



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

REPORT

ON

TITLE BY ADVERSE POSSESSION OF LAND

(LRC 67 - 2002)

IRELAND

The Law Reform Commission

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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 five 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.

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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 is most grateful to Margaret O'Driscoll, Barrister-at-Law, who drafted the draft Bill which is appended to this Report. Ms O'Driscoll is a former member of the Office of the Parliamentary Counsel to the Government. Full responsibility for this Report and draft legislation, however, lies with the Commission.

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INTRODUCTION

1 Adverse possession of land is the foundation upon which acquisition of title to land by possession is based. In this Report, the Commission is concerned, not with a wide survey of the law relating to adverse possession,¹ but with a narrowly focussed, historically deep-rooted problem – that is to say, the precise nature of the title acquired by a squatter to lands at the expiry of the limitation period.

2 This is particularly important in the case of a squatter to leasehold lands. While, upon expiry of the limitation period, the squatter displaces the original tenant, his position as regards the landlord is in need of clarification. The squatter is liable for forfeiture at any time for breach of covenant, and has no right to information about the terms of the lease. A large proportion of land in Ireland is held under long leases and a discrepancy appears between a squatter on such land and a squatter on freehold land.

3 In this Report, we attempt to supply an answer to this question by recommending the oft-discussed solution that the squatter should be given a parliamentary conveyance on the passing of the requisite period of limitation.

¹ The general law relating to adverse possession has recently been the subject of a thorough and authoritative statement by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2002] 3 All ER 865. Although it should also be noted that the law relating to adverse possession of registered land has recently undergone fundamental alteration in England and Wales due to the provisions of the *Land Registration Act 2002*.

CHAPTER 1 ADVERSE POSSESSION OF LAND: THE NEED FOR REFORM

Historical Introduction

1.01 Outside the field of title to land (especially leasehold land), pursuant to the *Statute of Limitations 1957*, the expiry of a period of limitation usually has the uncomplicated effect of providing a defence to a cause of action. However, this cannot be said, without more, of its operation in respect of titles to land. The *Statute of Limitations 1957* provides a defence to an action to recover possession of land, and since the ownership of land is based on possession, the deceptively simple question arises: if possession cannot be recovered, what effect does the Statute have on the ownership of the land? In particular, what is the status of “the squatter”? We should alert the reader that, for convenience, the term “squatter” (with no pejorative connotations) is used throughout this Report in the rather unusual sense of a person who has been in adverse possession of land for in excess of the period of limitation, unless the context indicates otherwise. This term is not used to refer to a person who has been in adverse possession for less than the period of limitation.

1.02 Section 24 of the Statute provides that “at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.” The precise effect of this provision, and of its predecessor, section 34 of the *Real Property Limitation Act 1833*² was not initially clear.

² 3 & 4 Will 4 (1833) c 27. Section 24 of the 1957 Act repeats the language used in section 34 of the 1833 Act which provided: “At the determination of the period limited by this Act to any person making an entry or distress, or bringing any writ of *quaere impedit* or other action or suit, the right and title of such person to the land, rent or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.”

1.03 In reliance on various *dicta* in cases such as *Scott v Nixon*,³ *Doe v Sumner*⁴ and *The Incorporated Society v Richards*,⁵ it was initially thought that these sections had the effect of conveying the estate or interest of the dispossessed owner to the squatter, in other words, a parliamentary conveyance. However, these cases concerned the effect of the 1833 Act on a freehold estate and, where a freehold is involved, there is no doubt that, whatever may be the effect of the Limitation Acts, the squatter acquires a title which is as good as a conveyance of the freehold.

1.04 The effect of the Limitation Acts on a leasehold estate was considered for the first time in Ireland in *Rankin v M'Murtry*.⁶ Of the judgments given by the Irish Court of Appeal in that case, Holmes and Gibson JJ were of the view that the leasehold estate had been vested in the person in possession,⁷ while O'Brien J based his decision on estoppel.⁸ Johnston J thought that the title gained by possession would be commensurate with the interests which the rightful owner had lost by operation of the statute, and would have the same legal character, though he, too, seems to have been satisfied that

³ (1843) 3 Dr & War 388.

⁴ (1845) 14 M & W 39.

⁵ (1841) 1 Dr & War 258.

⁶ (1889) 24 LR Ir 290.

⁷ See Holmes J *ibid* at 301 who stated that “the estate and interest, the right to which is extinguished, so far as the original owner is concerned, became vested in the person whose possession has caused such extinction,” although he was unhappy with the term “parliamentary conveyance.” Gibson J is more ambiguous in his reasoning, stating that “[t]he statute does not extinguish the term: it only extinguishes the right of the party dispossessed.... I think it must be taken that the defendants, assuming the statutory bar has arisen, have in some way, whether by statutory estoppel, transfer, or otherwise, become owners of the lease.” (At 303-304.)

⁸ The term “estoppel” is not used, but O'Brien J states that the plaintiff landlord had, by his own course of action, treated the defendant as his tenant as if she had taken out letters of administration to her deceased husband's estate, and that it was not open to him, when the lease expired, to object that the defendant did not have the character of tenant *ibid* at 296.

the landlord was estopped from denying that the squatter was tenant of the lands.⁹

Decline of the doctrine of parliamentary conveyance

1.05 The matter was addressed in the clearest possible terms in 1892 in *Tichborne v Weir*.¹⁰ Here, the issue which arose for consideration by the English Court of Appeal was whether a landlord, having accepted rent from the defendant who had entered into possession of the demised premises, could sue the defendant on foot of the covenant to repair in the lease. The Court unanimously held that “the effect of the statute is not only to bar the remedy, but also to extinguish the title of the person out of possession and in that sense the person in possession holds by virtue of the Act, but not by a fiction of a transfer of title.”¹¹ Each of the learned judges was of the opinion that the *dicta* in *Doe v Sumner* and in *Incorporated Society v Richards* did not support the idea of parliamentary conveyance, and that, in any event, those decisions dealt with freehold estates where the matter did not carry the same significance.

1.06 As far as Irish law was concerned, this decision naturally caused confusion, appearing as it did to contradict the Irish Court of Appeal. In addition, the prevalence of long leases in Ireland meant that the rejection of the doctrine of parliamentary conveyance had more significance, and indeed more adverse consequences in this country. Indeed, the practical difficulties, which we outline below,¹² had weighed on the mind of Holmes J in *Rankin v M’Murtry*.¹³

1.07 Some years later, the Irish Court of Appeal returned to the matter, albeit *obiter*, in *O’Connor v Foley*.¹⁴ Fitzgibbon LJ stated:-

⁹ *Ibid* 297-298.

¹⁰ (1892) 67 LT (NS) 735.

¹¹ *Ibid* 737 *per* Bowen LJ.

¹² See paragraph 1.12.

¹³ *Op cit* fn 5 at 301.

¹⁴ [1906] 1 IR 20.

“I do not question the authority of *Tichborne v Weir*. It is the decision of three eminent Judges on Appeal; it appears never to have been questioned in any text-book or subsequent case, and I respectfully say that it appears to me to be right. But, in my opinion, its effect extends only to liability *in contract*, and it does not affect the case now before us. It appears to me to decide only this - that the Statute of Limitations operates by way of extinguishment, and not by way of assignment of the estate, which is barred; and that the person who becomes entitled to a leasehold interest by adverse possession for the prescribed period is not liable to be sued *in covenant as assignee* of the lease, unless he has estopped himself from denying that he is assignee.”¹⁵

1.08 Although this passage is *obiter*, it clearly signals that the position of the squatter as against the landlord might not be as easily explained as his position as against the tenant. The precarious nature of a person holding leasehold land on foot of the Statute of Limitations first became apparent in *Ashe v Hogan*.¹⁶ Here, the Irish Court of Appeal held that the position of a squatter on leasehold land was dubious enough for a possessory title not to be forced on a purchaser.

The decision in *Perry v Woodfarm Homes Ltd*

1.09 It was not until the relatively recent decision in *Perry v Woodfarm Homes Ltd*¹⁷ that the status of a squatter on leasehold land was more fully explored. The case was one of encroachment, and no question of estoppel – a concept which had formed a convenient alternative basis for the decisions in *Rankin v M’Murtry* and *O’Connor v Foley* – arose on the facts. It was somewhat inevitable that the case would arise in the way it did, since the House of Lords had determined in 1962 in *St Marylebone Property Co Ltd v*

¹⁵ [1906] 1 IR 20 at 26.

¹⁶ [1920] 1 IR 159.

¹⁷ [1975] IR 104.

*Fairweather*¹⁸ that the effect of both section 34 of the *Real Property Limitation Act 1833* and section 16 of the *Limitation Act 1939*, which was in similar terms, was that a tenant who had been dispossessed still retained the leasehold estate which he could then surrender to his landlord, thereby allowing the landlord to recover possession. Lord Morris had dissented strongly on the basis that such a result would contravene the principle of *nemo dat quod non habet*, and the decision has been subject to cogent academic criticism¹⁹ as nullifying the operation of the Statute of Limitations.

1.10 The defendant in *Perry v Woodfarm Homes Ltd*, presumably in reliance on the decision in *Fairweather*, had taken an assignment of the leasehold interest from the dispossessed tenant of lands. The title of the tenant had been barred by the acts of adverse possession of the plaintiff. On subsequently acquiring the freehold title, the defendant alleged that it was entitled to re-enter as freeholder, claiming that its paper leasehold title had merged in the freehold so as to give it the right to immediate possession by virtue of its freehold estate. However, a majority of the Supreme Court preferred the reasoning of the dissenting judge in *Fairweather*, and held that the title of the lessee to the leasehold estate had been extinguished, and could not therefore be transferred to the freeholder.²⁰ The result of the decision was to affirm the view of the Irish Court of Appeal in *Ash v Hogan*²¹ to the effect that the squatter obtains not the leasehold estate itself but the right to hold possession of the lands during the residue of the term of the lease. Accordingly, this remained as an encumbrance upon the freehold and prevented the freeholder from repossessing the lands during the continuance of the lease.²²

1.11 The judgments also set out the position of the landlord. It is clear from the *Statute of Limitations 1957* itself that the rights of the landlord are not affected by the dispossession of his tenant. His rights during the currency of a fixed term lease, which include the right to

¹⁸ [1963] AC 510.

¹⁹ See Wade “Landlord, Tenant and Squatter” (1962) 78 *LQR* 541-559.

²⁰ Walsh and Griffin JJ, Henchy J dissenting.

²¹ *Op cit* fn 15.

²² *Per* Walsh J at 119.

enforce the covenants and to forfeit for any breach, do not fall within the ambit of an “action to recover land.” Consequently, they are not affected by expiry of the limitation period under section 13. In *Perry*, the Supreme Court confirmed this, ruling that the landlord is still in a position to enforce breaches of covenant against his tenant, and that he may forfeit for breaches of covenant.²³

The need for reform

1.12 While the decision in *Perry* affords some security to a squatter in leasehold land, in that he is not subject to the sort of collusive action between landlord and ousted tenant which succeeded in *Fairweather*, his position remains precarious, and his title would not be forced on an unwilling purchaser. The reason for this is that he is liable for forfeiture at any time for breach of covenant on the part of the ousted tenant. He may seek to protect himself by offering to pay rent, or remedy other breaches, but, crucially, the landlord is not required to accept this offer. In addition, the squatter has no right to information about the terms of the lease. Thus, he can take no preventative steps, since he is probably not aware of the covenants in the lease, nor can he satisfy a purchaser that forfeiture is not imminent. Relief against forfeiture not being available,²⁴ the squatter’s only defence against such action would be the possibility of an estoppel against his landlord.²⁵ In short, while the position of the squatter in Irish law is not as unsatisfactory as that in English law, in its present form it undermines a number of titles, and reform is an urgent practical need attested to by several experienced practitioners.

1.13 The insecurities to which a squatter on leasehold land is subject are unsatisfactory for a number of reasons. First, a large part of urban land is held under long leases. Many of these leases are for a term as long as 999 years, and the discrepancy between a squatter on land held under such a lease and a squatter on freehold land could hardly be said to be a credit to the law. Secondly, many leases would

²³ *Per* Walsh J at 119-120; *per* Griffin J at 130.

²⁴ *Tickner v Buzzacot* [1965] Ch 426.

²⁵ *O’Connor v Foley* [1906] 1 IR 20.

be such as to entitle the tenant to acquire the fee simple under the provisions of the *Landlord and Tenant (Ground Rents) Acts 1967-1978*, but a squatter on leasehold land does not succeed to the rights of such a tenant, since he does not acquire the leasehold estate. The decision in *Perry v Woodfarm Homes Ltd* therefore has the effect that the legislative policy of enfranchisement has been, to some extent, frustrated. Thirdly, the decision renders the title unmarketable, thereby reducing the quantity of land available for development, as well as leaving present occupiers in a position of uncertainty.

1.14 At this point, we must consider the moral argument against lifting a hand to improve the position of the squatter in any way. Put briefly, this is founded on the notion that he is a land-thief. At first glance, this might seem to be a strong argument against conferring further legal rights on a squatter. However, we think that this argument does not stand up to scrutiny since, in the experience of the Working Group, squatters usually fall into one of the following categories:

- (i) a family member holding adverse to the interests of other family members, often under an intestacy. Sometimes, though not always, the person in adverse possession is the person whom the testator and/or the next of kin tacitly regard as being morally entitled to the lands;
- (ii) a person who has encroached on neighbouring land - which sometimes occurs inadvertently due to the inadequacy of maps, particularly in old deeds, although, of course, it may occur less accidentally and less justifiably;
- (iii) a person who has a defective paper title (*eg* by virtue of a conveyance's failure to employ adequate words of limitation), and the defect is one which it is impossible or impracticable to rectify;
- (iv) a person who has taken possession of land which has been effectively abandoned.

The deliberate "taking" of land is rare. Indeed, the impression to be derived from the case law, at least, is that the deliberate entry into possession of the land of another appears to arise mainly where a person enters into possession of publicly owned and/or abandoned

land, such as the unused land of a local authority. In any event, a landowner's rights are not disturbed, save by acts of adverse possession for a period of 12 years (though the period may extend for up to 30 years in certain circumstances). Possession for a shorter duration does not confer any rights on the trespasser. We emphasise that most aspects of the law on adverse possession, such as the sufficiency of the acts of the possession and the length of the limitation period are not considered here and will not be altered by our proposals.

1.15 Moreover, there is a significant positive countervailing policy. Our objective, which is also that of the present law, is to quiet titles. And this objective is founded not merely on the purpose of assisting the squatter, but more on the wider policy of serving the public interest by lifting the curse of dubious title which at present sterilizes land held by a squatter, however long-established his occupation. Our recommendation is designed to meet this objective by ensuring that the squatter should, at the end of the limitation period, be given a viable and merchantable title. Bearing in mind the entitlement of the landlord, the best way in which this can be done is to put the squatter in the same position as the paper tenant to whom the landlord has agreed to let the land. *In short, we recommend the introduction, by statute, of a parliamentary conveyance.*

1.16 The introduction of parliamentary conveyance would not have anything like as much practical effect where the estate extinguished is freehold rather than leasehold; since the legal effect given to the action of the squatter is to bar the owner of the freehold estate. The squatter, therefore, will be able to defeat any other claim to the land by virtue of his possession of it. Generally, there is no risk of forfeiture in the case of a freehold estate, and the insecurities outlined above at paragraph 1.12 would not arise. However, there is some doubt as to the quality of possessory title to lands held under a fee farm grant.²⁶ Reform of the law in relation to leasehold estates only would not remove these doubts, as well as creating further difficulties by requiring particular fee farm grants to be characterized as either leasehold or freehold. In addition, we think that, as a matter of

²⁶ See the *dictum* of Keane J (as he then was) in *Mohan v Roche* [1991] 1 IR 560, 568 where he commented that "there are clearly serious difficulties in holding that a vendor is entitled to insist upon a purchaser accepting such a title where he has contracted for a documentary title."

principle, acts of adverse possession should have the same effect on all types of estate. Accordingly, we shall be proposing the same sort of reform for freehold as for leasehold land.

1.17 We also emphasise that there should be no distinction in law between the position of a squatter on registered land and one on unregistered land. In England, a squatter on registered land is effectively entitled to parliamentary conveyance by virtue of the provisions of section 75 of the *Land Registration Act 1925*, which provides that the paper owner holds land in trust for the squatter until the squatter is registered.²⁷ This has led to substantial differences between the rights of squatters against leasehold property, depending on whether the land is registered or unregistered. Such a difference in treatment is, we think, difficult to justify.

1.18 In Ireland, section 49 of the *Registration of Title Act 1964* simply applies the *Statute of Limitations 1957* to registered land,²⁸ thereby suggesting that there is no substantial difference in the

²⁷ In *Spectrum Investment v Holmes* [1981] 1 WLR 221, it was held that a dispossessed tenant of registered land could not surrender her lease (as had the tenant in *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510) since the squatter had become registered with ownership of the lease. The High Court (Browne-Wilkinson J) confirmed that the interest to which the squatter became entitled to be registered was the dispossessed tenant's lease itself. In *Central London Estates Ltd v Kato Ltd* [1998] 4 All ER 948, 959 where the squatter had not yet become registered as proprietor of the lease, Sedley J confirmed that the squatter "becomes entitled, without regard to merits, to be placed in the same relationship with the freeholder as had previously been enjoyed by the leaseholder.... This is to all appearances a statutory conveyance of the entire leasehold interest."

²⁸ Proposals for reform in England have recommended provisions which would be equivalent to the provisions of our *Registration of Title Act 1964*. Section 72 of the 1964 Act provides that the interest of a person who is in the course of acquiring rights by virtue of the provisions of the *Statute of Limitation 1957* is an overriding interest. Referring to the English law, Charles Harpum states: "[I]t is unclear why the use of the trust was ever thought to be necessary. The principles of adverse possession could have been applied to registered land just by conferring overriding status on squatters' rights - which is done by section 70(1)(f) and would, in any event, have come about in most cases under section 70(1)(g) (rights of persons in actual occupation). In fact, in their recent Consultative Document *Land Registration for the Twenty-First Century* (Law Commission 1998) the Law Commission and HM Land Registry provisionally suggested reform along those lines." see (1999) 115 *LQR* 187-191.

operation of the Statute in relation to registered and unregistered land. Nevertheless, the squatter on registered land is in a superior position in this jurisdiction also. The *obiter dicta* of Walsh J in *Perry v Woodfarm Homes Ltd*²⁹ suggest that a squatter against registered leasehold land can apply to be registered in place of the registered owner. It is notable that these comments vindicated the practice of the Land Registry, which was, and remains, that where a person has barred the right to possession of the registered owner, he will be registered with absolute title to the existing leasehold interest, thereby in effect giving such a squatter the advantage of parliamentary conveyance. The practice of the Land Registry is based on the interpretation of the word “title” in section 49 as referring to the particular ownership or claim of the registered owner rather than an “estate” or “interest,” and this practice had been in place since the enactment of the *Registration of Title Act 1891*.³⁰ It is possible that this Act provided for registration of the squatter in place of the registered owner on the assumption that the *Real Property Limitation Act 1833* effected a parliamentary conveyance. However, the position of the Land Registry is supported by the interpretation of the *Statute of Limitations 1957*, which was applied in *Perry v Woodfarm Homes Limited*³¹ as well as by the provisions of section 49(2) of the *Registration of Title Act 1964*, which clearly contemplate the registration of the squatter as registered owner of a leasehold estate in place of the dispossessed registered owner.³²

1.19 This matter will now be clarified if, as we propose, parliamentary conveyance is introduced.³³ In making

²⁹ [1975] IR 104 at 120.

³⁰ See also the judgment of Walsh J [1975] IR 104, 119 where he states: “the effect of the Statute is to destroy the title of the person dispossessed to the estate from which he has been dispossessed, but it does not destroy the estate itself.”

³¹ A recent analysis of the operation of the Limitation Acts in England tends to support this view: see Curwen, ‘The Squatter’s Interest at Common Law’ [2000] *Conv* 528.

³² See Walsh J in *Perry v Woodfarm Homes supra* at 120-121.

³³ This is also, broadly speaking, the solution proposed as “the one which makes most sense” in an excellent, recent survey: Woods, ‘Adverse Possession of unregistered Leasehold Land’ (2001) *Irish Jurist* 304, 317.

recommendations as to the introduction and implementation of this concept, we shall follow the policy view that there should be no distinction between the position of a squatter against registered land and a squatter against unregistered land, and the principle of parliamentary conveyance should be introduced in such a way that the *Registration of Title Act 1964* should mirror the *Statute of Limitations 1957*.

The basic provisions

2.01 We turn next to consider how best the policy of giving the squatter a parliamentary conveyance can be accommodated in the existing legislative framework. The law on adverse possession of land is contained in two distinct legislative codes, according to whether it is registered or unregistered.

(a) *Unregistered land*

2.02 In rejecting the notion that parliamentary conveyance was part of the law in Ireland in *Perry v Woodfarm Homes Ltd*, the Supreme Court based its reasoning on the wording of section 24 of the *Statute of Limitations 1957* which provides:-

“Subject to section 25 of this Act and to section 49 of the *Registration of Title Act 1964* at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall be extinguished.”

It was the word “extinguished,” in particular, which influenced the Court to reject the notion of parliamentary conveyance.³⁴

2.03 We believe that a vesting provision drafted in simple terms so as to cover all estates or interests in land should be introduced, and we recommend that section 24 be replaced by the following draft:-

“Subject to section 25 of this Act and to section 49 of the *Registration of Title Act 1964* at the expiration of the period fixed by this Act for any person to bring an action to recover

³⁴ See the discussion of *Perry v Woodfarm Homes Ltd* [1975] IR 104 at paragraphs 1.09-1.11.

land, the title of that person to the land shall vest in the person in adverse possession.”

(b) Registered land

2.04 The present law on possession adverse to the title of a registered owner is contained in section 49 of the *Registration of Title Act 1964* which provides:-

“(1) Subject to the provisions of this section, the *Statute of Limitations 1957* shall apply to registered land as it applies to unregistered land.

(2) Where any person claims to have acquired a title by possession to registered land, he may apply to the Registrar to be registered as owner of the land and the Registrar, if satisfied that the applicant has acquired the title, may cause the applicant to be registered as owner of the land with an absolute, good leasehold, possessory or qualified title, as the case may require, but without prejudice to any right extinguished by such possession.

(3) Upon such registration, the title of the person whose right of action to recover the land has expired shall be extinguished....”

2.05 *We recommend that this section be amended by removing the concept of mere extinguishment from section 49(3). This would have the effect that any change to the Statute of Limitations 1957 would remedy the position in relation to registered land as well as unregistered land. We recommend that section 49(2) and (3) be replaced by the following draft:-*

“(2) Where any person claims to have acquired a title by possession to registered land, he may apply to the Registrar to be registered as owner of the land and the Registrar, if satisfied that the applicant has acquired the title, may cause the applicant to be registered as owner of the land with an absolute, good leasehold, possessory or qualified title, as the case may require, but without prejudice to any right not vested in the applicant by such possession.

(3) Upon such registration, the title of the person whose right of action to recover the land has expired shall be vested in the person making the application referred to in subsection (2) of this section.”

(c) Appurtenant rights

2.06 In order to honour the basic objective (set out at paragraph 1.15) of establishing a marketable plot in the hands of the squatter, we have to allow for the transfer not only of the lands which are vested in the squatter by virtue of parliamentary conveyance, but also any appurtenant rights. At present, when land is conveyed or transferred, section 6 of the *Conveyancing Act 1881* operates to transfer all appurtenant rights with the land. Provision should be made for an equivalent section, to apply to the vesting of the paper owner’s title in the squatter.

2.07 *We recommend that the following form of words be adopted:-*

“The provisions of section 6 of the Conveyancing Act 1881 shall apply to a vesting under section 24 of the Statute of Limitations 1957 or section 49 of the Registration of Title Act 1964, as if such vesting had been effected by means of a conveyance.”

2.08 It should be noted that the effect of section 6 of the *Conveyancing Act 1881*, and therefore of this proposed subsection, is only to convey existing appurtenant rights. The creation of new appurtenant rights by acts of prescription are dealt with under the common law and the *Prescription Act 1832* – the reform of which is the subject of a Law Reform Commission Report.³⁵

³⁵ Law Reform Commission *Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66 - 2002).

CHAPTER 3 IMPLEMENTING PARLIAMENTARY CONVEYANCE

3.01 Where the title vested in the squatter is an unencumbered freehold estate, the vesting section recommended above should not require any ancillary provisions. However, where the estate which has been vested in the squatter is a leasehold estate, various ancillary issues arise.

Identification of the terms of the lease

Where there is evidence that the estate acquired is leasehold

3.02 We have already identified the consequences of the current state of the law for those squatters who acquire leasehold interests.³⁶ Without a provision for parliamentary conveyance, the squatter does not hold under a lease, is not bound by the covenants in the lease, and is not entitled to claim relief against forfeiture. If parliamentary conveyance were introduced without more, a lesser version of this evil might survive, in that a squatter might inadvertently breach covenants in the leasehold interest which he has acquired because he has no copy of the lease, although, presumably, after the introduction of parliamentary conveyance in the form of the vesting provision already proposed, he would be entitled to relief against forfeiture.

3.03 Secondly, on an assignment, the squatter would not be able to provide evidence of the covenants in the lease, or evidence of his compliance with them, so as to satisfy a purchaser. Thus, he could not make good title.

3.04 To remedy these difficulties, where a person in adverse possession is aware that he has become vested with a leasehold interest, he should be entitled to a copy of the lease in order to

³⁶ See above paragraph 1.12.

establish his rights and obligations *vis-a-vis* the landlord. For, while it is true that a landlord would have to produce the lease in order to prosecute proceedings successfully, this would be rather late in the day. In any case, the new tenant will require a copy of the lease if he is to sell his interest, or protect himself against breach of covenant and the possibility of proceedings.

3.05 *To remedy these difficulties, we recommend that a provision, modelled on section 7 of the Landlord and Tenant (Ground Rents) Act 1967 and on section 84 of the Landlord and Tenant Act 1980 be introduced to enable the new tenant to serve a notice on his landlord requiring the landlord to furnish him with a copy of the lease, and allowing him to apply to the Circuit Court to compel production of the lease if the landlord does not comply with the notice.*

3.06 The recommendation in the previous paragraph assumes that the identity of the landlord is known. *Where the identity of the current landlord is not known, we recommend that a notice procedure reflecting the practice applied in acquiring the fee simple, pursuant to the Landlord and Tenant (Ground Rents) Act 1967 be introduced.*³⁷ This would allow the new tenant to serve the notice by way of advertisement requiring the current landlord to come forward and to furnish evidence of the covenants in the lease. The legal effect of service of such a notice would be to give the new tenant a temporary immunity from forfeiture for breach of covenant or failure to pay rent. In order to give security to the squatter, this immunity would have to survive until he has had a chance to comply with the covenants in the lease. *We recommend that service or advertisement of such a notice would prevent a landlord from bringing any action on foot of the lease until three months from service of a copy of the lease, together with prescribed information, that is, the name and address of the landlord, on the tenant.*

³⁷ Section 4 of the 1967 Act provides that a person who proposes to acquire the fee simple in land shall serve a notice in the prescribed form upon various persons if they can be found and ascertained. Where this cannot be done, it is sometimes the practice that an advertisement in a form similar to the notice is placed in the Gazette of the Law Society of Ireland or in a national daily newspaper. See also section 69 of the *Landlord and Tenant (Amendment) Act 1980*.

Where there is no evidence of the title acquired

3.07 However, where there was never any evidence at all of the nature of the title acquired, the squatter's position is better, in that, under the present law, the long-established common law presumption of freehold acquisition means that the squatter acquires a freehold unless he can be defeated by a claimant proving a better title.³⁸ The provision for an application for registration based on long possession, Rule 17 of the *Registration of Title Rules 1972*,³⁹ is but an application of these general principles, and can be used by a squatter who has no knowledge of the title which he has acquired. Despite this, the Northern Ireland Land Law Working Group, in its final report,⁴⁰ expressed some disquiet about the use of such a procedure by a squatter, since the application for registration requires the squatter to aver that he has acquired the fee simple. The Northern Ireland Group suggested that it might not be possible for a squatter to aver to the fact that he has acquired the fee simple.⁴¹ In order to cure this, they suggest that:

“there should be an assumption that a squatter who cannot show what title he has obtained by parliamentary conveyance has obtained a fee simple. We do not suggest that this should amount to a legal presumption, because that would be in conflict with the statutory provision by virtue of which a parliamentary conveyance operates. What we are suggesting is that a squatter who does not know what title he has acquired

³⁸ See *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 at 9 where Cozens-Hardy MR states: “[W]henever you find a person in possession of property that possession is *prima facie* evidence of ownership in fee, and that *prima facie* evidence becomes absolute once you have extinguished the right of every other person to challenge it.”

³⁹ Rule 17 provides: “Where an application for registration of ownership of freehold or leasehold property is based on possession, or where the applicant has no documents of title in his possession or under his control in relation to such property, and the Registrar is satisfied on inquiry or otherwise that the applicant is in possession or in receipt of the rents and profits of the property, the application may be made in Form 5, with such modifications therein as the case may require.”

⁴⁰ *Final Report of the Land Law Working Group* Vol I (HMSO 1990) 190.

⁴¹ *Ibid.*

by parliamentary conveyance should be given an express statutory power to apply to the Registrar of Titles for registration of a possessory fee simple and that the Registrar should have power so to register him in the knowledge that the title registered may or may not correspond with the facts.”⁴²

3.08 However, we think that the doctrine of parliamentary conveyance should not and does not affect the power of the Registrar of Titles to register someone in long possession with freehold title and, thus, we do not share the concerns expressed in the above quotation. The legal position that a squatter is presumed to have taken the freehold is based on the idea of possession, and the fundamental notion in land law of the relative rights of property owners. Having taken possession, it is for any other person to prove that they have a better right to the property. If no one has emerged to do this, then the Registrar is justified in registering with freehold title. A presumption that the fee simple has been acquired is a matter of evidence, rather than a substantive rule of law. In other words, it does not extinguish any rights, since the actual freeholder may step forward to prove his title.

3.09 The concern in relation to the averments to be made by the applicant, it is suggested, does not arise, since the applicant may aver that he has been unable to ascertain the title, and has been advised that, in the circumstances, he is regarded in law as having acquired a freehold possessory title.

Where there is uncertainty as to the nature of the title acquired

3.10 However, we have identified a particular problem which might arise where searches by the squatter disclose that the property was at one time held under a lease, but do not disclose whether this lease has expired. This is possible since a Memorial which is registered in the Registry of Deeds will disclose the existence of a lease, but will not disclose the covenants. Neither will it disclose the rent, containing instead a clause such as “subject to the annual rent thereby reserved and to the covenants and conditions therein contained.” Most important of all, it may not disclose the term of the lease, so that the squatter cannot know at what stage he has entered

⁴² *Final Report of the Land Law Working Group* Vol I (HMSO 1990) 190 at 191.

into possession against the owner of the superior lessor. Knowledge of the term of a lease is crucial, for the right of action of a superior landlord (the owner of the interest expectant on the determination of the lease) does not accrue until his interest falls into possession by the determination of any inferior lease.⁴³

3.11 In Northern Ireland, *The Final Report of the Land Law Working Group* recommendation was as follows: if the squatter did not know with certainty whether the documentary title to land adversely possessed by him was freehold or leasehold, he should be able to apply for registration of a possessory freehold estate upon the termination of the twelve-year period (whether the documentary title was then extinguished, or not).⁴⁴ It was suggested that if no objection to the possessory title were taken within the statutory period of fifteen years, the title could be reclassified as absolute on the occasion of a transfer for valuable consideration; alternatively, it could be reclassified at any earlier time on production of suitable evidence. Thereafter, any claim arising would be directed against their Land Registry insurance fund.⁴⁵

3.12 We do not recommend such a scheme, since it could involve the possible extinguishment of a landlord's title before it becomes vested in possession, and this extinguishment could take place without the knowledge of the landlord. In addition, it would confer on a squatter a benefit which is not available to a paper owner (in particular, a paper tenant). Notwithstanding the necessity for certainty in questions of title to land, we are of the view that the parliamentary conveyance should not operate to place a squatter in a position which is better than that of a paper owner of the same estate.

3.13 Therefore, our conclusion is that, where there is uncertainty as to whether the interest vested in the squatter is leasehold or freehold, there is very little that can be done to make the title certain. However, here we can make a very general point. This problem is not one which is specific to squatters, but may arise in the case of a paper owner who has inherited property. To take a common scenario,

⁴³ Section 15(1) *Statute of Limitations 1957*.

⁴⁴ *Op cit* fn 42 at 194.

⁴⁵ *Ibid* 191.

where deeds to a property are lost, it may be unclear whether the paper owner's predecessors-in-title held under a lease or whether they were, in fact, freeholders. This is, in fact, a problem of a general nature resulting from the lack of a comprehensive system of registration of title rather than as a consequence of the introduction of parliamentary conveyance.⁴⁶ Accordingly, we cannot see any practical recommendation to deal with the situation in which it is uncertain whether the interest taken by the squatter is freehold or leasehold.

Liability for leasehold covenants

General

3.14 At common law, the relationship of landlord and tenant comprises both privity of estate and (if one is dealing with the original parties) privity of contract. The proposed vesting provision will operate to transfer the interest of the lessee under the lease to the squatter, thereby placing the squatter in a situation of privity of estate with the landlord. The privity of contract between the original landlord and the original tenant will not be affected by the vesting provision.⁴⁷ It would therefore follow that the original landlord could

⁴⁶ The uncertainty arising from the lack of a comprehensive system of registration of title is not cured by the *Statute of Limitations 1957*. It is impossible for a tenant under a fixed term tenancy to extinguish his landlord's title by way of adverse possession. Failure to pay rent simply bars the right of the landlord to sue for the rent (*Statute of Limitations 1957* section 28). The failure of a landlord to react to a breach of covenant merely bars the right of the landlord to forfeit for breach of that covenant. The only way in which a landlord's title may be disturbed during the currency of a fixed term tenancy is if rent is paid to someone other than the landlord: in that case, the landlord's right to recover possession is deemed to accrue and his interest may be extinguished (section 17(3)). However, it is not the tenant who may have barred his title, but the person who received the rent. The cumulative effect of these provisions is that, under a fixed term tenancy, time will not usually run against a landlord in favour of his tenant until the lease has determined by effluxion of time. A lease for an unknown term cannot be safely ignored, even if rent has not been demanded for many years.

⁴⁷ Privity of contract only exists between the original landlord and the original tenant, and therefore may well not be relevant to the operation of the vesting provision, in that either or both of them may no longer be alive or (in the case of corporations) in existence.

pursue the paper tenant (if he is the original tenant) on foot of the contract for breaches of covenant.⁴⁸ Usually, if the original tenant wishes to protect himself against further liability after assignment of his leasehold estate, he may do so by complying with section 16 of Deasy's Act (the *Landlord and Tenant Law Amendment Act Ireland 1860*),⁴⁹ which provides for the landlord's consent to be endorsed on the deed or note of assignment. But, obviously, this option is not open to him where he has been ousted by acts of adverse possession.

3.15 Where the paper tenant is not the original tenant, his liability under the lease will be automatically transferred to the squatter by virtue of the provisions of section 12 of Deasy's Act. However, despite this, the paper tenant will continue to be liable on the leasehold covenants (including rent) until written notice of the assignment that has been effected by virtue of the proposed vesting provisions has been given to the landlord.⁵⁰ In the situation with which we are concerned, it is once again obvious that this option may not be available to the paper tenant, where he has been ousted.

3.16 We regard the transfer of liability and rights from the paper tenant (whether he is the original tenant or is, himself, an assignee) to the squatter as the fair result, which we intend to achieve by the present reform. Since the paper tenant will have been deprived of his rights under the lease by virtue of being ousted, as a matter of policy, it is only fair that he should be relieved of his liabilities under it. Furthermore, we think the policy of quieting titles, which we are pursuing in recommending parliamentary conveyance, requires that there should be no obligation on the squatter or on the paper tenant to notify the landlord or to procure his consent. This transfer of liability

⁴⁸ See *Perry v Woodfarm Homes Ltd* [1975] IR 104, 120 *per* Walsh J.

⁴⁹ Section 12 provides that "[e]very landlord of any lands holden under any lease or other contract of tenancy shall have the same action and remedy against the tenant, and the assignee of his estate or interest ... in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant, or his heir or personal representative respectively...." Section 13 provides a similar right for a tenant. Since section 1 defines both "landlord" and "tenant" to include persons acquiring the interest of the landlord or tenant by operation of law, sections 12 and 13 would apply to a tenant who had acquired the leasehold estate by virtue of the vesting provision proposed in paragraph 2.03.

⁵⁰ Section 14 of Deasy's Act.

from paper tenant to squatter might be seen as diminishing the rights of the landlord in that a landlord would normally⁵¹ have the privilege of consenting or otherwise to a proposed assignment. However, this privilege has, in any case, been substantially restricted in the context of a sale by the paper tenant by section 66 of the *Landlord and Tenant (Amendment) Act 1980*,⁵² so that the landlord can hardly be heard to say that he was assuming that there would be no change without his consent. Moreover, it should be remembered that a landlord whose rights are to be affected will have procrastinated for at least twelve years without taking advantage of his right to forfeit the lease.⁵³ In the circumstances, we think that the possible injustice to a dispossessed paper tenant outweighs any concerns arising out of the change in the landlord's position. We therefore recommend that, on the vesting of the leasehold estate in the squatter, the rights and duties of the paper tenant under the lease should transfer to the squatter.

3.17 Section 14⁵⁴ of Deasy's Act, ("act and operation of law") is

⁵¹ Usually, a lease will prohibit assignment or sub-letting without the landlord's consent. However, this is a matter of agreement rather than law.

⁵² Section 66 replaces section 56 of the *Landlord and Tenant Act 1931*. By section 66(2)(a) the landlord's "consent shall not be unreasonably withheld".

⁵³ There is also precedent for diminishing the rights of absentee landlords in section 69 of the *Landlord and Tenant (Amendment) Act 1980*, which provides that:- "Where (a) a lease (whether made before or after the commencement of this Act) of a tenement contains a covenant prohibiting or restricting the doing by the lessee of any particular thing without the licence or consent of the lessor, and (b) the rent reserved by the lease has not been paid for five or more years, and (c) the lessor is not known to and cannot be found by the lessee, the Court may, on the application of the lessee and after the publication of such (if any) advertisements as the Court directs, authorise the lessee, subject to such (if any) conditions as the Court thinks fit to impose, to do the particular thing so prohibited or restricted and thereupon it shall be lawful for the lessee to do such particular thing without the licence or consent of the lessor, in accordance with the conditions (if any) so imposed."

⁵⁴ Section 14 states: "No landlord or tenant, being such by assignment, devise, bequest, or act and operation of law only, shall have the benefit or be liable in respect of the breach of any covenant or contract contained or implied in the lease or other contract of tenancy, otherwise than in respect of such rent as shall have accrued due, and such breaches as shall have occurred or continued subsequent to such assignment, and whilst he shall have continued to be such assignee: provided however that no assignment made by any

wide enough possibly to apply to the situation which we have just recommended, namely a transfer, by operation of law, of the tenancy from the paper tenant to the squatter. The effect of section 14 may thus be to require a notice to be given by the squatter to the landlord. In the instant circumstances, we do not consider that such a notice should be necessary. In addition, where the paper tenant is the original tenant, then Section 16 of Deasy's Act⁵⁵ requires the consent of the landlord in order for his common law liability in contract to be removed. This consent may not be forthcoming and, again, we consider that, in the circumstances, it should not be required. To implement the views expressed here, it will be necessary to remove the need for any notice or endorsement of consent of the landlord, as is provided for under sections 14 and 16 of Deasy's Act, and to relieve an original tenant of his liabilities in contract. *We therefore recommend that the provision should state explicitly that the transfer of liabilities from the paper tenant to the squatter shall occur without any need for notice, to, or the obtaining of consent from the landlord.*

Apportionment of liabilities in the case of encroachment

3.18 In practice, it will often be the case that a squatter will occupy only a part of a plot of leasehold land, with the remainder continuing in the occupation of the paper tenant. A matter which then arises is the division of responsibility for covenants as between the squatter and the paper tenant. Crucially, neither the 1860 Act nor any other piece of legislation deals with this situation. Instead, usually a covenant against assignment and subletting is included in the lease, and this will be sufficient to protect the landlord's interest, and prevent partial assignment without approval by the landlord of the apportionment of liabilities. At common law, covenants capable of

assignee of the estate or interest of any tenant shall discharge such assignee from his liability to the landlord, unless and until notice in writing of the particulars of such assignment shall have been given to the landlord."

⁵⁵ Section 16 states: "From and after any assignment hereafter to be made of the estate or interest of any original tenant in any lease, **with the consent of the landlord**, testified in manner specified in section ten, the landlord so consenting shall be deemed to have released and discharged the said tenant from all actions and remedies at the suit of such landlord, and all persons claiming by, through, or under him, in respect of any future breach of the agreements contained in the lease, but without prejudice to any remedy or right against the assignee of such estate or interest." (Emphasis added.)

running with the land will bind an assignee insofar as they relate to the part assigned to him, whether or not that assignment is made with the landlord's consent.⁵⁶ Furthermore, the assignee of a portion of a demised plot will be liable only for the portion of rent attributable to his part, which, in default of agreement, may be determined by a court.⁵⁷

3.19 In order to mirror this position in situations where the vesting provision affects a statutory assignment, *we recommend that, where only part of a demised plot is vested in a squatter pursuant to the proposed vesting provision, the squatter should become liable for the covenants in the lease (including the payment of rent) insofar, but only insofar, as they affect the portion of the plot which has become vested in him. We also recommend that, where such apportionment cannot be agreed by the tenant, squatter and landlord, the Circuit Court should have jurisdiction in the matter.*

The effect of parliamentary conveyance on the presumption of accretion

3.20 Many cases of adverse possession arise where the squatter is a person who, in fact, holds a paper title to leasehold land and who, whether by accident or design, has encroached on other, neighbouring land. If read without reference to any other rule or principle of general application, the proposed vesting provision would, *prima facie*, vest those neighbouring lands in the squatter, rather than the landlord.

3.21 Therefore, it is necessary to consider the presumption of accretion, for the application of the proposed provision might be found to cut across this presumption. The presumption of accretion, as it seems to be generally accepted in English law, means that a tenant who encroaches on neighbouring land does so for the benefit of

⁵⁶ *Lester v Ridd* [1990] 2 QB 430. Dillon LJ states at 438: "The effect in law of the partition of the demised premises ... by the assignment of part ... for the residue then unexpired ... of the term of the 1902 lease was, notwithstanding that the landlord did not concur in the partition, to sever the covenants of the lease so as to follow the land."

⁵⁷ *Ibid* 438.

his landlord.⁵⁸ Halsbury states:-

“Where, during the currency of his tenancy, a tenant encroaches upon, or without title to do so takes possession of, other land, there is a presumption that the land so taken becomes annexed to the demised premises, whether or not it is immediately adjacent to the demised premises, and whether or not it belongs to the landlord or to a third person, and on the determination of the tenancy the land must be given up to the landlord together with the demised premises.”⁵⁹

In other words, the tenant takes a lease in the land encroached upon on the same terms and for the same period as the existing lease. At the determination of that lease, the land acquired by his acts of possession “reverts” to the landlord.

3.22 There is no Irish authority on the presumption.⁶⁰ However, in practice, it seems to be accepted that it forms part of Irish law.⁶¹

3.23 Under the present law, therefore, if the squatter holds land as tenant, the presumption of accretion should apply to bar the title of the neighbouring owner as against the squatter until his own lease determines. At that point, all of the lands, both those originally demised and those acquired by the squatter by adverse possession,

⁵⁸ *Whitmore v Humphries* (1871) LR 7 CP 1; *AG v Tomline* (1880) 5 Ch D 750; *Kingsmill v Millard* (1855) 11 Exch 313.

⁵⁹ 4th ed (1998) paragraph 165. See also, Megarry and Wade *The Law of Real Property*, (Harpum ed) (6th ed Sweet & Maxwell 2000) at 1313. The older authorities have been reviewed relatively recently in England: see *Smirk v Lyndale Developments Ltd* [1975] Ch 317, applied: *Long v Tower Hamlets LBC* [1998] Ch 197.

⁶⁰ As to the uncertainty of the application of this presumption in Ireland, see the discussion in Pye ‘Adverse Possession and Encroachments by Tenants’ (1987) 81 *Gazette of the Law Society of Ireland* 5, where it is pointed out that the presumption could have applied on the facts of *Perry v Woodfarm Homes Ltd* [1975] IR 104, but there is no reference to it in the judgment. In fact, it seems not to have been argued.

⁶¹ See: *Meares v Collis and Hayes* [1927] IR 397, 403 where Meredith J appeared to assume, *obiter*, that the presumption was good law and Wylie *Irish Land Law* (3rd ed Butterworths 1998) at 1092. The presumption does not receive mention in other leading textbooks on Irish land law.

would revert to the landlord of the former lands. Since the proposed provision would probably alter this aspect of the current law, we therefore need to consider the presumption.

3.24 The basis for this presumption is unclear. On occasion, it has been justified by reference to the idea that the tenant has acquired the opportunity of entering into possession of the neighbouring lands, because he holds land from his landlord.⁶² On other occasions, it has been explained as a form of estoppel, or the result of an implied agreement between landlord and tenant.⁶³ The first theory may spring from the notion that the landlord and tenant relationship is tenurial in nature. Given that the relationship of landlord and tenant is deemed to be founded on contract by virtue of section 3 of Deasy's Act,⁶⁴ the idea of estoppel or implied agreement seems more relevant to the present day.

3.25 Whatever the theoretical basis for the presumption, the important point is that a provision (such as is proposed) which vests the estate of the paper owner (whether leasehold or freehold estate) in a squatter could well, if it were generally drawn, have the effect of impliedly overruling the operation of the presumption. We have therefore felt obliged to consider whether we should provide for the continued co-existence of the presumption with the principle of parliamentary conveyance. This requires us to consider the desirability of the presumption, and it is appropriate to do so in three distinct contexts.

3.26 First, where the land which has been encroached upon by the tenant belongs to the landlord and is immediately adjacent to the demised land, the presumption, insofar as it is based upon implied agreement or estoppel, appears to operate in a fair way. Here, all that happens is that the tenant takes a lease over the neighbouring land from his landlord. It is reasonable to suppose that a landlord who continues to take an interest in the activities of his tenant, and who does not speak up when the tenant encroaches further into the

⁶² *Whitmore v Humphries op cit.*

⁶³ *JF Perrott & Co Ltd v Cohen* [1951] 1 KB 705.

⁶⁴ See the discussion in Brady and Kerr *The Limitation of Actions* (Butterworths 1994) at 124-127.

landlord's neighbouring plot, should be taken as having acquiesced in the possession, on the basis that the tenant occupies this extra land on the same terms as the premises actually demised, and that, at the end of the term, the extra land reverts to him with the plot which he originally leased to the tenant. The operation of the presumption in this context also has the effect that the extra land is included for the purposes of the calculation of rent on a rent review.⁶⁵ In addition, it is possible, though far from certain, that the additional land might be regarded as being "held under the lease", within the meaning of section 9 of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* and section 5 of the *Landlord and Tenant (Amendment) Act 1980*, thereby allowing the tenant to claim any statutory rights which arise in respect of the land encroached upon as well as the demised lands.

3.27 Secondly, take the case where the land encroached upon is not immediately adjacent to the demised premises. The presumption will apply where the land encroached upon is referable to the occupation of the demised land; for example, where the tenant uses a plot of land which is situate across a road from demised land for a car park serving commercial premises on the demised lands. The application of the presumption in this context, therefore, entails a difficult judgment as to whether the encroached-upon land is referable to the demised land. Where it is so referable, the presumption has the practical result that lands which were used for a common purpose remain in the same ownership. On the other hand, there would seem to be no reason in principle why the landlord should escape the effects of the *Statute of Limitations 1957* simply by virtue of the coincidence that he has leased other land to the squatter, although we acknowledge that the tenant's opportunity of occupying the lands is acquired by virtue of his occupation of the demised lands, and therefore, by virtue of his status as tenant.

3.28 Thirdly, where the land encroached upon is vested not in the landlord but in a third party, the presumption can only be justified by reference to the fact that the tenant has acquired the opportunity of entering into possession of the encroached-upon lands, by virtue of his occupation of the demised lands.

⁶⁵ *Kensington Pension Developments Ltd v Royal Garden Hotel (Oddenino's) Ltd* [1990] 2 EGLR 117. Presumably, on the same principles, the additional lands would also be taken into account in calculating the terms, including rent, of a new occupational lease claimed under the *Landlord and Tenant (Amendment) Act 1980*.

3.29 There is a further point: if the presumption were to be abolished, this would leave small, and possibly inaccessible, plots of land held by former tenants rather than by the owners of neighbouring lands. However, as it stands, the presumption has the pragmatic result that lands used together for a common purpose remain in common ownership *We therefore recommend that the presumption be retained.*

CHAPTER 4 ADVERSE POSSESSION AND MORTGAGED LAND

Effect of the Statute of Limitations 1957 on the rights of the mortgagee

4.01 This chapter deals with the issues arising where the land vested in a squatter by virtue of the proposed provision is subject to a mortgage or charge.⁶⁶ These issues are common to both freehold and leasehold land, and, accordingly, the discussion and recommendations in this chapter will apply equally to both. Before turning to those issues, it is necessary to outline the present law on adverse possession of mortgaged land.

4.02 On the one hand, if the mortgage was executed prior to the commencement of the possession of the squatter, time will run from different dates as against the mortgagor and the mortgagee. In the case of the mortgagee, the matter is governed by section 62 of the *Statute of Limitations 1957*, which provides that the statutory period runs from the date of the last payment pursuant to the mortgage.⁶⁷ However, time will run as against the mortgagor from the date of entry into possession.⁶⁸

⁶⁶ For convenience, the word “mortgage” will be used to refer to and cover both mortgages and charges.

⁶⁷ Section 62 provides:- “Where (a) the right of a mortgagee of land to bring an action to recover the land has accrued, and (b) the person in possession of the land or the person liable for the mortgage debt makes any payment in respect thereof, whether of principal or interest, the right of action shall be deemed to have accrued on and not before the date of the payment.” It will be noted that this section is contained within Part III of the Statute which provides for extension of the limitation periods in certain circumstances. The section is the successor to the *Real Property Limitation Act 1874* which was designed to remove doubts which had arisen that by leaving a mortgagor in possession, as was usual, the mortgagee’s right to possession would become statute-barred.

⁶⁸ *Ludbrook v Ludbrook* [1901] 2 KB 96.

4.03 Since it is unlikely that a dispossessed mortgagor will make payments, it is probably the case that, where the squatter has entered into possession of the entire of the mortgaged premises, time will begin to run against both mortgagor and mortgagee at the same point. However, in certain situations it is entirely possible that mortgage payments would continue to be made even though a squatter is in possession: for example, in cases of encroachment or where, after the death of the mortgagor, there is confusion as to who is entitled to succeed to his interest in the lands. In such cases, the mortgagee's right of action may not have accrued, still less have been barred, even though the title of the mortgagor has been extinguished.

4.04 On the other hand, if, at the date of the creation of a mortgage, a squatter has already taken up possession of land such that time is running in his favour against the mortgagor, then time runs from the same date as against both mortgagor and mortgagee, and, upon the elapse of the statutory period, he acquires title against both the mortgagor and the mortgagee. This has been established as a matter of English law since *Thornton v France*.⁶⁹ Here, Chitty LJ stated that the provisions of the *Real Property Limitation Act 1874*, which are similar to section 62 of the *Statute of Limitations 1957* did not "confer a new right of entry on the mortgagee where, at the time of the making of the mortgage, a man is in possession holding adversely to the mortgagor, and the statute ... has already begun to run in his favour against the mortgagor."⁷⁰

4.05 These statements of the law were accepted by the High Court in *Munster and Leinster Bank v Croker*.⁷¹

Effect of parliamentary conveyance

4.06 The vesting provision already suggested in paragraph 2.03 would operate to vest in the squatter such title as the mortgagor would have in the lands, and would therefore have the effect of vesting the

⁶⁹ [1897] 2 QB 143.

⁷⁰ *Ibid* at 158.

⁷¹ [1940] IR 185, 192-3.

equity of redemption in the squatter, without the need for any explicit provision in this regard. However, this still leaves a number of issues in respect of which the position of the parties - the squatter, the mortgagor, or the mortgagee - remains in doubt, and we now turn to consider the other matters which would affect the interests of these parties in cases where the vesting provision applies.

Liability to pay: the mortgagor

4.07 The personal covenant of the mortgagor to repay the loan for which the land is security arises from the contract between mortgagor and mortgagee and is – crucially - separate from the equity of redemption. The conveyance of an estate or interest in the land to the mortgagee, leaving the equity of redemption first in the mortgagor and, then, if our proposal is implemented, in the squatter, is affected only as security for this covenant. Because the covenant is separate from the security, it would survive the vesting of the equity of redemption in the squatter, and the mortgagor would continue to be liable on foot of it.

4.08 This continuing liability is justified in principle, because the mortgagor has had the full benefit of the loan monies. *For this reason, we do not recommend that the mortgagor should be rendered immune from continuing liability on the covenant.*

4.09 However, in practice it will often be the case that this liability is statute-barred. While we have already pointed out⁷² that, in some circumstances, a mortgagor who has been dispossessed will continue to make payments, it is at least equally likely that the mortgagor will cease to make payments in or around the time of dispossession. Provided that the squatter does not make payments while the limitation period is running as against the mortgagor, the right to the mortgagee to recover possession will become barred at the same time. Once this right of the mortgagee has become statute-barred, any liability on the covenant to pay is also barred by virtue of section 38 of the *Statute of Limitations 1957*.⁷³

⁷² At paragraph 4.03.

⁷³ Section 38 provides: “At the expiration of the period fixed by this Act for a mortgagee of land to bring an action to recover the land or for a person claiming as mortgagee or chargeant to bring an action claiming sale of the land, the right of the mortgagee or such person to the principal sum and

Liability to repay: the squatter

4.10 At present, the squatter is not obliged to make repayments,⁷⁴ though it may be in his interest to do so, in order to protect his position. The *Statute of Limitations 1957* itself acknowledges the fact that the squatter may make payments. Section 62 refers to payments by “the person in possession or the person liable to pay.”

4.11 It does not seem to follow from the vesting of the equity of redemption in the squatter, or from the rather imprecise wording of section 62, that the mortgagee is required to accept payments from the squatter, and we have already stated our position that the mortgagor should remain liable on his personal covenant to pay.⁷⁵ However, we think that the squatter should have the right to pay if he so wishes, in order to protect his position. *We therefore recommend that, where payment is tendered by the squatter, the mortgagee should be obliged to accept payment directly from the squatter.*

4.12 We recognise that a potential difficulty for the squatter in this area is that the mortgage on the lands may be one to secure “all sums due” by the mortgagor to the mortgagee. If this is the case, the amount of the mortgage will fluctuate, and the squatter may find that he does not wish to or cannot pay an amount which may be very large relative to the value of the holding. Nevertheless, we feel that the squatter must take the lands as he finds them, and is not entitled to any special treatment in this matter.

4.13 We also note that a rather technical legal issue may arise here in that the advancement of further sums on foot of a mortgage might be thought to be a new mortgage by virtue of *Bank of Ireland v Purcell*,⁷⁶ which held that each advance of monies made on the security of a deposit of title deeds was the conveyance of an interest in land within the meaning of section 3 of the *Family Home Protection Act 1976*. If this reasoning were to be applied to an “all

interest secured by the mortgage or charge shall be extinguished.”

⁷⁴ *Re Errington* [1894] 1 QB 11.

⁷⁵ See paragraph 4.08.

⁷⁶ [1990] ILRM 106.

sums due” mortgage, then each further advance of money might be held to be a fresh mortgage of the lands. In that case, a squatter who had been in possession prior to the advancement of further sums could be held to have barred the right of the mortgagee to possession in respect of those further sums after twelve years from the date of the advance.

4.14 However, *Bank of Ireland v Purcell* turned on the proper interpretation to be given to the *Family Home Protection Act*, which is a remedial statute and “is not to be construed as if it were a conveyancing statute.”⁷⁷ If the application of the case were to be considered in the context of the limitation of actions and a mortgagor's right of action to recover possession of mortgaged lands, the matter would have to be decided by reference to the provisions of the *Statute of Limitations 1957* and, in particular, sections 13 and 62 thereof. The net question would be whether the action for possession was one which accrued to the mortgagee within twelve years of the last payment made by the person in possession of the land or the person liable for the mortgage debt. *The situation and legislation in question in Bank of Ireland v Purcell are sufficiently distinct that this line of argument would not, we think, be accepted, and therefore we do not feel that there is a need to exclude it expressly in the proposed legislation.*

Encroachment

4.15 In many of the cases of adverse possession which arise from encroachment, the land encroached upon comprises only part of the lands which are the subject of a particular mortgage. In such cases, it is necessary to decide whether those lands will remain as security for all, or only a proportionate part, of the mortgage debt. It was suggested in *Munster and Leinster Bank v Croker*⁷⁸ that the liability

⁷⁷ [1990] ILRM 106 *per* Walsh J (*per curiam*) at 108.

⁷⁸ See 194 where Black J states: “I am inclined to agree with [counsel for the plaintiff] that if a person in possession of a portion of mortgaged premises acquires, as against the mortgagor only, and not as against the mortgagee, a title to that portion under the Statute of Limitations, he thereby acquires the right to redeem, so far as the portion in question is concerned, on paying a proportionate part of the mortgage debt and interest. This was decided in...*Fletcher v Bird*...”

to pay should be apportioned as between the land encroached upon and the remaining land. However, we feel that this is not appropriate: a squatter has given no value for the lands and must take them as he finds them. *We recommend, therefore, that there should be no provision for apportionment, and that the land encroached upon which has been acquired by the squatter should remain available as security for the entire of the mortgage debt.* The squatter, accordingly, must offer payment of all sums due and owing in order to protect himself (assuming that the mortgagee's right of possession has not been barred). In practice, the squatter's liability in this situation will be subject to a ceiling in the form of the market value of the lands, which is the largest sum the mortgagee would be able to realize on a sale.

Implementation: Identifying the terms of the mortgage or charge

4.16 In line with the fact that the mortgage as security is a separate transaction from the personal contract of the mortgagor to repay the loan, the introduction of parliamentary conveyance will not have the effect that the squatter will become the mortgagor under the mortgage, nor will he be required to make payments on foot of the mortgage. However, the squatter will need to ascertain the date of the last payment in respect of the mortgage debt, in order to establish whether the mortgagee's right to recover possession has been statute-barred. If that right has not been statute-barred, the squatter will need to ascertain the terms of the mortgage, as well as the monies already paid in respect of the mortgage debt, so as to allow him to exercise his right to pay the monies due on foot of the mortgage.

4.17 The date on which the last payment was made to a mortgagee in respect of a mortgage debt does not present any particular difficulty. Therefore, *we recommend that a squatter on mortgaged land should be entitled to serve a notice on the mortgagee requiring the latter to inform him of the particulars of the terms of the mortgage, including the date of the last payment made pursuant to the mortgage, the monies already paid in respect of the mortgage debt and the amount outstanding.* This recommendation, although it does not ensure that all squatters will have complete information as to the extent to which their lands are encumbered, will at least allow the squatter to discover whether the mortgagee's right to possession has

also been statute-barred and, if the reply is favourable, will allow him to offer good marketable title on a sale of the lands.

4.18 However, for the squatter to secure information as to the nature of the debts secured on the land, and details as to payments made thereunder presents a difficulty. Since this would involve disclosure of the dispossessed mortgagor's financial arrangements as well as of the terms of the mortgage document itself, the mortgagor's right of privacy falls to be considered.⁷⁹ A particularly sensitive case would be where the mortgage was "all sums due." Disclosure of the terms of the mortgage and of the sums due on foot of the mortgage document, might involve the revelation of the entire of the mortgagee's financial affairs to a squatter occupying one part only of the mortgagee's lands. One solution to this problem would be to leave the squatter to be sued by the mortgagee, at which point the terms of the mortgage would have to be revealed by the mortgagee. However, this solution would have the inevitable and undesirable result of necessitating litigation in order to grant to the squatter the information to which we consider he is reasonably entitled (based on our position that he should be put in the same position as the mortgagor). Given that the right of privacy, even of a third party, can be restricted in the public interest,⁸⁰ for example, in the interests of a public inquiry,⁸¹ we think that it can similarly be restricted in the interests of the administration of justice, which requires a determination of the respective legal rights and liabilities of the mortgagee and the squatter.⁸² Therefore, *we recommend that the*

⁷⁹ In *Haughey v Moriarty* [1999] 3 IR 1, 58 it was accepted, without being decided, that the constitutional right to privacy extends to the privacy and confidentiality of a citizen's banking records and transactions. At common law, a bank's duty of confidentiality to its customer, and the individual's right to privacy, may be abrogated in the public interest: see *National Irish Bank Ltd. v Radio Telefís Éireann* [1998] 2 IR 465, 494.

⁸⁰ *National Irish Bank Ltd v Radio Telefís Éireann, op cit* at 494.

⁸¹ *Haughey v. Moriarty, op cit* at 59.

⁸² In *Cooper Flynn v Radio Telefís Éireann* [2000] 3 IR 344, a non-party bank was ordered to discover details of its customers' banking records. The bank's duty of confidentiality was outweighed by the entitlement of the defendants to a fair trial, and the importance to them of the disclosure of the identity of the bank's clients. However, discovery was granted on condition that inspection could only be carried out by the legal advisors of the parties to the action.

squatter should have the entitlement to apply to the Circuit Court for an order compelling the mortgagee to disclose to the squatter the terms of the mortgage document as well as particulars of the payments made in respect of the mortgage debt. The Circuit Court should have power to order disclosure on such conditions as it thinks fit, having regard to any rights of privacy or confidentiality of the dispossessed mortgagor.

4.19 In the case where it is suggested by searches that there may be a lease on the lands,⁸³ or where there is a doubt as to whether or not there is a mortgage on the property, it seems that little can be done to help the squatter. However, the prospect of an unknown mortgage on the property seems less likely than that of an unknown lease, given that most, if not all, mortgagees are likely to take a keen interest in their security.

Surplus arising on sale by mortgagee

4.20 In those cases where the squatter has barred the title of the mortgagor but not the right of the mortgagee to recover possession of land, if he cannot discharge the arrears of the mortgage debt, he is, of course, susceptible to a sale of the lands by the mortgagee. The squatter will become vested, on the expiry of the period of limitation, with the equity of redemption once held by the mortgagor. Does this mean that he thereby becomes entitled, by virtue of such vesting, to the surplus arising on any sale of the lands by the mortgagee? Note, first, that section 21(3) of the *Conveyancing Act 1881* provides:-

“The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this Act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first in payment of all costs, charges and expenses... and secondly, in discharge of the mortgage money ... due under the mortgage; and the residue of the money so received shall be paid to **the person entitled to the mortgaged property** or authorized to give receipts for the proceeds of the sale thereof.”⁸⁴

⁸³ See paragraph 3.06.

⁸⁴ Emphasis added. Similarly, section 24(8) provides that the residue of the

It seems to us that, on a sale of the property, a squatter in whom title to land had been vested pursuant to the proposed vesting provision would be “the person entitled to the mortgaged property”, and that therefore the surplus on a sale by a mortgagee would fall to the squatter. In the case of freehold land, this is probably the present state of the law, for it is beyond dispute that where the ousted paper owner held for an estate in fee simple, a squatter acquires a title which is as good as a conveyance of the freehold.⁸⁵

4.21 We think that, in the case of either leasehold or freehold land, this is the better outcome, on the basis that the power of sale is a remedy designed to recover those monies which the mortgagor has covenanted to repay, and it arises where the monies secured by the mortgage have become due.⁸⁶ It would seem more appropriate to pay the surplus to the squatter rather than to the mortgagor for two reasons. First, the requirement in section 21(3) of the 1881 Act that payment of the proceeds of sale be made to the person who is entitled to the lands, is based on first principles, in that the lands to which that person had title have been converted into money form. Payment of any surplus proceeds to the mortgagor would thus effectively reverse the operation of the Statute of Limitations. Secondly, the squatter may have made payments on foot of the mortgage, whether under the present section 62 or pursuant to the provision requiring acceptance of the squatter’s payments which we have proposed, thereby reducing the amount due to the mortgagee from the proceeds of sale, and enriching the mortgagor. The same possibility of unjust enrichment of the squatter if payments had been made by the mortgagor would not arise, for the significant reason that the mortgagor has already received (and failed to repay) the loan moneys.

4.22 *Our conclusion, therefore, is that it is in line with our general recommendation and would do no injustice to the paper mortgagor if the squatter were to take any surplus, if the land were sold by the*

money received by a receiver shall be paid “to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.”

⁸⁵ See the discussion by Lord Esher MR in *Tichborne v Weir* (1892) 67 LT (NS) 735, 736.

⁸⁶ *Conveyancing Act 1881* section 19(1)(i).

mortgagee after the squatter had acquired title. This is what would happen anyway by virtue of section 21(3) of the *Conveyancing Act 1881*, and so there is no need for any change in the law.

CHAPTER 5 SCOPE OF PROVISIONS

Effect of change

5.01 The issue here is the time at which the period of adverse possession must have occurred before the new law can apply to it. In short, should the new law be confined to situations in which adverse possession commenced after the new law comes into operation, or should it extend to cases in which the period of adverse possession has already commenced, or even expired, at the time when the law comes into force? (Since the change of law proposed above will not make much impact in the case of freehold, the following discussion concentrates on leasehold land).

5.02 The important point here is that the law's normal presumption against retrospectivity does not apply to limitations law. A distinction is drawn between substantive law, which attracts the presumption, and procedural law, including limitations, which does not. In line with this, much of the limitations legislation which has been enacted in the United Kingdom, Australia and Canada has expressly applied to causes of action which accrued before any change of law.⁸⁷ In Ireland, section 8 of the *Statute of Limitations 1957* is to the same effect.⁸⁸ And section 7 of the *Statute of Limitations (Amendment) Act 1991* (dealing with personal injuries) states: "This Act shall apply to all causes of action whether accruing before or after its passing."

⁸⁷ *Limitation Act 1939* (UK); *Limitation Act 1980* (UK); *Latent Damage Act 1986* (UK); *Limitation Act 1969* (NSW); *Limitations of Actions Act 1969* (Queensland); *Limitation Act 1974* (Tasmania); *Limitations of Actions Act 1968* (Victoria); *Limitation Act 1950* (New Zealand); *Limitation Act 1979* (British Columbia).

⁸⁸ This proposition is subject to the condition that the new rules (under the 1957 Statute) would not apply where the **full** period of time necessary, under the previous law, to bar the action had elapsed at the time when the 1957 Statute came into effect. But this requirement is not relevant in the present context because the change proposed here, in contrast to that effected by the 1957 Statute, does not alter the length of the period of limitations.

5.03 For present purposes, one can summarise the net effect of the change of law, proposed above, as being to improve the position of the squatter, and to alter the position of the paper tenant and the landlord. Thus, three distinct parties (*ie* paper tenant, squatter and landlord) might appear to be affected. The general policy interests of the three sets of parties involved are as follows:

Paper Tenant

5.04 In practice, the position of the paper tenant, which is already poor under the existing law, is not much affected by the change. It could indeed be said to be improved by virtue of the fact that his liability under the covenants is terminated.

Squatter

5.05 The change of law is designed to make a change in the position of the squatter, and, from his perspective, it would plainly be desirable to bring it into effect earlier. To take one example of hardship resulting from the present law, where the lease is one which would entitle the tenant to acquire the fee simple, the right is lost where a squatter obtains possessory title to the leasehold interest. This is especially unfair where the possessory nature of the title results from a failure to deal adequately with the estate of deceased family members, leaving the current member in possession liable to ejection at the end of the lease, notwithstanding the long-established legislative policy of enfranchisement.

Landlord

5.06 With regard to the interest of the landlord, it is relevant that the general policy of reforming legislation in the landlord and tenant field has been to apply the new law even to a tenancy which commenced before the law even came into operation. This may be illustrated by reference to such major reforms as section 3(1) of the *Landlord and Tenant (Ground Rents) Act 1967*; section 8 of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*; and section 13(1) of the *Landlord and Tenant (Amendment) Act 1980*.

5.07 Moreover, the diminution in the landlord's position which would flow from the proposed change is that he would no longer be

able to forfeit for breach of covenant by the paper tenant. However, he retains his right to forfeit for breach of covenant by the squatter, who is the person in possession for the duration of the lease. The landlord's right to forfeit is once again defined by the terms of lease, and - here is an important point - the landlord is returned to the position for which he bargained on entering into the lease, subject to one exception.

5.08 The exception just mentioned is that it might be said that the landlord's rights have been diminished in that he originally chose the person with whom he was to be bound in contract, but, as a result of the squatter's action, a different person is foisted on the landlord. However, the landlord's right to choose his tenant is anyway now substantially restricted in the general context by (what is now) section 66 of the *Landlord and Tenant (Amendment) Act 1980*, which provides that a landlord cannot reasonably withhold consent to assignment. By contrast, in the present situation, there is a vesting by operation of law, and the only practical difference is that a landlord is not free to put forward objections to his new tenant (the squatter) on the basis of his creditworthiness. One can argue that this loss to the landlord is justified by his failure to supervise the premises for at least twelve years, by any standards a substantial period of time.

5.09 It seems to us, too, that such a suggestion would run no substantial risk of unconstitutionality (especially bearing in mind the general approach adopted towards retrospectivity in limitations law, as mentioned above in paragraph 5.02). The closest explicit reference in the Constitution to the situation under consideration is Article 15.5,⁸⁹ which bans laws "declar[ing] acts to be infringements of the law which were not so at the date of their commission." Plainly, this does not cover the present situation. As regards the possibility of the landlord basing an argument on his constitutional property right,⁹⁰ this right is not absolute, but must be balanced against the variety of considerations to which the shorthand label, the "common good" is usually given. It is almost the law's oldest public policy that it is in the public's well-being to make the best use of land. In the present situation, the substantial contribution to the common good which the proposed legislation would make would be to restore to full

⁸⁹ See, generally, Hogan and Whyte *Kelly: The Irish Constitution* (3rd ed Butterworths 1994) at 127-131.

⁹⁰ *Ibid* 1061-91.

marketability and utility leasehold title which had had the curse of vulnerability to forfeiture by the landlord hanging over it.

5.10 Moreover, there is a wider argument, namely that the case law on the constitutional right to property shows, as might be expected, that it has invariably been used to bar what were regarded as outrageous infringements of the right by agencies of the State, for instance land use planning, compulsory acquisition or rent control legislation. By contrast, we are concerned here with an entirely different field, namely private law and, in particular, a slight re-adjustment of rights as between two private parties.

5.11 In summary, it seems that there are no reasons for not following the normal pattern in respect of the most comparable legislative fields, and *we therefore recommend that the proposed change of law should apply even if the limitation period had commenced, or even concluded before the legislation came into effect.*

- (1) In order to further the public interest of quieting titles, thereby freeing more land for use the Commission recommends the introduction, by statute, of a parliamentary conveyance (paragraph 1.15).
- (2) Parliamentary conveyance should be introduced by enacting a vesting provision drafted in simple terms so as to cover all estates or interests in land, registered or unregistered (paragraph 2.03).
- (3) All rights appurtenant to the lands to be vested, by virtue of parliamentary conveyance, in the squatter should also vest in him. The Commission recommends that the equivalent of section 6 of the *Conveyancing Act 1881* should apply to the vesting of the paper owner's title in the squatter (paragraphs 2.06 and 2.07).
- (4) Where the interest to be vested in the squatter is leasehold, the squatter should have the right to serve a notice on the landlord requiring that he furnish the squatter with a copy of the lease. (Paragraph 3.05) If the identity of the current landlord is not known, the squatter should be able to serve or advertise a notice in a manner similar to the procedure available to a tenant under the *Landlord and Tenant (Ground Rents) Act 1967* requiring the landlord to come forward. Service or advertisement of this notice will give the squatter immunity from forfeiture for breach of covenant until three months from service on the tenant of a copy of the lease, together with prescribed information, that is, the name and address of the landlord (paragraph 3.06).
- (5) Where the entire of the lands demised in a particular lease is vested in a squatter pursuant to the proposed vesting

provision, the Commission recommends that explicit provision be made for the transfer of the liabilities of a tenant to a squatter in whom land has been vested. We also recommend that it be made clear that there be no need for notice to, or the consent of, the landlord (paragraph 3.17).

- (6) However, where only part of the lands forming the subject-matter of a particular demise vested in a squatter, the Commission recommends that the squatter should become liable for the covenants in the lease (including the payment of rent) insofar, but only insofar, as they affect the portion of the plot which has become vested in him. We also recommend that, where such apportionment cannot be agreed by the tenant, squatter and landlord, the Circuit Court should have jurisdiction to settle the question (paragraph 3.19).
- (7) The Commission recommends that the presumption of accretion should be retained (paragraph 3.29).
- (8) Where the lands vested in a squatter are subject to a mortgage or charge, the mortgagor should remain liable on his personal covenant to repay the mortgage debt (paragraph 4.08).
- (9) The Commission also recommends that where payment is tendered by the squatter in order to prevent repossession by a mortgagee or chargee whose right to recover possession has not been statute-barred, the mortgagee should be obliged to accept payment directly from the squatter (paragraph 4.11).
- (10) The Commission recommends that there should be no provision for apportionment, and that the land encroached upon which have been acquired by the squatter remain available as security for the entire of the mortgage debt (paragraph 4.15).
- (11) In order to protect himself against unnecessary payment in respect of a mortgage debt which has become statute-barred, the Commission recommends that a squatter on mortgaged land should be entitled to serve a notice on the mortgagee requiring the latter to inform him of the date of the last

payment made pursuant to the mortgage (paragraph 4.17).

- (12) In order to protect himself against unnecessary payment in respect of a mortgage debt which has not become statute-barred, but may have been partially discharged, the Commission recommends that the squatter should have the entitlement to apply to the Circuit Court for an order compelling the mortgagee to disclose to the squatter the terms of the mortgage document as well as particulars of the payments made in respect of the mortgage debt. The Circuit Court shall have power to order disclosure on such conditions as it thinks fit, having regard to any rights of privacy or confidentiality of the dispossessed mortgagor (paragraph 4.18).
- (13) Where a mortgagee exercises his power of sale in respect of lands which have become vested in a squatter pursuant to the proposed vesting provision, the Commission recommends that any surplus on the sale should go to the squatter. Since this would appear anyway to be the effect of section 21(3) of the *Conveyancing Act 1881*, there is no need for any change in the law (paragraph 4.22).
- (14) The Commission recommends that the proposed change of law should apply to any proceedings coming before a court after the law becomes operative, irrespective of when the limitation period commenced, or whether it has already been completed (paragraph 5.11).

APPENDIX A DRAFT LEGISLATION

Number __ of 2003

TITLE BY ADVERSE POSSESSION BILL, 2003

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Amendment of section 24 of Statute of Limitations, 1957.
3. Amendment of section 49 of the Registration of Title Act, 1964.
4. Short title and commencement.

ACTS REFERRED TO

Conveyancing Act, 1881	44 & 45 Vict. c. 41
Statute of Limitations, 1957	1957, No. 6
Registration of Title Act, 1964	1964, No. 16

TITLE BY ADVERSE POSSESSION BILL, 2003

BILL

entitled

AN ACT TO AMEND SECTION 24 OF THE
STATUTE OF LIMITATIONS, 1957 AND TO
AMEND SECTION 49 OF THE
REGISTRATION OF TITLE ACT, 1964.

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation

1. In this Act –

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

“Act of 1964” means the Registration of Title Act, 1964.

Amendment of
section 24 of the
Act of 1957

2. – The Act of 1957 is hereby amended by the substitution for section 24 thereof (as amended by sections 5 and 49 (4) of, and the Schedule to, the Registration of Title Act, 1964) of the following:

“Vesting of title
to land after the
expiration of
period limited
for actions to
recover

24.–(1) Subject to section 25 of this Act and to section 49 of the Registration of Title Act, 1964, at the expiration of the period fixed by this Act for any person to bring an action to recover land, the title of that person to the land shall vest in any person in possession (in this section referred to as “adverse possession”) of the land in whose favour the period of limitation can run.

(2) The provisions of section 6 of the Conveyancing Act, 1881, shall apply to a vesting under *subsection (1)* of this section as if such vesting had been effected by means of a conveyance.

(3) (a) A person in whom title to land is vested pursuant to *subsection (1)* of this section may, where the land was, immediately before such vesting, held under a tenancy agreement, serve a notice upon his immediate landlord or any superior landlord requiring such landlord to provide him or her with –

(i) in case the land was held under a lease, a copy of the lease or, in case the land was held under an oral agreement, a written statement of the terms of that agreement,

(ii) the particulars of any incumbrance on the lands, and

(iii) the name and address of the person for the time being entitled to the next superior interest in the land and of the owner of any such incumbrance.

(b) Where the identity, existence or whereabouts of any person upon whom a notice may be served under *paragraph (a)* of this subsection cannot be established by taking reasonable measures, a notice may be served instead on any person in receipt of any rents in respect of the land requiring such person to provide him or her with the name and address of the person to whom any such rent is paid and any other information within his or her procurement or possession capable of assisting in the identification of the terms of the agreement

pursuant to which the land is held.

(c) A person upon whom a notice is served under *paragraph (a)* or *(b)* of this subsection shall comply with the notice

(d) If a person fails or refuses to comply with a notice under *paragraph (a)* or *(b)* of this subsection, the person who served the notice may apply to the Court for an order compelling him or her so to do.

(e) If the identity, existence or whereabouts of any person upon whom a notice may be served under *paragraphs (a)* or *(b)* of this subsection cannot be established by taking reasonable measures, the person entitled to serve the notice may cause an advertisement form to be published in a daily newspaper circulating in the area in which the lands are situated or in such other area, including an area outside the State, as appears to the person that is entitled to serve the notice to be appropriate in all the circumstances.

(f) Where a person has served a notice in accordance with *paragraph (a)* or *(b)* or has caused an advertisement to be published in accordance with *paragraph (e)*, his or her interest shall not be subject to forfeiture (whether by action or otherwise), ejection or any other proceedings arising out of his or her liabilities under the lease before the expiry of a period of 3 months after the date of service on him or her of a copy of the lease or other information requested in the notice or advertisement.

(4) Where the land in respect of which title is

vested pursuant to *subsection (1)* was, immediately before such vesting, held under a tenancy agreement, then in respect of the period beginning on the date of such vesting:

(a) the person in whom the title is so vested (referred to subsequently in this subsection as the tenant) shall be solely liable to the person holding the immediate or superior landlord's interest under the tenancy agreement in respect of any breach of the terms of the agreement that is capable of running with the title so vested; notwithstanding that no notice shall be given to, or consent obtained from, the person holding the immediate or superior landlord's interest.

(b) the person holding the immediate or superior landlord's interest under the tenancy agreement shall become solely liable to the tenant in respect of any covenant in the tenancy agreement in so far as it is capable of benefiting the tenant:

Provided that where the title so vested relates to part only of the land conveyed this subsection shall apply only in respect of such part and any rights and liabilities shall be apportioned among the tenant, immediate or superior landlord and the person who holds the title to the remaining part as the parties shall agree or, in the absence of any such agreement, as the court may determine

(5) Where any title to land in respect of which title is vested pursuant to *subsection (1)* is subject to any mortgage or charge, the person in whom such title is vested may pay or make

tender of any amount due or owing on foot of the mortgage or charge to any person entitled under such mortgage or charge to receive it and such last-mentioned person shall be obliged to accept the amount in satisfaction of such amount due or owing.

(6) Where any land in respect of which title is vested pursuant to *subsection (1)* is subject to any mortgage or charge, the land and any part thereof shall remain subject to such mortgage or charge as security for the entire of any monies secured by such mortgage or charge.

(7) (a) Where any land in respect of which title is vested pursuant to *subsection (1)* is subject to any mortgage or charge, the person in whom such title is vested may serve a notice on any person entitled to receive payment of an amount due or owing under the mortgage or charge, requesting that other person to inform him or her, within 4 weeks of the date of service of the notice, of any of the following:

(i) particulars of the terms of the mortgage or charge;

(ii) particulars of any amount already paid pursuant to the mortgage or charge;

(iii) the date of the last payment pursuant to the said mortgage or charge; and

(iv) particulars of any amount outstanding pursuant to the mortgage or charge.

(b) Where a person fails or refuses to comply with a notice under *paragraph (a)*

the person in whom title is vested as aforesaid may apply to the Court for an order compelling him or her so to do, and on the hearing of the application, which shall be on notice to the mortgagor or chargor unless the identity of the mortgagor or chargor cannot be ascertained the Court, may, having regard to all the circumstances, including any right of privacy or confidentiality of the mortgagor or chargor make such order as it considers appropriate.

(8) [Court jurisdiction – this subsection will be in accordance with the new system of valuation and court jurisdiction currently being prepared by the Department of Justice]

(9) Subject to *subsection 10* of this section, *subsection (1)* of this section shall apply and have effect as respects periods of limitation that have expired before or after the commencement of this section.

(10) If, because of any or all of its provisions, this section would, but for the provisions of this subsection, conflict with a constitutional right of any person, the provisions of this section shall be subject to such limitations as are necessary to secure that it does not so conflict, but shall be otherwise of full force and effect.

(11) In this section –

“immediate landlord” means the person who, for the time being, is entitled to the next superior interest in the land, and where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of his or her tenancy;

“landlord” means the person for the time being

entitled to receive (otherwise than as agent for another person) the rent paid in respect of premises by the tenant thereof and, where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of his or her tenancy;

“*superior landlord*” in relation to a tenant, means any person entitled to an interest in the land held by the tenant superior to the interest of the person from whom the tenant holds the land;

“*tenant*” means the person for the time being entitled to the occupation of premises and, where the context so admits, includes a person who has ceased to be entitled to that occupation by reason of the termination of his or her tenancy.”

Amendment of section 49 of the Act of 1964

3. – Section 49 of the Act of 1964 is hereby amended –

(1) in *subsection (2)* by the substitution for “extinguished” of “vested in the applicant”; and

(2) in *subsection (3)* by the substitution for “be extinguished” of “vest in the applicant”.

Guidance on interpretation

4. – The Law Reform Commission Report (LRC 67 - 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.

Short title and commencement

5. – (1) This Act may be cited as the Title by Adverse Possession Act, 2003.

(2) This Act shall come into operation on such day as the Minister may by order appoint.

**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
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Twelfth (Annual) Report (1990) (P1 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
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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
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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 Restitutory 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
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