to be exposed. This is a further example of a positive duty being imposed on a neighbouring landowner.

5.16 When a case involving similar facts to those in *Leakey* came before Buckley J in *Daly v McMullan*,<sup>157</sup> the learned judge adopted the reasoning in *Leakey*. It was held that an occupier of land has a general duty in relation to both natural and man-made hazards occurring on his land. Where the occupier knows or ought to have known of the threatened damage to his neighbour's land, he will be liable in nuisance if he does not do what is reasonable in the circumstances to prevent or minimise the risk of the known or foreseeable damage or injury.

5.17 Therefore, the principle set out in *Leakey* is becoming well established in English law. There is also some evidence of its acceptance in Ireland. However, there appears to be a dearth of Irish cases on this point, and the principles outlined in *Leakey* are therefore not clearly established as part of Irish law. The negligence cases examined above do not, in principle, distinguish between support of a building by land and support of a building by a building. However, in practice, it must be the case that these circumstances are significant in determining what is reasonable in any particular case. Bland points out that the division between the law of property and the law of tort has become blurred.<sup>158</sup> In *Munnelly v Calcon Limited*,<sup>159</sup> a claim in negligence for the removal of support from a building was accepted as such by both the High Court and the Supreme Court. The plaintiff could have established a prescriptive easement of support, yet neither court referred to such right. The decision would therefore seem to provide authority for a plaintiff who cannot establish a prescriptive easement of support to claim in negligence.<sup>160</sup> However, taking the same line of criticism as was noted in paragraph 5.14, Bland criticises

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<sup>157</sup> [1997] 2 ILRM 232.

<sup>158</sup> Bland *The Law of Easements and Profits a Prendre* (Round Hall 1997) at 76. McMahon and Binchy also comment that the "boundaries between nuisance and negligence are crumbling at this point": McMahon and Binchy *Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) at 705.

<sup>159</sup> [1978] IR 387.

<sup>160</sup> This case illustrates how the question of support can stymie development. The property at issue in that case is in the same condition today as it was during the proceedings.

the decision, as it accepts without argument a radical departure from an established common law rule. He states that, until the Supreme Court or the Oireachtas expressly confirms the application of the law of negligence to the support of property, the absence of liability for damage caused by non-repair must be taken to remain the law. In addition, he observes that strict liability for the disturbance of a prescriptive right of support will be unlikely to survive the encroachment of negligence. The existence of an easement of support would become irrelevant.<sup>161</sup>

### **Proposed reform in other jurisdictions**

5.18 In 1966, the English Law Reform Committee recommended the introduction of an entirely new scheme based on notice and compensation, involving intervention by the Lands Tribunal in the absence of agreement, to deal with the question of the support of buildings by land and the lateral support of one building by another.<sup>162</sup> Where one landowner decided to build on his land, he would notify the landowner from whose land his building would derive support. The matter could then be disposed of by agreement, or the second landowner could serve a counter-notice of objection. In the latter case, the matter would be referred to the Lands Tribunal, which would have the power to order payment of assessed compensation if it was felt that such payment would adequately compensate the servient owner for the infringement of his property rights. There is no equivalent body to the Lands Tribunal in Ireland, so if a similar scheme were to be implemented here, the question would arise as to what body should assess compensation. One possibility is that a property arbitrator might assess compensation in such cases and an appeal could lie from his decision to the High Court.

5.19 The Law Commission of England and Wales later criticised the recommendation of the Law Reform Committee on the basis that

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<sup>161</sup> Bland *The Law of Easements and Profits a Prendre* (Round Hall 1997) at 76.

<sup>162</sup> English Law Reform Committee *Acquisition of Easements and Profits by Prescription* Fourteenth Report (1966 CMND 3100) paragraphs 86-95. Discussing the question of horizontal support of buildings by buildings, the Law Reform Committee endorsed the recommendations in the *Report of the Committee on Positive Covenants Affecting Land* that a code of minimum obligations should apply in the case of all horizontally-divided buildings.

it could lead to disputes by creating an issue between neighbouring owners of land which might never have arisen otherwise.<sup>163</sup> It is likely that an adjoining owner would seek to protect his rights by serving a counter-notice, even if he had no intention of building in the foreseeable future. The paper also observed that the basis upon which compensation is to be assessed (bearing in mind the variety of different uses to which the adjoining land might be put) could also give rise to difficulties. It was acknowledged that to give an “automatic right” to lateral support of buildings by land would give an advantage to the owner who builds first. However, the Law Commission was of the view that “[I]t seems preferable to put the burden of support on the second builder when he comes to excavate rather than to encourage disputes in anticipation of a situation which may never become an issue between the two owners”.<sup>164</sup> The Law Commission provisionally recommended that the right to support of a building by land should exist as a statutory right.<sup>165</sup>

5.20 The *Survey of Northern Ireland Land Law*<sup>166</sup> recommended a similar scheme to that proposed by the English Law Reform Committee, involving arbitration to determine the extent of precautionary measures to be undertaken by the excavating landowner, but the proposed scheme was not approved by the Northern Ireland Land Law Working Group.<sup>167</sup> The Working Group

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<sup>163</sup> Law Commission of England and Wales Published Working Paper No 36 *Appurtenant Rights* (HMSO 1971) at 29.

<sup>164</sup> *Ibid* at 29-30.

<sup>165</sup> The paper also recommended that a similar scheme to that under the *London Building Act 1939* should operate in these circumstances so that the stability of an existing building is not put in unnecessary danger. Therefore, A would serve a notice on B before he started to excavate, with plans showing the extent of the intended work; if B took no action within a specified time, A could proceed with the work. If B served counter-notice objecting to the work and the parties could not reach agreement, the dispute would have to be determined by a surveyor’s award, subject to appeal to the court. An award would be binding on A as to the way in which the work was to be done, if permitted at all; but he would still be liable to B for any damage which resulted from the operation; Law Commission Published Working Paper No 36 *Appurtenant Rights* (HMSO 1971) at 31. The Working Paper was not followed by a final Report.

<sup>166</sup> HMSO 1971.

<sup>167</sup> For criticism of the proposed scheme, see Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 135-136.

criticised the Survey's scheme on the basis that, having provided for the exchange of notices and arbitration, the Survey went on to say that the excavating owner must compensate the adjoining owner for any inconvenience, loss or damage which may result by reason of the work. This would seem to render the exchange of notices and arbitration pointless. The excavating landowner should be protected from liability to the extent that he executes agreed or awarded protective works, or where his neighbour agreed that no protective works were necessary.<sup>168</sup>

5.21 The Northern Ireland Land Law Working Group recommended that there should be an statutory right of support of buildings by land<sup>169</sup> but not of buildings by buildings; the latter would remain capable of being acquired by prescription.<sup>170</sup> The Working Group stated:

“The erection of buildings is, in present-day circumstances, a normal and reasonable use of land, and the nature of modern buildings is such that their weight must, in very many cases, be a factor involved in aggravating the stresses which follow the removal of lateral support. Owners intent on developing their own land ought to have some regard for their neighbours and the practical way of doing this is to have consultations before works are started and agreement upon any supportive works that may be necessary.”<sup>171</sup>

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<sup>168</sup> Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 135-136. The excavating owner would be liable for any consequential damage, such as where the neighbour suffers personal injury or loss of business through dust, noise etc. The Working Group suspected that the Survey's exception for loss, damage or injury related to consequential matters, but pointed out that consequential damage would be compensatable in any event, even though no express provision were made about it. The Working Group was also concerned with certain points of detail in the Survey's provision, such as who the notice should be served on, and sanctions for failure to notify: at 136.

<sup>169</sup> Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 133.

<sup>170</sup> Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 145. The question of support of buildings by buildings is currently under consideration by the Law Reform Commission in the context of freehold ownership of multi-unit developments.

<sup>171</sup> Northern Ireland Land Law Working Group *The Final Report of the Land*

The Group doubted whether any statutory provision for consultation between the neighbouring landowners was necessary. Such a provision would inevitably be complicated, because it would have to provide for a wide range of circumstances. The Group thought it was preferable to “leave it to an owner undertaking works on his land to communicate with his neighbour in such a way as he thinks best in the prevailing circumstances.”<sup>172</sup>

5.22 In relation to the right of support of buildings by buildings, the Working Group referred to the difficulties which arise when the buildings are built at different times, as opposed to where they are built at the same time where (as mentioned at paragraph 5.06) they are almost certain to enjoy either express or implied cross-easements of support. The Group did not think it reasonable to impose a blanket rule that the owner of a building has a right to insist that support for his building must not be withdrawn by an adjoining building. They did not recommend an express statutory right of support of buildings by buildings; such rights would be capable of being acquired by prescription.

5.23 The New South Wales Law Reform Commission recommended imposing a duty on an occupier or owner of land to take reasonable care that he does not do or omit to do anything to land which might cause loss or damage by removing support provided by that land to the other land.<sup>173</sup> The Commission stated that, as it had recommended that the remedy of nuisance be abolished, the duty of care should be created by statute, even though it is arguable that a duty of care would be placed by the general law on the owner or occupier of supporting land.<sup>174</sup>

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*Law Working Group* (HMSO 1990) at 133.

<sup>172</sup> Northern Ireland Land Law Working Group *The Final Report of the Land Law Working Group* (HMSO 1990) at 133.

<sup>173</sup> In relation to the support of buildings by buildings, the Commission stated that if a building is supported by a building erected on adjoining land, without a registered easement of support, the owner of the supported building would not be able to claim compensation if the supporting building is demolished, altered or not properly maintained: New South Wales Law Reform Commission *The Right to Support from Adjoining Land* (NSWLRC 1997) at 49.

<sup>174</sup> New South Wales Law Reform Commission *The Right to Support from Adjoining Land* (NSWLRC 1997) at 49.

5.24 It is notable that the application of the principles of common law tort, set out in *Leakey v National Trust* in the present context was not considered in either the English (1966) or Northern Ireland (1990) reports, as the law had not fully developed at the time of publishing, especially in the case of the English report.

### **Recommendation**

5.25 Under the traditional law, when the dominant owner decides to build on his land, he may ask the servient owner to grant him expressly a right of support of his building. The same applies where the dominant owner decides to build against his neighbour's existing house, or change the use of his own building, resulting in an increased burden on the servient tenement. In granting a right of support, the servient owner would be imposing a substantial restriction on the use he can make of his own land; it is understandable that he may not be willing to make such a grant. The dominant owner, if he wishes to secure the support he requires for his property, will have to pay his neighbour's price for the express grant.

5.26 The decisions in *Munnelly v Calcon* and *Daly v McMullan* indicate that the Irish courts may follow the line adopted in England, that is, where a servient owner could have reasonably foreseen the damage to the dominant tenement, whether arising from a natural or man-made hazard,<sup>175</sup> he is under a duty to take such steps as could reasonably be taken to prevent the damage occurring. However, this proposition has yet to be clearly established in Irish law. If it became part of our law, it would mean that, even where the dominant owner could not establish a prescriptive right of support, he would have a claim in negligence against the servient owner. This change would arguably be a very pro-dominant owner change, placing an obligation on the servient owner to repair his premises so as not to undermine the support it provides to his neighbour's property. It should be noted that, to an extent which is admittedly uncertain in the current state of flux, the interests of the dominant owner are already protected to

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<sup>175</sup> That is, whether arising from excavation of his land, demolition of his buildings or inaction in letting his buildings fall into natural decay.

some degree by the law of negligence and by the right of abatement, which he has in relation to nuisances.<sup>176</sup>

5.28 The difficulties in making recommendations in this area are substantial. First, the existing law as to negligent liability is in a state of flux. It is probably correct to say that there has been a shift from the traditional law, but how far matters have moved in a pro-plaintiff or pro-developer direction is uncertain. In particular, if one is optimistic, one might predict that, when the law settles down, it will produce a reasonable compromise<sup>177</sup> between the needs of the owner of a building and, on the other hand, the neighbouring landowner. It would be ill-advised, given the state of flux of the law, to say that it is unbalanced, and therefore needs tweaking in one or other direction. There is also the point that developments in the law of negligence are at present following a fairly expansionist legal policy, and we would prefer not to interfere with one aspect of it. To give an entirely reliable assurance to a developer that he can rely on the support of his neighbour's land (in a case in which there is no easement, whether acquired by prescription or grant) would require the kind of radical scheme which was proposed by the English Law Reform Committee thirty five years ago, and – it is worth emphasising – which is still not implemented. We do not recommend anything similar. It is true that, in some cases, there may be difficulty for developers.<sup>178</sup> However, the developer can usually secure support if he is prepared to pay his neighbour's price for an express grant. We do not think that the need to go beyond this is sufficiently strong to justify the complication and curtailment of the property rights of the neighbour that a legislative scheme would draw with it. In due course and as the law develops in the courts, a revisit and analysis of developments may well be warranted.

5.29 *The Commission has decided not to recommend, at this stage, the introduction of legislation imposing a statutory duty of care on owners of servient tenements.*

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<sup>176</sup> See paragraph 5.07 above.

<sup>177</sup> The term “reasonable” is indeed used in defining the law of negligence: see quote from judgment of Megaw J, paragraph 5.10 above.

<sup>178</sup> As was noted above at paragraph 5.17 in the context of *Munnelly v Calcon* [1978] IR 387, where the property is in the same condition today as it was twenty three years ago, during the proceedings.

## CHAPTER 6            TRANSITIONAL PROVISIONS

6.01    The changes to the law proposed in this Report involve giving some advantage to one property owner against a neighbouring property owner. Therefore, we believe that the conventional practice of making legislation only prospective in effect should be adopted here. Thus, where a dominant owner has started to prescribe for rights before the commencement of the legislation, the new legislation will not apply, so that the old law of prescription will apply, and all three modes of prescription will be available to him.

6.02    *The Commission therefore recommends that the new legislation will apply only to prescriptive claims based on prescriptive periods commencing after its enactment.*



- (1) The Commission recommends the improvement of the present law on prescription of easements and profits à prendre as opposed to abolition thereof (paragraph 2.15).
- (2) There is no reason to distinguish the acquisition of profits à prendre from the acquisition of easements. It is recommended that profits à prendre be treated in the same way as easements (paragraph 2.20).
- (3) In respect of both easements and profits à prendre, prescription at common law and under the doctrine of lost modern grant should be abolished (paragraph 2.24).
- (4) In light of the desire to simplify and clarify the law in this area, the Commission is of the opinion that there is no virtue in retaining the *Prescription Act 1832*. We therefore recommend the repeal of this Act and the *Prescription (Ireland) Act 1858*, and their replacement with new legislation, which is set out in Appendix A to this Report (paragraph 2.26).
- (5) The Commission recommends that, under the new legislation, it will be possible to acquire a profit à prendre in gross by prescription (paragraph 2.28).
- (6) The Commission recommends, subject to Recommendation 8, that there be a single prescriptive period of twelve years for both easements and profits à prendre (paragraph 3.03).
- (7) The Commission recommends that the necessary conditions for prescriptive acquisition should still be in existence at the time of the initiation of proceedings (paragraph 3.11).

- (8) In relation to State-owned land, the Commission recommends that there should be a thirty-year prescriptive period, and a sixty-year period where the said land is foreshore (paragraph 3.14).
- (9) The Commission does not recommend any alternative system to the ways which are presently open to the servient owner to mark an interruption of user (paragraph 3.19).
- (10) The Commission recommends that the provisions of section 7 of the *Prescription Act 1832* not be repeated in the new legislation. It is recommended that periods during which the servient tenement is held by a minor should not be excluded from the computation of the prescriptive period, as the parent or guardian of the minor may take action on the minor's behalf. It is recommended that where the servient tenement is held by a person who is incapable, whether at the commencement of the prescriptive period or subsequently, the computation of that period will be suspended for the period of incapacity. However, a long stop provision should apply, whereby an easement or profit à prendre will be acquired by prescription after thirty years, irrespective of when the servient owner recovers. (paragraph 3.23).
- (11) The Commission recommends that the servient owner's incompetence to make a grant should not bar a prescriptive claim. The dominant owner's incompetence to acquire an easement by grant should not prevent him from asserting a right to an easement by prescription (paragraph 3.27).
- (12) The Commission is of the view that, as the *Prescription Act 1832* is to be repealed in full, and that, as section 8 of that Act is an unnecessary complication, its provisions should not be repeated in the new legislation. (paragraph 3.29).
- (13) The Commission recommends that, in the new legislation, it should continue to be the case that one can prescribe against the owner of a limited interest. However, the easement so acquired may only attach to and last for the term of the servient owner's interest; when this expires, the dominant owner will have to prescribe afresh. In the opposite direction, the owner of a limited interest should continue to be capable

of obtaining a prescriptive easement which will enure for the benefit of the freeholder. A tenant should continue, as at present, to be able to prescribe against his landlord, and vice versa (paragraph 3.31).

- (14) The Commission recommends that, in the new legislation, there be a statutory definition of user as of right in the form of a simple statement without definitions: that is, without force, without secrecy and without permission. It should also be stated that enjoyment by written or oral consent shall not count towards the required period of enjoyment (paragraph 3.34).
- (15) The Commission recommends that it should be left open to the courts to determine whether the dominant owner is abusing the rights he has acquired by prescription (paragraph 3.37).
- (16) It is recommended that a twelve-year period of non-user should give rise to a rebuttable presumption of abandonment where the easement in question has been acquired by prescription. Where a full twelve-year period of non-user has not elapsed, positive proof of an intention to abandon, accompanied by non-user, should continue to be the requirement to establish extinguishment (paragraph 3.40).
- (17) The Commission recommends, in the interests of consistency and simplifying the law, that easements of light be treated in the same manner as all other easements; an easement of light will, therefore, be capable of being acquired by prescription in the same manner as other easements and profits à prendre (paragraph 4.03).
- (18) The Commission recommends that it should be possible to acquire a prescriptive easement of light against the State after thirty years' user as of right (paragraph 4.05).
- (19) The Commission has decided not to recommend the introduction of legislation imposing a statutory duty of care on owners of servient tenements (paragraph 5.29).

- (20) The Commission recommends that the new legislation will apply only to prescriptive claims based on prescriptive periods commencing after its enactment (paragraph 6.02).

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*Number \_\_ of 2003*

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**PRESCRIPTION BILL, 2003**

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ARRANGEMENT OF SECTIONS

Section

1. Purpose.
2. Interpretation.
3. Abolition of prescription at common law and by way of lost modern grant.
4. Acquisition of easements and profits à prendre by prescription.
5. Incapacity.
6. Extinguishment of easements and profits à prendre.
7. Period of user commencing prior to Act.
8. Court jurisdiction.
9. Repeals.

10. Guidance on interpretation.

11. Short title and commencement.

## ACTS REFERRED TO

Prescription Act, 1832	2 & 3 Will. 4 c. 71
Prescription (Ireland) Act, 1858	21 & 22 Vict. c.42



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**PRESCRIPTION BILL, 2003**

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**BILL**

*entitled*

AN ACT TO AMEND THE LAW RELATING TO THE ACQUISITION OF EASEMENTS AND PROFITS À PRENDRE BY PRESCRIPTION AND THEIR EXTINGUISHMENT, AND TO REPEAL THE PRESCRIPTION ACT, 1832, AND TO REPEAL THE PRESCRIPTION (IRELAND) ACT, 1858

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Purposes of Act

1. – The purposes of this Act are to –

- (a) repeal the Prescription Act, 1832,
- (b) repeal the Prescription (Ireland) Act, 1858
- (c) abolish the acquisition of easements and profits à prendre by prescription at common law and by way of lost modern grant,
- (d) reform and simplify the legal basis upon which easements and profits à prendre are to be acquired otherwise than by way of express grant,
- (e) reform and simplify the legal basis upon which easements and profits à prendre are to be extinguished.

2. –(1) In this Act –

“Act of 1832” means the Prescription Act, 1832;

“Act of 1858” means the Prescription (Ireland) Act, 1858;

“dominant tenant” means a person who is the holder of land or an interest therein, which land or interest is either benefited by the relevant easement or profit à prendre or in respect of which the relevant user period has commenced;

“easement” includes an easement of light and a customary right analogous to an easement;

“interruption” means interference with, or cessation of the use or the enjoyment for a continuous period of at least one year, but shall not include a suspension pursuant to *section 5 (2)* of this Act;

“limited interest” means –

- (a) an interest for the duration of a life or lives or for a period certain; or
- (b) any other interest which is not an absolute interest;

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

“non-user” means a period during which the dominant tenant does not exercise user nor have enjoyment as of right;

“profit à prendre” includes a profit à prendre in gross;

“relevant user period” means a period of user or enjoyment as of right, on the part of the dominant tenant for:–

- (a) subject to *paragraph (b)*;
  - (i) where the servient tenant is not a State authority, a minimum period of 12 years; or
  - (ii) where the servient tenant is a State authority, a minimum period of 30 years;
- (b) where the servient tenement is foreshore, a minimum period of 60 years;

provided in each case that, subject to *section 5*, the period shall be without interruption;

“servient tenant” means the holder of a servient tenement;

“servient tenement” means the land or interest therein over which an easement or profit à prendre either exists or in respect of which a relevant user period has commenced;

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

“user as of right” means user or enjoyment of the relevant easement or profit à prendre without force, secrecy or permission. User or enjoyment with the written or oral consent of the servient tenant shall not constitute user as of right.

Abolition of prescription at common law and by way of lost modern grant

**3.** – Prescription at common law and by way of the doctrine of lost modern grant are hereby abolished.

Acquisition of easements and profits à prendre by prescription

**4.** – (1) An easement or profit à prendre shall be acquired by prescription where there is a relevant user period immediately before a suit or action taken to establish or dispute such acquisition.

(2) The holder of a limited interest may obtain an easement or profit à prendre under this Act. An easement or profit à prendre so acquired will not terminate upon the termination of such limited interest but instead shall then pass to the reversioner.

(3) An easement or profit à prendre may be acquired against the holder of a limited interest. However, an easement or profit à prendre so acquired shall terminate upon the termination of such limited interest.

Incapacity

**5.** – (1) Periods during which the servient tenant is a minor shall not be excluded in computing the relevant user period.

(2) (a) Subject to *subsections (b) and (c)*, where the servient tenant is incapable of the management of his affairs because of a disease or impairment of his physical or mental condition, whether at the commencement or during the currency of the relevant user period, the computation of the relevant user period shall be suspended until the incapacity ceases.

(b) when *subsection (a)* applies, the relevant user period, in any event, will not exceed thirty years.

(c) *Subsections (a) and (b)* do not apply where the servient tenant is a State authority or where the servient tenement is foreshore.

Extinguishment of easements and profits à prendre

**6.** – An easement or profit à prendre acquired under this Act, or otherwise by prescription, shall be extinguished upon proof of abandonment by the dominant tenant; provided that a dominant tenant shall be presumed to have abandoned his easement or profit à prendre upon the expiry of a continuous period of twelve years non-user, unless he can prove to the contrary.

Act does not apply to any period of user commencing prior to commencement of the Act.	<p><b>7.</b> – (1) Subject to <i>section 7 (2)</i>, this Act shall not apply to any claim made to an easement or profit à prendre by way of prescription, in respect of a period of user alleged to have commenced prior to the commencement of this Act.</p> <p>(2) <i>Section 6</i> of this Act applies to the extinguishment of any easement or profit à prendre provided that abandonment occurs after the commencement of this Act; even if the easement or profit à prendre was established before the commencement of this Act.</p>
Court jurisdiction	<p><b>8.</b> – [This section will be in accordance with the new system of valuation and court jurisdiction currently being prepared by the Department of Justice, Equality and Law Reform]</p>
Repeals	<p><b>9.</b> – The Act of 1832 and Act of 1858 are hereby repealed.</p>
Guidance on interpretation	<p><b>10.</b> – The Law Reform Commission Report (LRC 66 - 2002) may be considered by any court when interpreting any provision of this Act and shall be given such weight as the court considers appropriate in the circumstances.</p>
Short title and commencement	<p><b>11.</b> – (1) This Act may be cited as the Prescription Act, 2003.</p> <p>(2) This Act shall come into operation on such day as the Minister may by order appoint.</p>



**APPENDIX B 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 Harbours 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 Harbours 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
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (PI 4281)	€1.27
Report on the Statute of Limitations: Claims in Respect of Latent Personal Injuries (LRC 21-1987) (September 1987)	€5.71
Consultation Paper on Rape (December 1987)	€7.62
Report on the Service of Documents Abroad re Civil Proceedings -the Hague Convention (LRC 22-1987) (December 1987)	€2.54
Report on Receiving Stolen Property (LRC 23-1987) (December 1987)	€8.89
Ninth (Annual) Report (1986-1987) (PI 5625)	€1.90
Report on Rape and Allied Offences (LRC 24-1988) (May 1988)	€3.81

Report on the Rule Against Hearsay in Civil Cases (LRC 25-1988) (September 1988)	€3.81
Report on Malicious Damage (LRC 26-1988) (September 1988)	€5.08
Report on Debt Collection: (1) The Law Relating to Sheriffs (LRC 27-1988) (October 1988)	€6.35
Tenth (Annual) Report (1988) (PI 6542)	€1.90
Report on Debt Collection: (2) Retention of Title (LRC 28-1988) (April 1989)	€5.08
Report on the Recognition of Foreign Adoption Decrees (LRC 29-1989) (June 1989)	€6.35
Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)	€6.35
Consultation Paper on Child Sexual Abuse (August 1989)	€12.70
Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)	€5.08
Eleventh (Annual) Report (1989) (PI 7448)	€1.90
Report on Child Sexual Abuse (LRC 32-1990) (September 1990)	€8.89

Report on Sexual Offences against the Mentally Handicapped (LRC 33-1990) (September 1990)	€5.08
Report on Oaths and Affirmations (LRC 34-1990) (December 1990)	€6.35
Report on Confiscation of the Proceeds of Crime (LRC 35-1991) (January 1991)	€7.62
Consultation Paper on the Civil Law of Defamation (March 1991)	€25.39
Report on the Hague Convention on Succession to the Estates of Deceased Persons (LRC 36-1991) (May 1991)	€8.89
Twelfth (Annual) Report (1990) (Pl 8292)	€1.90
Consultation Paper on Contempt of Court (July 1991)	€25.39
Consultation Paper on the Crime of Libel (August 1991)	€13.97
Report on the Indexation of Fines (LRC 37-1991) (October 1991)	€8.25
Report on the Civil Law of Defamation (LRC 38-1991) (December 1991)	€8.89
Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)	€7.62

Thirteenth (Annual) Report (1991) (PI 9214)	€2.54
Report on the Crime of Libel (LRC 41-1991) (December 1991)	€5.08
Report on United Nations (Vienna) Convention on Contracts for the International Sale of Goods 1980 (LRC 42-1992) (May 1992)	€10.16
Report on the Law Relating to Dishonesty (LRC 43-1992) (September 1992)	€25.39
Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)	€7.62
Consultation Paper on Sentencing (March 1993)	€25.39
Consultation Paper on Occupiers' Liability (June 1993)	€12.70
Fourteenth (Annual) Report (1992) (PN 0051)	€2.54
Report on Non-Fatal Offences Against The Person (LRC 45-1994) (February 1994)	€25.39
Consultation Paper on Family Courts (March 1994)	€12.70
Report on Occupiers' Liability (LRC 46-1994) (April 1994)	€7.62
Report on Contempt of Court (LRC 47-1994) (September 1994)	€12.70

Fifteenth (Annual) Report (1993) (PN 1122)	€2.54
Report on the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (LRC 48-1995) (February 1995)	€12.70
Consultation Paper on Intoxication as a Defence to a Criminal Offence (February 1995)	€12.70
Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49-1995) (April 1995)	€10.16
An Examination of the Law of Bail (LRC 50-1995) (August 1995)	€12.70
Sixteenth (Annual) Report (1994) (PN 1919)	€2.54
Report on Intoxication (LRC 51-1995) (November 1995)	€2.54
Report on Family Courts (LRC 52-1996) (March 1996)	€12.70
Seventeenth (Annual) Report (1995) (PN 2960)	€3.17
Report on Sentencing (LRC 53-1996) (August 1996)	€10.16
Consultation Paper on Privacy: Surveillance and the Interception of Communications (September 1996)	€25.39

Report on Personal Injuries (LRC 54-1996) (December 1996)	€12.70
Eighteenth (Annual) Report (1996) (PN 3760)	€7.62
Consultation Paper on the Implementation of The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (September 1997)	€12.70
Report on The Unidroit Convention on Stolen or Illegally Exported Cultural Objects (LRC 55-1997) (October 1997)	€19.05
Report on Land Law and Conveyancing Law; (6) Further General Proposals including the execution of deeds (LRC 56-1998) (May 1998)	€10.16
Consultation Paper on Aggravated, Exemplary and Restitutionary Damages (May 1998)	€19.05
Nineteenth (Annual) Report (1997) (PN 6218)	€3.81
Report on Privacy: Surveillance and the Interception of Communications (LRC 57-1998) (June 1998)	€25.39
Report on the Implementation of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993 (LRC 58-1998) (June 1998)	€12.70
Consultation Paper on the Statutes of	

Limitation: Claims in Contract and Tort in Respect of Latent Damage (Other Than Personal Injury) (November 1998)	€6.35
Twentieth (Annual) Report (1998) (PN 7471)	€3.81
Consultation Paper on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC CP14-1999) (July 1999)	€7.62
Consultation Paper on Section 2 of the Civil Liability ( <i>Amendment</i> ) Act, 1964: <i>The Deductibility of Collateral Benefits from Awards of Damages</i> (LRC CP15-1999) (August 1999)	€9.52
Report on Gazumping (LRC 59-1999) (October 1999)	€6.35
Twenty First (Annual) Report (1999) (PN 8643)	€3.81
Report on Aggravated, Exemplary and Restitutionary Damages (LRC 60-2000) (August 2000)	€7.62
Second Programme for examination of certain branches of the law with a view to their reform: 2000-2007 (PN 9459) (December 2000)	€6.35
Consultation Paper on the Law of Limitation of Actions arising from Non-Sexual Abuse Of Children (LRC CP16-2000) (September 2000)	€7.62

Report on Statutory Drafting and Interpretation: <i>Plain Language and the Law</i> (LRC 61-2000) (December 2000)	€7.62
Report on the Rule against Perpetuities and Cognate Rules (LRC 62-2000) (December 2000)	€10.16
Report on the Variation of Trusts (LRC 63-2000) (December 2000)	€7.62
Report on The Statutes of Limitations: Claims in Contract and Tort in Respect of Latent Damage (Other than Personal Injury) (LRC 64-2001) (March 2001)	€7.62
Consultation Paper on Homicide: The Mental Element in Murder (LRC CP17-2001) (March 2001)	€6.35
Seminar on Consultation Paper: Homicide: The Mental Element in Murder (LRC SP 1-2001)	
Twenty Second (Annual) Report (2000) (PN 10629)	€3.81
Consultation Paper on Penalties for Minor Offences (LRC CP18-2002) (March 2002)	€5.00
Consultation Paper on Prosecution Appeals in Cases brought on Indictment (LRC CP19-2002) (May 2002)	€6.00
Report on the Indexation of Fines: A Review of Developments (LRC 65-2002) (July 2002)	€5.00

Twenty Third (Annual) Report (2001)  
(PN 11964)

€5.00