
REPORT

ON

LAND LAW AND CONVEYANCING LAW: (7)

POSITIVE COVENANTS OVER FREEHOLD LAND AND

OTHER PROPOSALS

(LRC 70 - 2003)

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 Office of the Attorney General under the terms of the Act.

To date the Commission has published sixty eight Reports containing proposals for reform of the law; eleven Working Papers; twenty one 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 C to this Report.

Membership

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

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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, 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 6 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 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 by 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 legislation proposed in this Report. Ms O'Driscoll is a former member of the Office of the Parliamentary Counsel to the Government, formerly the Office of the Parliamentary Draftsman.

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INTRODUCTION

1 This Report is concerned with six distinct areas of land law and conveyancing law. Chapter 1 deals with one of the most striking anomalies in our land law, *viz* the issue of the enforceability of freehold covenants. The Commission examines the possible enactment of a statutory provision for the enforceability and modification of freehold covenants.

2 Chapter 2 deals with the definition of “purchaser” in section 3 of the *Succession Act 1965*. As originally enacted section 3 requires a purchaser to make all reasonable enquiries, whether buying from a personal representative of a deceased owner or from a person who has acquired the property from a personal representative by an assent. This appears not to have been the intention of the promoters of the original Bill which became the Succession Act. The Commission, therefore, reviews a solution to this problem by the deletion of the words “in good faith” from section 3 of the *Succession Act 1965*.

3 Chapter 3 deals with the situation where two or more joint tenants to a property die simultaneously. The common law provides that on the non-simultaneous death of a joint tenant, that joint tenant’s interest passes automatically to the surviving joint tenant or tenants. However, in cases of simultaneous death it is impossible to say which joint tenant survived the other. The Commission, therefore, examines the possibility of providing that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, any land held by them in a joint tenancy, will be deemed to have been held under a tenancy in common, and will pass to their respective successors as under a tenancy in common.

4 In Chapter 4 the Commission recommends legislation to deal with the problems posed by compulsory registration under the *Irish Church Act 1869*.

5 Chapter 5 deals with the issue of a joint tenant unilaterally severing its portion of a joint tenancy. As an agreement is necessary to enter into a joint tenancy, the Commission examines whether an agreement should also be necessary to sever the joint tenancy. The Commission reviews the possibility of introducing legislation to prohibit a joint tenant unilaterally severing its portion of a joint tenancy.

6 Chapter 6 deals with section 126 of the *Succession Act 1965* and the *Statute of Limitations 1957* in regard to the time limits surrounding claims to a deceased's estate. The Commission examines whether there should be uniform periods of limitation regarding claims involving a deceased's estate.

7 Throughout the Report various legislative proposals are recommended. These proposals have been consolidated, for ease of reference, into a draft *Land Law and Conveyancing Bill 2003* which is contained in Appendix A to this Report.

CHAPTER 1 THE ENFORCEABILITY OF FREEHOLD COVENANTS

1.01 One of the most striking anomalies in our land law and conveyancing system is the law governing enforceability of covenants relating to freehold land.¹ Much land in Ireland, whether held under a freehold or leasehold title, is subject to covenants arising from some previous transaction. In the case of land held under a leasehold title the covenants will have been contained in the lease when it was originally granted. It is usual for a lease, especially one granting a substantial term, to contain a wide range of covenants entered into by the landlord and, more extensively, by the tenant.²

1.02 In the case of freehold land, covenants are usually entered into when the owner sells off part only of his land. The essential point is that, because he is retaining some of the land, he will be concerned about the use and development of what is becoming neighbouring land, *ie*, the part sold off.³ It is common in such a situation for the vendor to require the purchaser to enter into various covenants designed to protect the vendor in his and his successors' continuing enjoyment of the retained land. In this respect freehold covenants form part of a more general law of what are sometimes called "appurtenant" rights. Essentially such rights exist as between neighbouring landowners that is, one landowner (owner of the "dominant" land) has rights over his neighbour's land (the "servient" land). Another extremely common example is an easement, such as a

¹ See generally on this subject Lyall *Land Law in Ireland* (2nd ed Round Hall 2000), Chapter 21; Wylie *Irish Land Law* (3rd ed Butterworths 1997) Chapter 19.

² See generally Wylie *Landlord and Tenant Law* (2nd ed Butterworths 1998).

³ Sometimes, of course, the owner ends up selling off all his land, *eg*, where he is a developer of a larger site, such as a housing estate, which is sold off in parts to individual purchasers of the new houses. In such cases the scheme of covenants is usually designed ultimately to benefit each and every purchaser and to be mutually enforceable as between them and their respective successors in title: see paragraphs 1.09 and 1.12 below.

right of way, or a profit à prendre, such as fishing, sporting rights, and the right to cut turf or timber on the neighbour's land.⁴

1.03 The existence of freehold covenants may be an important factor in preserving the value of the land retained, just as many covenants entered into by a tenant are designed to preserve the value of the landlord's reversion. The anomaly that exists lies in the fact that the law governing freehold covenants has developed quite differently from that governing leasehold covenants. Put simply, there is generally little problem about the enforceability of leasehold covenants whereas there is a major problem about the enforceability of freehold covenants.

Leasehold Covenants

1.04 It is of the essence of a lease that the various covenants entered into by the original landlord and original tenant should remain enforceable by and against their respective successors in title. This is particularly important where the lease is granted for a substantial term, for the likelihood, indeed the inevitability in the case of very long terms, is that the landlord's and the tenant's interest will each be passed on to a successor. Fortunately, from the earliest days of the development of leasehold law such mutual enforceability was recognised to some extent under the general law,⁵ and amplified by legislation enacted by the old Irish Parliament.⁶ This position was reinforced by various provisions in the *Landlord and Tenant Law Amendment Act, Ireland 1860* (Deasy's Act)⁷ and the *Conveyancing Act 1881*.⁸ The result has been that there is generally no problem about ensuring that leasehold covenants remain enforceable by and

⁴ Note, however, that, unlike an easement, a profit need not be an appurtenant right and may exist "in gross", *ie*, it may be owned by someone who is not a neighbouring landowner, indeed, not an owner of any land at all. See generally Lyall *op cit* Chapter 22; Wylie *Irish Land Law* (3rd ed Butterworths 1997) Chapter 6.

⁵ *Spencer's Case* (1583) 5 Co Rep 16a.

⁶ Statute of Reversions (Ir) Act 1634 (10 Chas 1 Sess 2 c 4).

⁷ Sections 12-16.

⁸ Sections 10 and 11. For detailed discussion of the 1860 and 1881 provisions see Wylie *Landlord and Tenant Law* (2nd ed Butterworths 1998) Chapters 21 and 22.

against the successors in title to the original landlord and original tenant. It should be noted that this applied in any situation where the relationship of landlord and tenant was created. Thus it applied in one type of freehold estate, *viz* a fee farm grant which was either created directly or resulted from the conversion of a lease or which created the relationship of landlord and tenant.⁹

1.05 There was one particular feature of Deasy's Act which was to prove of considerable practical significance, especially in the context of modern commercial leases. This was the provision in section 16 whereby, subject to compliance with its requirements,¹⁰ the original tenant ceases to have any continuing liability under the lease after he has assigned his interest to someone else with the landlord's consent.¹¹ This negation of the contractual liability, which would otherwise apply, meant that Ireland has not suffered the serious practical problems which have arisen in other jurisdictions.¹² These were particularly acute where a modern commercial lease was involved, because in such a case the original tenant might find himself liable for escalating rents resulting from regular rent reviews carried out long after he had ceased to hold the tenant's interest.

1.06 This generally satisfactory state of the law partly explains why so much property development in Ireland was, until recently, carried out by way of leasehold conveyancing. As we point out below, the law relating to freehold covenants was, in contrast, defective in several respects. Moreover, the impact of this anomaly became much more serious with the prohibition on the creation of new ground rents in respect of dwellings contained in the *Landlord and Tenant (Ground Rents) Act 1978*. This created an immediate shift to freehold conveyancing, a development which has been reinforced by the

⁹ See Lyall *op cit* Chapter 7; Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraph 4.057 *et seq.*

¹⁰ These have been the subject of earlier consideration by the Commission: see *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 58-59.

¹¹ See Wylie *Landlord and Tenant Law* (2nd ed Butterworths 1998) paragraphs 21.29-30.

¹² *Eg* England: see the Law Commission's report *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 174 1988). Its recommendations on this subject were put into effect by the *Landlord and Tenant (Covenants) Act 1995*, especially section 5.

substantial conversion of leasehold titles to freehold titles which has resulted from the provisions for acquisition of the fee simple contained in the *Landlord and Tenant (Ground Rents) Acts, 1967-87*.

Freehold Covenants

1.07 The defects in the current law derive from several factors. First, the common law originally took a very restrictive view of enforceability against successors in title. The basic rule was that the **benefit** of the covenant (*ie* the right to enforce it) could, in certain circumstances,¹³ pass to a successor in title to the covenantee,¹⁴ whereas the **burden** (*ie*, the obligation to comply with the covenant) could not pass to a successor in title to the covenantor.¹⁵ It is true that there were some indirect ways of getting round these restrictions, such as creating successive indemnity agreements or reciprocal mutual covenants attracting the so-called “benefit and burden” principle,¹⁶ but these were of limited application and did not displace the general rule that the burden did not run.¹⁷ Secondly, there are no statutory provisions governing enforceability of freehold covenants,¹⁸ similar to those relating to leasehold covenants referred to earlier. Thirdly, although the courts during the nineteenth century developed equitable principles to alleviate the common law rule that the burden of a freehold covenant did not pass to a successor in title, this was a partial solution only. Named after the leading English decision,¹⁹ the

¹³ *Eg* provided the covenant “touched and concerned” the covenantee’s land and the successors held the same legal title as the original covenantee.

¹⁴ *Ie* the vendor in the example given in paragraph 1.02 above.

¹⁵ *Ie* the purchaser in the example given in paragraph 1.02 above. See *Austerberry v Oldham Corporation* (1885) 29 ChD 750; *Smith v Colbourne* [1924] 2 Ch 533.

¹⁶ See the discussion in Lyall *op cit* at 687-688; Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraphs 19.22-23.

¹⁷ Note the recent affirmation of this rule by the House of Lords in *Rhone v Stephens* [1994] 2 AC 310, wherein support was expressed for the recommendations of legislative changes in the law contained in the Law Commission’s *Report on Positive and Restrictive Covenants* (Law Com No 127 1984).

¹⁸ Apart from the leasehold statutory provisions applying to freehold grants like fee farm grants: see paragraph 1.04 above.

¹⁹ The Irish courts have recognised and applied these principles: see *eg* , *Craig*

rule in *Tulk v Moxhay*,²⁰ which enshrines these equitable principles, is subject to major limitations.

1.08 The first, and arguably the most serious, limitation is that the rule permits the burden of only “restrictive” (or “negative”) covenants to pass to successors in title to the original covenantor. Thus while, for example, a covenant not to use the property for particular purposes may bind successors, any covenant of a “positive” nature, *ie*, one involving positive action, such as expenditure of money, remains subject to the general common law rule and will not bind successors. Obvious examples would be any covenant to pay money, such as service charges, or to carry out building works or to do repairs. The contrast with leasehold covenants, therefore, is striking. A second, and also serious, limitation is that the rule in *Tulk v Moxhay* is based upon equitable principles. This has a number of consequences. One is that the landowner seeking to enforce the burden of a covenant against a neighbour is invoking equitable remedies, such as an injunction to stop the infringement. The essential point about such a remedy is that its grant lies within the discretion of the court; there is no guarantee that a court will grant it and the court will insist upon looking into all the particular circumstances of the case and the conduct of the parties. It follows that the right to enforce the covenant creates at most an equitable interest in the landowner enjoying the benefit of the covenant. In this respect a freehold covenant is to be contrasted with similar rights enjoyed by a landowner over a neighbour's land such as an easement, like a right of way. An easement usually exists as a legal right which remains enforceable against a successor in title of the land burdened by it, however the successor acquired the land. By contrast, in theory, a freehold covenant may cease to be enforceable if the burdened land has passed to a *bona fide* purchaser of the legal title without notice of the covenant.²¹

v Greer [1899] 1 IR 258; *Williams & Co Ltd v LSD Ltd* High Court 19 June 1970; *Power Supermarkets Ltd v Crumlin Investments Ltd* High Court 22 June 1981; *Whelan v Cork Corporation* [1991] ILRM 19 (affirmed [1994] 3 IR 367).

²⁰ (1848) 2 Ph 774.

²¹ In practice the deed creating the covenant will usually be registered in the Registry of Deeds, thereby securing priority for the covenant; in the case of registered land, it may be registered as a burden on the land affected by it under s 69(1)(k) of the *Registration of Title Act 1964*. See the discussion in *McAllister Registration of Title in Ireland* (1973) at 219-21.

1.09 Take next the question of the transfer of the benefit of a freehold covenant: notwithstanding the common law's acceptance of the principle that the benefit of a freehold covenant may pass to successors in title of the covenantee, there are often practical difficulties which arise from the fact that an attempt to assign the benefit expressly is defective or it is difficult to establish that the benefit has been sufficiently "annexed" to the covenantor's land so as to pass with it automatically on its subsequent disposal.²² Particular problems may arise where the covenanted land is subsequently sold off in parts as, *eg*, where a housing estate is developed, and it may be questioned whether the benefit was annexed to each and every part.²³ The courts did devise special rules to govern such "estate schemes",²⁴ but these are somewhat complicated and their precise scope can hardly be said to be clear.²⁵

1.10 These defects and limitations in the law governing enforceability of freehold covenants are sufficiently serious in themselves to justify legislative reform, but the practical problems to which they give rise in conveyancing transactions make the case for reform overwhelming. As stated earlier, the most serious problem lies in the fact that the obligations contained in a positive covenant, such as a covenant to pay money or to carry out works or to do repairs, generally cannot be made to pass to a successor in title. This creates particular difficulties in developments involving a high degree of interdependence between the various owners in the developments. Obvious illustrations are blocks of flats, apartments and similar multi-occupational complexes involving properties like town houses and duplex accommodation. The continued enforceability of positive obligations against successive owners of such properties is vital to the

²² See the discussion of this subject in Lyall *op cit* at 695-705; Wylie *op cit* paragraphs 19.26-33.

²³ It should be noted that section 58 of the *Conveyancing Act 1881* which is still in force in Ireland, is worded differently from section 78 of the *English Law of Property Act 1925* so that the scope for the "statutory" annexation found by the Court of Appeal in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371 may not exist here.

²⁴ Sometimes referred to as the rule in *Elliston v Reacher* [1908] 2 Ch 374. This has been recognised in Ireland: *Fitzpatrick v Clancy* High Court 1964; *Belmont Securities Ltd v Cream* High Court 17 June 1988.

²⁵ See Lyall *op cit* at 701-705; Wylie *op cit* paragraphs 19.34-37.

security of all and this explains why hitherto such developments have usually been carried out by way of leasehold conveyancing. The view has been taken by most conveyancers that the current state of the law relating to freehold covenants creates too many difficulties in using freehold conveyancing.²⁶ The particular problems of developments like flats and apartments were solved in many parts of the world by special legislative schemes, such as the strata titles legislation in Australia and the condominium laws of North America. Apart from that particular area, the need for reform of the law relating to freehold covenants in general has long been recognised.²⁷

Legislative Reform

1.11 Apart from proposals for reform which have been made from time to time,²⁸ at least two jurisdictions have enacted legislation dealing with the enforceability of freehold covenants generally, *viz* Trinidad and Tobago and Northern Ireland. They are both relatively short provisions, so it is worth quoting them in full.

Trinidad and Tobago

1.12 Section 118 of the Trinidad and Tobago *Land Law and Conveyancing Act 1981* (the "T&T Act") provides as follows:

(1) Any covenant or agreement which imposes in respect of land (hereinafter referred to as "the servient land") for the benefit of other land (hereinafter referred to as "the dominant land") an obligation -

(a) restricting the use of, or the execution of works on, the servient land; or

²⁶ Note the evidence put before the Supreme Court in *Metropolitan Properties Ltd v O'Brien* [1995] 1 IR 467 and referred to by O'Flaherty J at pp 481-482.

²⁷ Note the view of the House of Lords in England recently expressed in *Rhone v Stephens* [1994] 2 AC 310.

²⁸ See those made in England over recent decades: *Report of the Committee on Positive Covenants Affecting Land* (Cmnd 2719 1965); *Restrictive Covenants* (Law Com No 11 1967); *Appurtenant Rights* (Law Com WP No 36 1971); *Positive and Restrictive Covenants* (Law Com No 127 1984).

- (b) to execute any works on the servient land; or
- (c) to pay, or contribute to, the cost of works to be carried out on the dominant land; or
- (d) of any other thing of a negative or positive nature concerning the dominant or servient land;

is enforceable by action by the owner or occupier for the time being of the dominant land, or any part thereof, against the owner or occupier for the time being of the servient land, or any part thereof, or any person interfering with the performance or observance of the obligations.

(2) No covenant or agreement is enforceable under subsection (1) by or against any person whose interest in, or occupation of, the dominant or servient land has ceased.

(3) For the purposes of this section, "works" includes not only constructional works but also the planting of trees and hedges, the digging of ditches, the making of drains and the maintenance, repair, cleansing and replacement of any works.

(4) This section applies only –

- (a) to covenants or agreements affecting freehold land and entered into after the commencement of this Act;
- (b) to covenants or agreements contained in a deed registered under Part IV of the Land Registration Act, 1980, or entered on a certificate of title relating to registered land;
- (c) if and so far as a contrary intention is not expressed in the covenant or agreement and has effect subject to the provisions contained therein.

(5) Upon application by any interested person, or on reference by the Land Registrar, the Court may determine any

question as to the enforceability of covenants or agreements under this section and, upon such determination, may make all such orders, including orders as to costs, as it thinks fit.

Northern Ireland

1.13 Article 34 of the *Property (NI) Order 1997* (the “Northern Ireland 1997 Order”) provides as follows:

- (1) Subject to paragraphs (2) and (3) and without prejudice to remedies for enforcement, this Article replaces the rules of common law and equity relating to the enforceability between the owners of estates in fee simple of covenants burdening or benefiting such estates.
- (2) This Article does not apply to –
 - (a) any covenant contained in a deed made before the appointed day; or
 - (b) any covenant contained in a deed made on or after the appointed day in pursuance of an obligation assumed before that day; or
 - (c) any covenant for title; or
 - (d) any covenant which is expressed to bind only the covenantor; or
 - (e) any covenant to which Article 25 applies.
- (3) Nothing in this Article affects the enforceability of any covenant as between the original parties to the covenant.
- (4) The following kinds of covenant (and only covenants of those kinds) are enforceable (as appropriate to the nature of the covenant and the circumstances of the breach or the anticipated breach) by the owner for the time being of the land benefited by the covenant against the owner for the time being of the land burdened by it –

- (a) covenants in respect of the maintenance, repair or renewal of party walls or fences or the preservation of boundaries;
- (b) covenants to do, or to pay for or contribute to the cost of works on, or to permit works to be done on, or for access to be had to, or for any activity to be pursued on, the land of the covenantor for the benefit of land of the covenantee or other land;
- (c) covenants to do, or to pay for or contribute to the cost of, works on land of the covenantee or other land where the works benefit the land of the covenantor;
- (d) covenants to reinstate in the event of damage or destruction;
- (e) covenants for the protection of amenities or services or for compliance with a statutory provision (or a requirement under it), including –
 - (i) covenants (however expressed) not to use the land of the covenantor for specified purposes or otherwise than for the purposes of a private dwelling;
 - (ii) covenants against causing nuisance, annoyance, damage or inconvenience;
 - (iii) covenants against interfering with facilities;
 - (iv) covenants prohibiting, regulating or restricting building works or the erection of any structure, or the planting, cutting or removal of vegetation (including grass, trees and shrubs) or requiring the tending of such vegetation;

- (f) covenants in relation to a body corporate formed for the management of land,

and, accordingly, covenants of those kinds cease to be enforceable –

- (i) by a person when he ceases to be owner of the land benefited by the covenant; or
- (ii) save in respect of the transfer of membership of a body corporate such as is mentioned in subparagraph (f), against a person when he ceases to be owner of the land burdened by the covenant (but without prejudice to that person's liability to the owner for the time being of the land benefited by the covenant for any breach arising during that person's ownership of the land; and, for the purposes of this provision, any proceedings may be continued by any subsequent owner of that land).

(5) For the purposes of paragraph (4), it is conclusively presumed that the benefit and the burden of a covenant of a kind mentioned in that paragraph attach permanently to the whole and every part of the land of the covenantee and the covenantor respectively.

(6) Where there is a development, paragraphs (4) and (5) apply as if (if it is not the case) the covenants made by parcel owners with the developer had been made also with other parcel owners to the extent that those covenants are capable of reciprocally benefiting and burdening the parcels of the various parcel owners and as if references in those paragraphs to the land benefited by a covenant, the land burdened by a covenant and the land of the covenantee and the covenantor included (to that extent) references to parcels.

(7) For the purposes of paragraph (6), a development arises where –

- (a) land is, or is intended to be, divided into two or

more parcels for conveyance in fee simple by the developer to parcel owners; and

- (b) there is an intention as between the developer and parcel owners to create reciprocity of covenants such as is referred to in paragraph (6); and
- (c) that intention is shown expressly in conveyances to parcel owners or by implication from the parcels and covenants in question and the proximity of the relationship between parcel owners.

(8) Paragraph (5) does not prejudice the release of a covenant by a deed executed by the owners of the respective land or, where there is a development, by all the parcel owners to whom paragraph (6) applies and (where he still owns part of the land comprised in the development) the developer.

(9) In this Article -

“conveyance” includes a transfer of registered land;

“developer” means an owner who conveys parcels of land under a development and his successors in title;

“limited owner” means a tenant for life of a settled estate in fee simple or a person who has the powers of a tenant for life over such an estate under the Settled Land Acts 1881 to 1890;

“owner” means a person who holds an estate in fee simple or who is a limited owner; but does not include a person who holds by adverse possession unless -

- (a) that possession has continued for a duration such as is sufficient to extinguish under Article 26 of the Limitation (Northern Ireland) Order 1989 the title to which it is adverse (and, in this event, a covenant to which this

Article applies is enforceable by or against that person as if he held under that title); or

- (b) a covenant which is sought to be enforced against that person is restrictive in substance or relates to permission;

“parcel owner” means a person who at any time acquires or holds a parcel of land within a development; and a mortgagee in possession of any parcel, or a person acting as a receiver appointed by a mortgagee, is to be taken to be a parcel owner.

1.14 The Commission wishes to make a number of comments about these two provisions. First, while it accepts that such provisions should be subject to some limitations, e.g., in being confined to appurtenant rights affecting “dominant” and “servient” land, it is not convinced of the need to provide an exhaustive list of the only type of covenants affected such as is contained in paragraph (4) of the Northern Ireland 1997 Order. This always runs the danger of excluding something which should have been included. In this respect it would prefer a formula more akin to that in subsection (1) of the T&T Act. Secondly, given the complexities of the existing law, a clear statement indicating that the legislation displaces the old law in its entirety, such as is contained in paragraph (1) of the Northern Ireland 1997 Order, is useful. Thirdly, the Commission is concerned about the effect of paragraph (3) of the Northern Ireland 1997 Order, which might be regarded as inconsistent with the provision in paragraph (4)(f)(i). The latter (note also subsection (2) of the T&T Act) is a provision which the Commission would certainly favour, since it would make a freeholder's position the same as a leaseholder's under section 16 of Deasy's Act.²⁹ In that connection the Commission also thinks that there should be a saving to cover the right of the owner of the “dominant” land to issue proceedings after he has ceased to be the owner in respect of the breaches of covenant which occurred while he was still the owner (subject, of course, to the usual time-bar for such proceedings under the general law relating to limitation of actions). Fourthly, given the complexity of the rules governing “estate schemes” and the fact that freehold conveyancing

²⁹ See paragraph 1.04 above.

must be used in Ireland for housing developments, the Commission thinks that provisions along the lines of paragraphs (6) and (7) of the Northern Ireland 1997 Order would be useful. It has concluded that there is no need at this stage to go further than this. In particular it is not recommending enactment of special legislation for multi-occupation developments like blocks of flats, apartments and the like, such as the strata titles or condominiums legislation mentioned earlier. This is a very complex subject which will be considered by the Commission at a later stage. *The Commission recommends that statutory provision should be made for the enforceability of freehold covenants by and against successors in title, as outlined in the draft legislation contained in paragraph 1.20 below.*

1.15 There is another practical point to which attention should be drawn. The effect of the provision we are proposing is that freehold covenants will, in future, acquire the status of legal rights, enforceable against successive owners of the “servient” land, just like easements. It will be important, therefore, that future purchasers bear in mind that the land being bought may be subject to covenants created many years previously, as a result of some earlier transaction relating to the land. In the case of registered land the position will be clear because the covenant will remain entered on the folio (unless or until discharged and removed) for all future purchasers to see. But as the Registry of Deeds currently operates the position with respect to unregistered land is not so straightforward. The point is that, although in order to remain enforceable against the “servient” land, the covenant would have to be contained in a deed registered in the Registry of Deeds, that registration, which gives the deed priority over all subsequent deeds (whether registered themselves or not registered), may have taken place many years previously. As time goes by, and the gap between the time of registration of the deed creating the covenant and subsequent transactions stretches into decades, the likelihood is that the usual Registry of Deeds searches carried out on behalf of purchasers will not reveal the earlier deed. The point is that these searches cover only the title deduced *ie*, they are made against only the names of persons appearing on the title documents furnished by the vendor. The title deduced invariably goes back for a limited time only and it should be noted that the Commission in an earlier Report,³⁰ recommended reducing the

³⁰ *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 8-9.

statutory period for deduction of title (which operates in the absence of an express contractual provision) from 40 years to 20 years.

1.16 The statutory scheme proposed for freehold covenants may thus involve the risk that, in time, such covenants will also become interests hidden in the “pre-root” title. However, the risk would seem to be small for a number of reasons. First, conveyancers are likely to respond to the new legislation by insisting that, when such covenants are first entered into, the covenantor will further covenant that when the property is sold on by him he will see that the covenants are repeated in the conveyance and that the new purchaser enters into a similar covenant to do the same when he sells on. In this way, the details of the covenants remaining enforceable against the land will exist in the later documents produced by vendors when deducing title. Secondly, even if the details of covenants are not so repeated, the likelihood is that the existence of covenants will at least be referred to in the later conveyances – this is fairly standard conveyancing practice. The enactment of the new legislation would prompt a purchaser’s solicitor to insist upon production of the deed giving the details. No doubt the Law Society will consider whether its standard contract should be altered to sanction this.³¹ Thirdly, it is a significant point that conveyancers have always had to deal with such problems because rights like easements and profits may have been excepted or reserved in earlier deeds.³² The primary object of the recommended provisions is to assimilate freehold covenants with rights like easements and profits. Fourthly, the risk, in any event, would only arise some decades after the enactment of the new legislation, because in the first couple of decades after enactment, the deed creating the covenants would in most, if not all, sales be part of the title deduced by the vendor. After that, with the rapid advances now being made in the Land Registry, much more land will be registered land where, as stated earlier, the problem does not arise.

³¹ Note that Condition 11 of the *General Conditions of Sale* (Law Society 2001) already creates exceptions to the rule against production of pre-root documents or raising objections or requisitions in respect of such documents (enshrined in section 3(3) of the *Conveyancing Act 1881*) eg in respect of burdens affecting land without registration: see *Wylie Irish Conveyancing Law* (2nd ed Butterworths 1996) paragraph 14.59.

³² See *Wylie Irish Conveyancing Law* (2nd ed Butterworths 1996) paragraph 16.10.

1.17 There is one further matter to be mentioned in this context. The T&T Act contains a provision enabling a landowner whose land is burdened with the obligation to comply with covenants, whether leasehold or freehold, to apply to a tribunal (in this instance, the Land Commission) to secure, in certain circumstances, a discharge or modification of the covenant.³³ That provision, like several others in various jurisdictions, is modelled on a provision first introduced in England by section 84 of the *Law of Property Act 1925*.³⁴ A similar provision is to be found in Northern Ireland, in Part II of the *Property (NI) Order 1978*.³⁵ The reasoning behind these provisions is that appurtenant rights like restrictive covenants can outlive their usefulness. For example, a covenant restricting the use of property to private residential purposes, imposed when part of a larger property was sold off, may have made sense at that time because of use made by the vendor of his retained land and the general character of the neighbourhood. However, several decades later that covenant may have become entirely obsolete because the retained land has long since been converted to commercial use and this reflects a complete change in the character of the neighbourhood.

1.18 Nevertheless, the covenant remains a burden on the title of the land originally sold off and the current owner will remain unable to develop his land in contravention of it, even though he may succeed in obtaining planning permission for such development. He may be forced to “buy off” the neighbour who has the right to enforce the covenant and refuses to release it³⁶ or run the risk of that neighbour seeking an order, like an injunction, to stop the development, hoping that the court can be persuaded to refuse such an order in the

³³ Section 166 of the *Land Law and Conveyancing Act 1981*.

³⁴ Some modifications were made by section 28 of the *Law of Property Act 1969*.

³⁵ For detailed discussion see Dawson “Modification and Extinguishment of Land Obligations under the Property (NI) Order” (1978) 29 NILQ 223.

³⁶ In the case of registered land, the court has power under section 69(3) of the *Registration of Title Act 1964*, to modify or discharge any covenant or condition where this will be “beneficial to the persons principally interested in the enforcement thereof” and the Registrar may also discharge or modify but only “with the consent of all persons interested in the enforcement thereof.” This seems clearly to rule out discharge or modification where the neighbour refuses to co-operate. Not surprisingly these powers are rarely, if ever, invoked.

circumstances of the case.³⁷ The legislative provisions referred to earlier provide an alternative solution, *viz* enabling the landowner burdened with such appurtenant rights to obtain a discharge or modification in certain circumstances without having to secure the consent or co-operation of the neighbour who holds the technical right to enforce the covenant. In view of the greater enforceability of freehold covenants which we are recommending, and the fact that such covenants could, in theory, remain a burden on the title indefinitely, consideration must be given to whether some legislative provisions for discharge and modification should also be introduced here. In reviewing this matter, the Commission studied, in particular, what is probably one of the most comprehensive provisions of the kind in question, Part II of the *Property (NI) Order 1978* (the “Northern Ireland 1978 Order”). This is set out in the Appendix B to this Report.

1.19 The Commission would make a number of comments about the Northern Ireland 1978 Order. First, as already stated, it has a very wide scope, in that the power to modify or extinguish relates to “impediments” on land, which encompass not only covenants but also interests like easements and profits. Furthermore, in respect of covenants, the power extends to leasehold covenants, but not in the first 21 years of the term unless special permission for an application is granted. At present, the Commission sees no need for such wide provisions in this jurisdiction and recommends that any legislation to be enacted should be confined to freehold covenants whose enforceability is provided for by the legislation recommended in the previous paragraphs. The notion of some limit on applications is, however, sensible and so it is proposed that no application should be made unless the covenant has been in existence for at least 20 years. Secondly, some provision for compensation is made in the Northern Ireland 1978 Order and, in light of constitutional requirements, it is important that any provision in this jurisdiction ensures that compensation is payable where appropriate.³⁸ Thirdly, the Commission sees no need for establishment of a special tribunal to

³⁷ The risk of an award of damages for breach of covenant will be less serious because the circumstances are likely to result in a nominal award only, *ie*, the neighbour will find it difficult to establish substantial loss.

³⁸ Note that the Northern Ireland 1978 Order was upheld by the European Commission of Human Rights: see *S v United Kingdom* (Application No 10741/84; Decision of 13 December 1984).

exercise such jurisdiction³⁹ and recommends that it should be vested in the county registrars, who already have similar jurisdiction.⁴⁰

Draft Legislation

1.20 *Subject to these points, the Commission recommends enactment of a statutory provision for modification of freehold covenants, as outlined below:-*

Enforceability of positive freehold covenants.

Section (). (1) Any covenant to which this section applies that imposes in respect of land (referred to subsequently in this Act as “the servient land”) for the benefit of other land (referred to subsequently in this Act as “the dominant land”) an obligation to do or abstain from doing any act or thing shall be enforceable -

(a) by –

(i) the owner for the time being of the dominant land, or any part thereof, or

(ii) a person who has ceased to be the owner for the time being of the dominant land, or any part thereof, in respect of any period when he or she was such owner, and

(b) against –

(i) the owner for the time being of the servient land or any part thereof, or

³⁹ The Lands Tribunal already existed in Northern Ireland when the 1978 Order was enacted, having been established by the *Lands Tribunal and Compensation Act (NI) 1964* to deal with matters like assessment of compensation for compulsory purchase of land.

⁴⁰ Eg arbitrations under the *Landlord and Tenant (Ground Rents) Act 1967*, which includes determining disputes over the purchase price and apportionment of rents.

(ii) a person who has ceased to be the owner for the time being of the servient land, or any part thereof, in respect of any period when he or she was such owner.

(2) This section applies to a covenant –

(a) affecting freehold land (but not including land held under a fee farm grant or otherwise held under a contract of tenancy or any land to which section 28 of the Landlord and Tenant (Ground Rents) (No.2) Act, 1978 applies), entered into after the commencement of this section;

(b) in so far as no contrary intention is expressed in the covenant or otherwise in the deed containing it.

Variation of covenants affecting freehold land.

Section () (1) On the application made in the prescribed form of any person interested in land affected by a covenant (“ the servient land”), the county registrar for the area in which the land is situate may, if satisfied that compliance with the covenant would involve an unreasonable interference with the use and enjoyment of the land, make an order varying or setting aside the covenant in whole or in part.

(2) Notice of an application under this section shall be given by the applicant –

(a) to the owner of the dominant land, and

(b) to such other persons as the county registrar may direct:

Provided, however, that the county registrar may dispense with service under this subsection where the applicant satisfies him that it is not reasonably practicable to effect such service.

(3) Service of a notice under subsection (2) may be effected –

(a) by registered post, or

(b) in such other manner (including pre-paid post) as the county registrar may direct.

(4) The county registrar, in determining whether to make an order under subsection (1), may have regard to the following matters, namely:

(a) the period when, the circumstances in and the purposes for which the covenant was entered into;

(b) any change in the character of the land or its neighbourhood;

(c) any public interest in the land, particularly as exemplified in any development plan made under the Planning and Development Act, 2000 for the area in which the land is situate and in force at the time of the application;

(d) any trend shown by planning permissions granted under that Act in respect of any land in the vicinity of the land or by refusals to grant such permissions;

(e) whether the covenant secures any practical benefit to any person and, if so, the nature and extent of that benefit;

(f) where the covenant creates an obligation to execute any works or do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous in comparison with the benefit to be derived from such compliance;

(g) whether the person entitled to the benefit of the covenant has agreed, expressly or by implication, to the covenant being varied or set aside;

(h) any representations made by any person served with notice of the application;

(i) any other matter which the county registrar considers relevant.

(5) Where the county registrar makes an order under subsection (1) he or she may include a condition in the order that the applicant pay to any person who, as a consequence of the making of the order, loses any benefit under the covenant such amount as the county registrar considers appropriate to compensate the person for such loss.

(6) Where an order is made under subsection (1), the county registrar concerned shall, in the case of registered land, furnish the Registrar of Titles with notice of the order and the Registrar of Titles shall thereupon cause an entry to be made in the register under the Registration of Title Act, 1964, inhibiting, until such time as the order is discharged, any dealing with any registered land or charge which appears to be affected by the order.

(7) Where notice of an order has been given under subsection (6) of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall thereupon cause the entry made under subsection (6) of this section to be varied to that effect.

(8) Where notice of an order has been given under subsection (6) of this section and the order is discharged, the county registrar concerned shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall cancel the entry made under subsection (6) of this section.

(9) Where an order is made under subsection (1) of this section, the county registrar concerned shall, in the case of unregistered land, furnish the Registrar of Deeds with notice of the order and the Registrar of Deeds shall thereupon cause the notice to be registered in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707.

(10) Where notice of an order has been given under subsection (9) of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cause the entry made under subsection (9) of this section to be varied to that effect.

(11) Where notice of an order has been given under subsection (9) of this section and the order is discharged, the county registrar concerned shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cancel the entry made under subsection (9) of this section.

(12) Where an order is made which applies to an interest in a company or to the property of a company, the county registrar concerned shall furnish the Registrar of Companies with notice of the order and the Registrar of Companies shall thereupon cause the notice to be entered in the Register of Companies maintained under the Companies Acts, 1963 to 1990.

(13) Where notice of an order has been given under subsection (12) of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cause the entry made under subsection (12) of this section to be varied to that effect.

(14) Where notice of an order has been given under subsection (12) of this section and the order is discharged, the registrar of the High Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cancel the entry made under subsection (12) of this section.

(15) References in this section to the county registrar for the area in which any land is situate shall, where the land is situate in the areas of two or more county registrars, be construed as references to the county registrar for the area in which the larger or largest portion of the land is situate.

(16) A county registrar shall have, for the purpose of and in relation to the making of an order under subsection (1) of this section, the same power of making orders in respect of—

(a) security for costs,

(b) discovery and inspection of documents and interrogatories,

(c) the giving of evidence by affidavit,

(d) examination on oath of any witness,

as the Court has for the purpose of and in relation to any action or matter in that court.

(17) Whenever it appears to a county registrar for any county that a matter falling to be determined under subsection (1) of this section, cannot properly be dealt with by the county registrar by reason of the fact that the county registrar has a personal interest therein or such personal knowledge of the facts or of the parties as might prejudice the determination of the matter, the county registrar shall nominate the county registrar for an adjoining county to hear and determine the matter and, upon such nomination, the matter may be heard and determined accordingly.

CHAPTER 2 DEFINITION OF “PURCHASER” IN THE SUCCESSION ACT 1965

2.01 The word “purchaser” is defined in the *Succession Act 1965* as “a grantee, lessee, assignee, mortgagee, chargeant or other person who in good faith acquires an estate or interest in property for valuable consideration”.⁴¹

2.02 The inclusion of the words “in good faith” means that an obligation is put on a purchaser to make all reasonable enquiries when buying property from another person. In the context of the Succession Act this would oblige a buyer to make all such reasonable enquiries, when buying either from a personal representative of a deceased owner of the property or from a person who has acquired the property from a personal representative by an assent.

2.03 The explanatory memorandum issued with the Bill which became the 1965 Act contained some contradictory statements. For example, section 51 affords protection to a buyer from a personal representative in relation to claims by creditors or beneficiaries of the deceased owner. Dealing with that section, the explanatory memorandum states:—

“There is, thus, no obligation on the purchaser to satisfy himself that the person from whom he is buying is, in fact, the person entitled to have received the property on the death of the previous owner.”

However, because of the inclusion of the words “in good faith” in the definition of “purchaser” in section 3(1), there is an obligation on a purchaser who buys from a person who has received the property from the personal representative, to check that the person was entitled to receive such property from the personal representative either as a

⁴¹ Section 3 of the *Succession Act 1965*.

next-of-kin, in the case of an intestacy, or as a devisee or legatee in the case of a testate estate.

2.04 Similarly, in dealing with section 53(3), the explanatory memorandum stated that this “introduces an important new provision to the effect that an assent or conveyance of unregistered land by a personal representative shall, in favour of a purchaser be conclusive evidence that the person in whose favour the assent or conveyance was made, was, in fact the person entitled to have the land vested in him”. Again, the good faith requirement nullifies the conclusive effect which the provision is said to have.

2.05 It would appear that the drafters of the legislation and the explanatory memorandum did not appreciate that the words “in good faith” had a precise meaning in conveyancing law, which requires that certain enquiries be made by a purchaser. The inclusion of the words in section 3 has, in fact, resulted in the very situation which the drafters appear to have wanted to avoid: it was the drafters’ intention that the words have a meaning equivalent to “at arms length”; not, as has happened, that they would oblige a purchaser to make all reasonable enquiries when buying from a personal representative.

2.06 Part V of the Succession Act contains a number of provisions which appear designed to enhance the powers of personal representatives and their responsibilities to creditors and beneficiaries. The obverse of these provisions is that claims against the estate are to be directed to the personal representatives and that persons who have dealt honestly with the personal representative are entitled to retain any property transferred to them by the personal representatives where the personal representatives have purported to execute such transfers in administering the estate.

2.07 The requirement that a purchaser act in good faith in the context of the Succession Act contradicts many of the provisions of the Act, and goes further than is necessary in placing an excessive burden on the purchaser. The underlying policy of the Act is to place authority and responsibility for proper administration of the deceased’s estate on the personal representative, not on the purchaser. The sections of the Act in which the definition of the word “purchaser” - as requiring good faith - gives rise to difficulties are:—

Section 25

This section provides that a subsequent revocation of a Grant of Administration or Probate is not to affect the validity of a conveyance to a purchaser. A good faith requirement would oblige a purchaser to search the registries of the appropriate courts up to the date of completion of the sale to ensure that no revocation had taken place.

Section 50

This section provides that while a personal representative may sell any part of the estate, not only for the purpose of paying the debts of the estate, but also for distributing the estate, the personal representative should, as far as practicable, give effect to the wishes of the persons of full age who are entitled to the property to be sold. A purchaser is not to be concerned to see that the personal representatives have complied with such wishes. But the good faith requirement obliges the purchaser to make such enquiries.

Section 51 (Referred to in paragraph 2.03 above)

Section 53 (Referred to in paragraph 2.04 above)

Section 55

Section 55 (14) provides that, where an appropriation has been made under the section, such appropriation shall, in favour of a purchaser from the person in whose favour the appropriation was made, be deemed to have been properly made in accordance with the requirements of the section. A good faith requirement would oblige the purchaser to enquire as to the circumstances in which the appropriation was made.

Section 56

Subsection (8) provides that, where a personal representative sells the dwelling in which the deceased's spouse resides, at a time when the right of appropriation remains exercisable, no right against the purchaser shall be conferred on the spouse. A good faith requirement would oblige a purchaser to enquire as

to whether the necessary notice had been served on the spouse, and what response, if any, had been received from the spouse.⁴²

Section 59

This section provides that creditors or persons entitled to a share in the estate can follow any assets which may have been “conveyed” by the personal representatives to any person, other than a purchaser. A good faith requirement would oblige a purchaser to enquire of a personal representative whether the personal representative had checked that there were no creditors or persons who might make claims against the assets concerned.

Section 61

This is a general provision, which appears to represent the general policy of the Act. It provides that a purchaser from personal representatives is entitled to assume that the personal representatives are acting correctly and within their powers. A good faith provision would entirely nullify this section.

Section 121

Subsection (1) provides that a purchaser from a personal representative is to be excluded from any challenge brought under the section to a disposition allegedly made by the deceased for the purpose of disinheriting a spouse or children and, under subsection (8), that any claim is to attach to the consideration paid by a purchaser to a donee and not to the property involved in the disposition. A good faith requirement would oblige a purchaser to enquire as to whether there was

⁴² Bearing in mind the relative weakness of the spouse *vis à vis* the purchaser and the legislative intention to protect the spouse, it is arguable that a purchaser should be under a legislative obligation to act in good faith in this context. However, since the enactment of the 1965 Act, there has been no general practice on the part of purchasers of requiring evidence that the spouse had notice, despite the existence of the good faith requirement. Thus, the removal of the requirement would not significantly change practice. In the event of maladministration, the spouse’s right of action will be against the personal representative of the estate, not against the purchaser.

any question of the disposition being for the purpose of disinheriting a spouse or children, and under subsection (8), to raise the same queries of the donee of the property which the purchaser is buying.

2.08 The general point is that the tenor of Part V of the Act suggests that a personal representative should have the power to dispose of any part of the deceased's estate in due course of administration, with minimal restrictions. A personal representative's duty is to collect in the assets, pay the debts of the estate and distribute the estate in accordance with the deceased's will or the law governing intestacy. If a personal representative finds it necessary to sell any part of the estate in order to have sufficient funds to discharge debts or to pay legacies or to give the next-of-kin their shares, the personal representative should be entitled to do so as readily as the owner of the full legal and beneficial interests in a property could do and should not be required to consult with or obtain the consent of any creditor or prospective beneficiary of the estate.

2.09 If there are any claims by creditors or prospective beneficiaries, then these should be brought against the personal representative and the assets of the estate in the hands of the personal representative. The personal representative has sole responsibility for the administration of the estate, and therefore any claims of maladministration should be directed at the personal representative alone. In the case of an intestacy, the personal representative will have been obliged to provide security to the court, to the extent of twice the value of the estate, normally by way of an insurance company bond, which can be estreated in the event of the personal representative committing a fraud on the creditors or beneficiaries.

2.10 The deletion of the words "in good faith" would offer no additional protection to a purchaser where there has been fraud or actual notice. Therefore, in the absence of fraud or actual notice, a person who takes an assent or purchases a portion of the estate from the personal representative or from a person in whose favour an assent has been made, should not be required by virtue of a good faith requirement to make any enquiries as to the manner in which the estate has been administered.

2.11 *The Commission recommends that the definition of “purchaser” in section 3 of the Succession Act 1965 should be amended by the deletion of the words “in good faith”.*

Draft Legislation

2.12 *The Commission recommends the following draft legislation to amend section 3 of the Succession Act 1965:-*

Section (___). - The Succession Act 1965 is hereby amended -

In section 3, by the deletion in subsection (1) thereof of “in good faith” from the definition of purchaser.

3.01 The word “commorientes” means “dying together or at the same time” and refers to the situation which arises where two or more people die in circumstances, such as an airline or shipping disaster, where it is unclear which of them died first.¹ Matters of succession may turn on the sequence of the parties’ deaths and yet, medical evidence will usually be inconclusive. For example, in *Re Kennedy Estates*,² a married couple died when their car plunged into Lough Derg. Autopsy reports showed that Mr Kennedy died of a heart attack and that his wife drowned. It was contended that Mr Kennedy probably pre-deceased his wife, but the coroner’s report stated that “the situation [was] not clear-cut,” and concluded, “I cannot say for certain whether Timothy Kennedy or Teresa Kennedy died first.” The unreliability of medical evidence in cases of simultaneous death presents problems for claimants seeking to assert that the deaths occurred in a particular order.

3.02 At common law, there was no universal presumption as to the order of deaths in such circumstances.³ However, as was frequently the case, where medical evidence proved inconclusive, the parties were deemed to have perished simultaneously.⁴ This common law approach was given statutory force in section 5 of the *Succession Act*

¹ See generally Brady *Succession Law in Ireland* (2nd ed Butterworths 1995) paragraphs 6.21-6.23; Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) paragraphs 16.2.1(b) and 26.1.13(i); Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraphs 14.32-14.33; Megarry and Wade *The Law of Real Property* (6th ed Sweet & Maxwell 2000) paragraphs 11-100, 11-053 and 11-054.

² High Court (Kearns J) 31 January 2000, see: “Case Notes” (2000) 5(2) CPLJ 43; and *Irish Times* 4 February 2000.

³ See *Re Nightingale* (1927) 71 Sol J 542; and *Re Rowland* (1963) Ch 1

⁴ See *Wright v Netherwood* (1793) 2 Salk 593; and *Re Phene’s Trusts* (1870) 5 Ch App 139

1965 which provides that where “two or more people have died in circumstances rendering it uncertain as to which of them survived the other or others, then, for the purposes of the distribution of the estates of any of them, they shall all be deemed to have died simultaneously.”⁵

3.03 While satisfactory in most cases, the section 5 formulation poses particular problems where the deceased persons held property together in a joint tenancy. One hallmark of a joint tenancy is that there is an automatic right of survivorship as between the co-owners. This means that as each joint tenant dies, their undivided share passes to the surviving joint tenants. Ultimately, the last survivor of the two (or more) tenants will be the sole owner of the property. The sequence of deaths is crucial in determining the question of devolution. In a commorientes situation, the right of survivorship cannot operate in the usual way since there is no single last survivor and medical evidence is unlikely to be of any real assistance. The courts’ solution has been to say that, “if two persons, being joint tenants, perish by one blow, the estate will remain in joint tenancy in their respective heirs.”⁶ This response of implying a joint tenancy between the (possibly numerous) respective successors of the deceased persons is not without its difficulties. The normal right of survivorship will operate as between these successors, even though they may have little or nothing to do with each other, and despite the fact that the testator may have intended them to take an absolute interest. It is this burdensome persistence of a joint tenancy after commorientes that forms the subject matter of our current proposal.

3.04 One possible solution might be to adopt the English approach, set out in section 184 of the *Law of Property Act 1925*. It provides that in situations where it is uncertain which deceased person survived the other, for all purposes affecting the title to property, deaths are presumed to have occurred in descending order of seniority, the younger being deemed to have survived the elder.⁷ In

⁵ The explanatory Memorandum of the 1965 Act tells us (at 2) that this provision is based on Article 20 of the German Civil Code, as amended in 1951.

⁶ *Bradshaw v Toulmin* (1784) Dick 633, *per* Lord Thurlow.

⁷ There are two modifications to this general presumption. First, the presumption is made subject to any order of the court. Secondly, if spouses die and one of them dies intestate, it is now always presumed that the testate spouse survived the intestate. (Section 46(3) of the *Administration of Estates*

the context of a joint tenancy, this presumption would confer sole ownership of the property on the younger victim, and subsequently on his or her successors alone. The major attraction of this approach is that it offers certainty and clarity as to the proper legatees. However, it is potentially unfair. Take for example the facts of the *Kennedy* case summarised in paragraph 3.01 above. Mr and Mrs Kennedy, aged 76 and 75, respectively, died in circumstances where the order of their deaths was, and remained uncertain. They had no children and their estate, held in joint tenancy, was valued at £100,000. Were the English presumption to have been applied, the automatic right of survivorship would have operated and, immediately prior to her death, Mrs Kennedy would have been the sole owner of the property. This approach would have had the effect of conferring a windfall of the entire inheritance on her beneficiaries or next of kin. By contrast, it would have prevented – without any evidential basis for doing so – Mr Kennedy’s beneficiaries or next of kin from taking any share in the estate.

Recommendation

3.05 Our preferred approach is to treat commorientes as an event that severs a joint tenancy, creating instead a tenancy in common. Thus the respective successors will inherit the estate – either on intestacy or under the terms of the will – as if it had been held under a tenancy in common. This solution carries two major advantages. First, no automatic right of survivorship will operate as between the various successors of the deceased parties, thereby avoiding the inconvenience of a joint tenancy. Secondly, the respective successors will continue to take equal shares in the estate, thereby avoiding the imbalance inherent in the English approach.

3.06 *Accordingly, the Commission recommends that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, any land held by them in a joint tenancy, will be deemed to have been held under a tenancy in*

Act 1925). The Scottish approach is to adopt the English presumption but to state that the rule never applies between spouses. In commorientes situations concerning husband and wife, it is presumed that neither survived the other. (Section 31 of the *Succession (Scotland) Act 1964*) This merely puts spouses on the same footing as they already are, under the Irish scheme.

common, and will pass to their respective successors as under a tenancy in common.

Draft Legislation

3.07 *In order to implement our recommendation, the Commission recommends the following draft legislation:-*

Section ().- The Succession Act 1965 is hereby amended:

In section 5, by the insertion of “and any property held by any or all of them in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common” after “simultaneously”.

CHAPTER 4 COMPULSORY REGISTRATION AND THE IRISH CHURCH ACT 1869

The Irish Church Act 1869

4.01 The principal aim of the *Irish Church Act 1869* was to terminate the union of the Church of Ireland and the Church of England, and so to achieve separation of Church and State in Ireland.

4.02 In the aftermath of the Reformation, the State had confiscated extensive properties in Ireland which had then been given to the Anglican Church. Though initially confiscated from pre-Reformation monasteries, the land in question also included extensive agricultural property. As part of the process of disestablishment, it was seen as appropriate that the Church should divest itself of all land, including but not limited to the property originally confiscated, other than clerical properties. For this purpose, a lay organisation called the Commissioners for Church Temporalities in Ireland was established, and all the property of the Church of Ireland became vested in this body.⁸ Section 34 of the 1869 Act empowered the Commissioners to sell any real or personal property vested in them by the Act. Owing to the patchy development of interests in Church land before 1869, these provisions applied to several different types of interest in land.

4.03 For reasons which will become evident later in this Report, there is no need here to deal in detail with these interests. Broadly speaking, they can be put under the following four heads: rent charges; fee farm rents; tenanted lands; reacquisitions by the Church.

(i) *Rent Charges*

4.04 First, there existed an incorporeal hereditament called a tithes. This was effectively an ecclesiastical tax, originally payable in kind by land-holders, to support the Church of Ireland. Payment in kind

⁸ Section 11 of the *Irish Church Act 1869*.

was transmuted to monetary payment by the *Tithe Composition Act 1823*. Subsequently, this approach was replaced by a system of rent charges as a result of the *Tithe Rent Charge Act 1838*. After 1869, the Commissioners for Church Temporalities were “authorised to purchase the surrender of ecclesiastical leases of rentcharges and thereafter the payers of the tithe rentcharges became entitled to redeem the rentcharges.”⁹

(ii) *Fee Farm Rents*

4.05 From the Seventeenth Century onwards,¹⁰ bishops, and other Church representatives had been constrained in their ability to grant leases. Leases had to be limited to twenty one years in respect of agricultural land, and to forty years for houses in cities and towns.¹¹ The *Church Temporalities Act 1833* enabled tenants holding land, under these so called “bishops’ leases”, to purchase the fee simple in the land, subject to fee farm or perpetual rents. A body called the Ecclesiastical Commissioners,¹² was established and was given the power to sanction these arrangements. The rents payable under these fee farm grants made up another type of interest that the Church of Ireland was required to surrender after 1869. The process of purchasing this interest, by the land-holder, was commonly referred to as redemption of the fee farm rent.

(iii) *Tenanted Lands*

4.06 Third, apart from tithes/rent charges and these statutory fee farm rents, the *Irish Church Act 1869* also applied to ordinary tenancies where the Representative Church Body effectively acted as landlord. It provided a system whereby the tenant of ecclesiastical land could purchase the freehold interest in the land.¹³

⁹ Wylie *Irish Land Law* (3rd ed Butterworths 1997) at paragraph 6.124. See also sections 33 and 34 of the *Irish Church Act 1869*.

¹⁰ *Ecclesiastical Lands Act (Ireland) 1634*.

¹¹ See sections 2 and 3 of the *Ecclesiastical Lands Act (Ireland) 1634*. See: Wylie *Irish Land Law* (3rd ed Butterworths 1997) at paragraph 4.079.

¹² That body was established by the *Church Temporalities Act 1833* and was a forerunner to the Commissioners for Church Temporalities in Ireland

¹³ See paragraph 4.21 below.

4.07 The method employed by the Commissioners for Church Temporalities in divesting itself of these first three interests is important. The *Irish Church Act 1869*, provided a system whereby both, “tenanted land and rentcharges could be purchased either by payment of the entire purchase price , or by payment of not less than 25% of the price, **with the balance being secured by way of mortgage in favour of the Commissioners.**”¹⁴ (Our emphasis). The annuity, after the redemption, is relevant to the issue of compulsory registration, discussed below.¹⁵

(iv) *Reacquisitions*

4.08 Fourthly and finally, the Act also provided for the reacquisition of any interest in property by the Church of Ireland.¹⁶

4.09 *The Record of Title (Ireland) Act 1865* had introduced the concept of registration of title, for the first time. However, the system of registration therein was voluntary, expensive, extremely unpopular and for those reasons, ineffectual.¹⁷ Thus, in 1869, the entire concept of a Land Registry was “in its infancy”¹⁸ and the Irish Church Act, not surprisingly, made no mention of it. The impact of subsequent legislation relating to the Land Registry on the types of interests set out above could scarcely have been anticipated. It is to that impact that we now turn.

¹⁴ Marshall, “Compulsory Registration and the Irish Church Act, 1869”, (1983) 77 GILSI 5 at p.6.

¹⁵ See paragraph 4.10 below.

¹⁶ Sections 25-28 of the *Irish Church Act 1869*.

¹⁷ Dowling “Of Ships and Sealing Wax: The Introduction of Land Registration in Ireland” (1993) 44 NILQ 360 at 366-371. Fitzgerald comments “Only about 800 of these titles were eventually registered as a result.” – see Fitzgerald *Land Registry Practice* (2nd ed Round Hall 1995) at 4.

¹⁸ Marshall “Compulsory Registration and the Irish Church Act, 1869” (1983) 77 GILSI 5 at 6.

Compulsory Registration Legislation

Pre-1964

4.10 The notion of compulsory registration was first given legislative effect in the *Local Registration of Title (Ireland) Act 1891*. Registration was thereafter compulsory for “the ownership of freehold land...where the land had been at any time sold and conveyed to or vested in a purchaser under any of the provisions of the Purchase of Land (Ireland) Acts and is subject to any charge in respect of an annuity or rentcharge....”¹⁹ The Irish Church Act was one such Purchase of Land Act by virtue of its inclusion in section 95 of the Act.²⁰ However, the registration requirement was confined to freehold land,²¹ and land itself was defined so as to exclude incorporeal hereditaments.²² These restrictions were particularly relevant to Church lands. Many such properties were by now subject to an outstanding annuity under the system set out above.²³ Thus it was unclear whether or not the most numerous of the interests arising under the *Irish Church Act 1869*, that is redeemed fee farm rents, were registrable under the 1891 Act.²⁴

4.11 In the years that followed, three factors combined to confirm that these interests were in fact compulsorily registrable. First, in *Keogh Grantor; Kettle Grantee*,²⁵ Madden J held that a redeemed fee farm rent was “land” within the meaning of the 1891 Act. Although the case related not to the *Irish Church Act 1869*, but rather to the *Redemption of Rents (Ireland) Act 1891*, the principle was the same.

¹⁹ Section 22 of the *Local Registration of Title (Ireland) Act 1891*.

²⁰ *Ibid* section 95.

²¹ *Ibid*.

²² *Ibid*.

²³ See paragraphs 4.05 and 4.06 above.

²⁴ A fee farm rent itself, as an incorporeal hereditament was clearly not included.

²⁵ [1896] 1 IR 285. Marshall notes that Madden J “had been Attorney General for Ireland and had piloted the Registration of Title Act through Westminster.” – see Marshall “Compulsory Registration and the Irish Church Act, 1869” (1983) 77 GILSI 5 at 6. It might be suggested that the judge’s experiences had rendered him peculiarly predisposed towards a broad definition of registrable land.

Secondly, to put the matter beyond doubt, Maguire J in the case of *In re Reeves Estate*,²⁶ applied the *Keogh* case, to the redemption of a fee farm rent under the *Irish Church Act 1869*, and held that it was compulsorily registrable. (Non-redeemed fee farm rents, as incorporeal hereditaments, did not have to be registered.) Thirdly, the *Land Act 1927*, extended compulsory registration to cover cases where the purchase annuity had been fully redeemed and where the land had been vested by the Land Commission for cash.²⁷

4.12 Failure to register, where such registration was required by the 1891 Act, carried with it a significant penalty. Section 25 thereof stated that “a person shall not ... acquire any estate in any such land until he is so registered as owner of such land”.²⁸ However, according to some commentators,²⁹ the wording of the 1927 Act was such that this penalty did not attach to lands which only became compulsorily registrable after and solely by virtue of the extensions introduced by the *Land Act 1927*. In real terms, the consequence of this analysis would be that these interests would be exempt from the severe penalty for non-registration, but only up until 1 January 1967, when the *Registration of Title Act 1964* came into effect.³⁰

The Registration of Title Act 1964

4.13 The 1964 Act re-stated the requirement of compulsory registration for freehold land conveyed under the Land Purchase Acts.³¹ The list of Land Purchase Acts continued to include the *Irish Church Act 1869*. However, there were three notable differences between section 23 of the 1964 Act, and section 22 of the 1891 Act.

²⁶ [1946] IR 56.

²⁷ See section 51 of the *Irish Land Act 1927* and see Anon “Compulsory Registration of Lands Conveyed under Irish Church Act 1869” (1948) ILT 41 at 42.

²⁸ Section 25 of the *Local Registration of Title (Ireland) Act 1891*.

²⁹ See McAllister *Registration of Title in Ireland* (1973) at 47 and Marshall “Compulsory Registration and the Irish Church Act, 1869” (1983) 77 GILSI 5 at 6.

³⁰ See paragraph 4.14 below.

³¹ Section 23 of the *Registration of Title Act 1964*.

4.14 First, the distinction that may have existed in the application of a penalty for non-registration,³² between land registrable under the 1891 Act, and land registrable solely because of the extensions in section 25 of the *Land Act 1927*, is abolished by the 1964 Act. The Act applies a uniform penalty to all cases. Marshall states: “The loophole...has been closed since 1 January 1967,” when the 1964 Act came into effect.³³ Secondly, the 1964 Act is considerably wider, in its application, than its forerunner. This can be seen in the wording of section 23 of the 1964 Act. Registration is compulsory where land has been “or is deemed to have been” at any time sold or conveyed under the Land Purchase Acts. The phrase “or is deemed to have been” was designed to, or is at least capable of, referring to redeemed fee farm rents. Arguably, in other words, this phrase amounts to a statutory version of the *Reeves* and *Keogh* decisions and thus any doubts surrounding the requirement of compulsory registration, and the penalties for failure to so register, were removed by the 1964 Act. Finally, land is defined so as to include incorporeal hereditaments.³⁴ While this embraces non-redeemed fee farm rents, the expanded definition does not render such interests compulsorily registrable. As before, the obligation to register is limited to freehold land.³⁵ A separate register is provided for such incorporeal hereditaments.³⁶

The Need for Reform

4.15 Although there is no way of accurately assessing the number of properties affected by the compulsory registration requirements, by virtue of their inclusion under the *Irish Church Act 1869*, there can be no doubt that the number is relatively large.³⁷ The broad drafting of

³² Section 25 of the *Local Registration of Title (Ireland) Act 1891*. See paragraph 4.12 above.

³³ Marshall “Compulsory Registration and the Irish Church Act, 1869” (1983) 77 *GILSI* 5 at 6.

³⁴ Section 3(e) of the *Registration of Title Act 1964*.

³⁵ Sections 3(e) and 23 of the *Registration of Title Act 1964*.

³⁶ Section 8 of the 1964 Act sets out three different registers for different categories of ownership: the freehold register, for freehold interests; the leasehold register for leasehold interests; and, the subsidiary register, for incorporeal hereditaments held in gross.

³⁷ In 1869 there were approximately 7,000 church tenants, (Hooker *Readjustments of Agricultural Tenure in Ireland* (1938) at 55). 6,000 of these

the *Registration of Title Act 1964*, casts the net of compulsory registration over an even greater number of Church properties than its predecessor in 1891. In 1989 the Law Reform Commission wrote:-

“As a result, the numbers of cases in which title was compulsorily registrable was extended to certain titles merely because an interest in land, including a rent charge, had been purchased in the past. In some cases the obligation to register arises in respect of purchases over 100 years ago. The *Land Act 1984* provides that there will be no more sales under the Irish Church Act but the obligation to register remains in respect of an extensive number of residential and commercial properties.”³⁸

4.16 Thus the number of titles which ought to have been registered runs into several thousand and it is understood that the obligation to register has often been ignored. Wylie states, “This point has often been overlooked in the past and has caused considerable conveyancing difficulties in the Republic.”³⁹ This problem is a significant one due to the gravity of the sanction attached to non-registration, by section 25 of the 1964 Act. Like its predecessor, the 1964 Act precludes the estate or interest purported to be conveyed from passing to the purchaser, where registration has not occurred. The prospect of this fundamental defect in title applying to substantial areas of land, upon which residential or commercial properties have been built, is a grim one. Admittedly, the possessory title of the unregistered landholder, will be of substantial assistance in defeating competing claims. However, this is hardly satisfactory, if one

were given the option of purchasing the freehold interest, and the Church of Ireland received £15 million as compensation for these reforms according to DH Akenson *The Church of Ireland, Ecclesiastical Reform and Revolution, 1800–1885* (London 1971).

³⁸ Law Reform Commission *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) at 43. Section 7(3) of the *Land Act 1984* stated “Any rent charges in lieu of tithes, perpetuity rents or other periodic payments, subsisting on the [28 September 1975] and payable to the [Irish Temporalities] Fund shall be deemed to have been extinguished on that day and any payments shall ... cease to be payable.”

³⁹ Wylie *Irish Land Law* (3rd ed Butterwoths 1997) at paragraph 21.05, footnote 34. See also Anon “Compulsory Registration of Lands Conveyed under Irish Church Act, 1869” (1948) *ILT* 41; Marshall “Compulsory Registration and the Irish Church Act, 1869” (1983) *77 GILSI* 5 *et seq.*

considers that such people thought that they held an indisputably good, marketable title.

4.17 Section 25 of the 1964 Act allows for a six month period of grace, during which the purchaser of compulsorily registrable property can register their interest. Moreover, the harsh effect of the broad drafting of section 23 of that Act is tempered by the fact that this six month deadline can be set aside and registration can occur “at such later time as the Registrar or, in the case of his refusal, the court may sanction in any particular case.”⁴⁰ However, it is a cumbersome process as it places the burden and expense of registration squarely on the shoulders of the purchaser, rather than the vendor. Where the deadline has elapsed, for this or for any other reason, the defect in title will remain. This in turn could lead to difficulties for subsequent purchasers whose solicitors will be unable to certify the title for a lending institution.

4.18 Even where the necessity for registration is belatedly adverted to, in practice the requirement actually to register can continue to cause problems. In most cases, title documents from as far back as 1869, are difficult to access. House purchase and mortgage transactions are frequently significantly delayed once it has become clear that the vendor’s title should have been registered but has not been. Thus even vigilant and compliant purchasers and vendors cannot side-step the expense and delay implicit in this particular system of compulsory registration.

4.19 Two other flaws which, however, are less likely to cause problems in practice may be noted. In the first place, one consequence of registration used to be that the registered land devolved on intestacy as personalty rather than realty.⁴¹ This was a feature of both Registration Acts.⁴² The *Succession Act 1965* harmonised the rules relating to devolution of property on intestacy, thereby all but nullifying the significance of this classification. Its significance was that prior to 1 January 1967, when the *Succession Act 1965* came into effect, there was a different line of devolution, depending on registration. The effect of registration was that the so-called

⁴⁰ Section 25 of the *Registration of Title Act, 1964*.

⁴¹ *Re Mary Smith* (1897) 33 ILTR 69; and *Re Collins’ Estate* [1924] 1 IR 72.

⁴² Part IV of the *Registration of Title Act 1964*; and sections 83-89 of the *Local Registration of Title (Ireland) Act 1891*.

personalty devolved to the deceased's next of kin on an intestacy. On the other hand, property which ought to have been registered, but was not, devolved as realty to the deceased's heir at law.⁴³ A point of uncertainty would be whether the argument could be made that, since the interest ought to have been registered, but was not, the person who would otherwise have inherited the personalty would have a claim. However, given the period of time that has passed, any such claim would almost certainly be statute barred. The point is, therefore, moot.

4.20 Secondly, as previously stated,⁴⁴ the *Irish Church Act 1869* made it possible for a tenant of ecclesiastical land to purchase the freehold interest in the land from the Church Temporalities Commissioners. The issue of whether or not these once-tenanted lands were ever compulsorily registrable, has been fairly described as "complex and technical."⁴⁵ For our present purposes, it suffices to note that most of these purchases were completed soon after the facility was established in 1869, and prior to the introduction of compulsory registration. It is unlikely, therefore, that any current or future traces of title will go back as far as these long extinguished tenancies.

Options for Reform

4.21 As we have demonstrated, the position arising out of the requirement of compulsory registration as it applies to interests under the *Irish Church Act 1869* is less than satisfactory. In assessing how best to remove that requirement, the interests of two groups of people need to be addressed:

- (a) Those who had complied with section 23 by registering their interest, and
- (b) Those who were obliged to register, as far back as 1891, but failed to do so.

⁴³ *Desmond dec'd; Creed v Kearney* [1943] IR 534.

⁴⁴ See paragraph 4.06 above.

⁴⁵ Marshall "Compulsory Registration and the Irish Church Act, 1869" (1983) 77 GILSI 5 at 7.

It is important, we believe, not to disrupt or devalue the title of those who have complied with the compulsory registration requirements, that is, those in category (a). Thus, an amendment whereby it would be provided retrospectively that this land need not have been registered would be unacceptable because it would mean that the land of those who had registered would be reconstituted as unregistered land and, therefore, devalued.⁴⁶

4.22 That said, a prospective exemption of Irish Church Act lands from the compulsory registration provisions, would be of little use. For while it is impossible to ascertain with any degree of certainty, it seems that there are now very few properties that still stand to be affected, for the first time since 1891, by a requirement of compulsory registration. Thus, the principal aim of any amendment has to be the curing of any existing defective title, where that defect is attributable to the requirement of compulsory registration. Thus we go on to recommend a limited form of retrospective exemption, whereby it is acknowledged that the Act at one stage encompassed Representative Church Body lands but, for practical reasons, the defects caused by that inclusion are to be remedied.

4.23 In 1989, the Law Reform Commission considered this problem and rejected a proposal “that registration would be deemed never to have been compulsory by reason of the Irish Church Acts...,” because this would involve “disturb[ing] the titles to any lands already registered in accordance with the law as it stood...”⁴⁷ In view of this it is important to note, that our present proposal refrains from providing that the land is to be deemed never to have been compulsorily registrable.⁴⁸ Rather we propose a compromise which will state that an interest which “has not been registered at the date of the enactment of the *Land Law and Conveyancing Act 2003*, ...shall be deemed never to have required registration on that ground”.⁴⁹ This proposal, of course, will not affect registered interests of compliant landholders, or their successors in title. It will, however, have the effect of restoring to the people who will have the benefit of

⁴⁶ Law Reform Commission *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) at paragraph 43.

⁴⁷ *Ibid* at paragraph 44.

⁴⁸ *Ibid*.

⁴⁹ See below paragraph 4.26.

the proposed law⁵⁰ good, unregistered title, free of the severe defects imposed by the 1891 and 1964 Acts. In sum, we propose to improve the title of one category of landowner, without affecting the title of the other category.

4.24 Another concern, which is accommodated in the proposed legislation set out below, is to ensure that interests subject to compulsory registration for some other reason, apart from their inclusion under the *Irish Church Act 1869*, should not be exempt from their concurrent obligation to register. This would be relevant, for example, to land which was both conveyed under the *Irish Church Act 1869*, and located in Laois, which has been a designated compulsory area since 1 January 1970.⁵¹

4.25 A final issue, is the compatibility of this proposal for reform with the overall policy of extended compulsory registration in the State. Informal consultation with staff at the Land Registry, has revealed a shift in approach to compulsory registration within that organisation. Currently the focus is on urban areas where boundaries are clearly defined. In the context of this clearly defined approach to land registration, the obligation to register former Church property because of purchases which occurred in the past, and sometimes distant past, seems haphazard. This is especially the case where, as often seems to happen, the requirement has been overlooked, and is unlikely to be followed.

4.26 At present, section 23(1) of the *Registration of Title Act 1964* provides as follows:-

“23. – (1) The registration of the ownership of freehold land

⁵⁰ Here we ought to notice the academic possibility that, in the present state of the law, a vendor of property can seek to assert title over property where the purchaser has failed to comply with the compulsory registration requirements within six months of the purported conveyance. The vendor could argue that under section 25 of the 1964 Act the purchaser is statutorily barred from acquiring the estate or interest in question, and that the interest remains the vendor's. However, the likelihood of such a proposition being accepted by the courts is small. The purchaser could rely on his/her equitable interest, which arises once the purchaser has paid the whole of the purchase price.

⁵¹ SI 87 of 1969. Section 24(2) of the *Registration of Title Act 1964* provides that an order may be made designating any county as a compulsory registration area.

shall be compulsory in the following cases –

- (a) where the land has been, or is deemed to have been, at any time sold or conveyed to or vested in any person under any of the provisions of the Land Purchase Acts or the Labourers Acts, 1883 to 1962;
- (b) where the land is acquired, after the commencement of this Act, by a statutory authority;
- (c) in any case to which subsection (2) of section 24 applies.”

Draft Legislation

4.27 *In order to implement our recommendation, the Commission proposes the insertion of the following, at the end of the sub-section, under section 23(1)(c):-*

“Provided that where any sale, conveyance or vesting has or is deemed to have occurred under any of the provisions of the Irish Church Act 1869, and the ownership of the land has not been registered, under paragraph (a), or under section 22 of the Registration of Title Act 1891 (repealed by section 5 of this Act) or section 51 of the Land Act 1927 (repealed by section 5 of this Act), at the date of the enactment of [the Land Law and Conveyancing Act 2003], ... , it shall be deemed not to require and never to have required registration on that ground.”

CHAPTER 5 UNILATERAL SEVERANCE OF JOINT TENANCIES

5.01 The principal distinction between a joint tenancy and a tenancy in common is that the right of survivorship applies only to the former. By virtue of this right, when one joint tenant dies, his undivided share passes to the surviving joint tenants. This feature follows from the theory that, unlike a tenant in common, a joint tenant does not have a distinct and separate interest or share in the property from the beginning of his co-ownership. A tenant in common is a co-owner to the extent that the property has not yet been divided up into the respective shares and, until this is done, it is not possible to say which tenant in common owns which particular part of the property.⁵² However, because each tenant in common has a distinct share from the commencement of the tenancy in common which is capable of passing to their successors in title, there can be no question of the other tenants in common enjoying a right of survivorship.

5.02 There are various ways in which a joint tenancy may be severed, in other words, converted into a tenancy in common. (The motivation for doing so is frequently to terminate the right of survivorship.⁵³) Broadly speaking, two situations are possible. Take first the case in which all the joint tenants agree that they wish to convert their joint tenancy in a fee simple interest into a tenancy in common. At present the law is that the joint tenants would have to convey the property to a third party to the use of the co-owners in fee simple, as tenants in common in equal shares.⁵⁴ *The Commission has recommended in an earlier Report*⁵⁵ *a simplification of this*

⁵² As discussed in Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 432

⁵³ The right of survivorship was described as “odious” in *R v Williams* (1735) Bunb 342 at 343; hence the ability of parties to sever the joint tenancy to mitigate against the capricious nature of the right: *Cray v Willis* (1729) 2 P Wms 529.

⁵⁴ Laffoy *Irish Conveyancing Precedents* (Butterworths) precedent J.1.7

⁵⁵ Law Reform Commission *Report on Land and Conveyancing Law* (1)

procedure: legislation should provide that freehold land may be severed and converted into a tenancy in common by a simple deed between the parties.

5.03 The second situation, and the one upon which this Report focuses, is where one of the joint tenants wishes unilaterally to bring about a severance. Under the present law, there are two main ways of bringing about a severance unilaterally, namely either by acquisition of some further interest in the property by one of the joint tenants; or by alienation of his interest in the property by one of the joint tenants. (These methods each apply to both severance at law and severance in equity.⁵⁶) Sale by one joint tenant of his or her interest to a third party destroys unity of title, one of the four unities⁵⁷ which are the prerequisites for creating a joint tenancy. Thus, it causes a severance. It follows that a joint tenant could bring about a severance *vis-à-vis* the others by conveying his interest to feoffees to hold to the use of himself. Next, the *Statute of Uses 1634* would execute the use, giving him back his interest, but this time as a tenant in common - since the conveyance would have caused a severance. Under the present law, this is the only means by which a joint tenant can bring about a unilateral severance (in contrast to a situation in which all the parties agree) while retaining an interest in the land. However, the *Statute of Uses 1634* does not apply to leasehold interests. Thus, to effect a unilateral severance of a joint tenancy of a leasehold interest, two steps must be followed. First, the joint tenant would have to assign the property to a third party on trust for the joint tenant as tenant in common, and secondly, the trustee would assign the premises to the joint tenant as tenant in common.⁵⁸ However this is also rather

General Proposals (LRC 30-1989) at 11.

⁵⁶ In line with the general precept that equity will regard as done that which ought to be done, it is possible to sever the equitable title (though not the legal title) by entering into a specifically enforceable contract to alienate. Moreover, in *Burgess v Rawnsley* [1975] 1 Ch 429 it was held that an agreement between the parties by which one agreed to convey an interest in the property to another need not be enforceable as a contract in order to sever the joint tenancy in equity. Equity may also infer such an agreement from the joint tenants' conduct, for example, where they seem to have treated their interests in the property as severed over a substantial period of time.

⁵⁷ The other unities necessary are; unity of time, unity of possession and unity of interest.

⁵⁸ *Laffoy Irish Conveyancing Precedents* (Butterworths) precedent J.1.8. This precedent deals with the situation where all the joint tenants wish to sever, though presumably the same procedure would apply where one of the joint

cumbersome. In the interests of simplification, it would be preferable if, in the case of both leasehold and freehold land, it was possible to effect severance simply by execution of a deed by the party who wishes to sever. However, that proposal is based on the premise that unilateral severance is desirable and should therefore be facilitated. This is a point to which we return at paragraph 5.06.

5.04 For the moment, we wish to deal with a separate point. Historically, the law has leaned against severance of legal joint tenancies. Legal tenancies in common were unpopular as the ever-increasing number of tenants made the enforcement of feudal incidents more and more difficult. Nowadays, it is frequently the case in commercial arrangements that the parties agree to hold as tenants in common. From a conveyancing point of view, these legal joint tenancies still present difficulties, as a purchaser must investigate the title of each individual tenant in common, who is free to alienate his interest *inter vivos* or on death as he sees fit, possibly to a number of grantees. It is not uncommon to find that the owner of such a share cannot be traced. For this reason, in England, since the *Law of Property Act 1925*,⁵⁹ it has not been possible to create a legal tenancy in common, even by agreement, and a legal joint tenancy cannot be severed so as to produce one. However, we believe that the parties to the agreement should be free to decide which form of co-ownership is desirable for their particular situation.

5.05 *Accordingly, the Commission does not wish to interfere with the parties' freedom to decide which form of co-ownership they prefer, and do not recommend a similar provision to that contained in the English Law of Property Act 1925.*

Unilateral Severance?

5.06 As noted already, at present, a joint tenant who wishes to effect a severance by alienation at law is forced to use the cumbersome and circuitous method of adopting the *Statute of Uses*. Another problem is that, in equity, the case-law in Ireland does not clearly establish what is the effect of a unilateral notice in writing of

tenants of a leasehold estate wishes to sever.

⁵⁹ See sections 1(6), 34(1), and 36(2) of the *Law of Property Act 1925*.

an intention to sever.⁶⁰ The present law is therefore unduly complicated and uncertain and clarification is needed. However, before approaching these issues, one has to ask the basic policy question of whether unilateral severance is, in fact, desirable. Depending on the answer to that question, it would appear that there are three options for reform:

- (a) prohibit severance altogether.
- (b) allow severance but render it difficult to achieve (this perhaps would involve leaving the present law unchanged, so that the *Statute of Uses* would have to be adopted), or restrict it to severance of the equitable title.⁶¹
- (c) facilitate severance by dealing with the problems mentioned in the previous paragraph.

Since we are recommending (a), we do not propose to deal further with the other options.

Reform⁶²

5.07 The major issue is whether to retain the possibility of one joint tenant unilaterally severing the joint tenancy, without the consent, or even the knowledge, of his fellow joint tenants. Under the present law, one joint tenant can act independently in a manner which affects

⁶⁰ In England, the *Law of Property Act 1925* expressly provided in section 36(2) that a unilateral notice in writing given by one joint tenant to the others was to be sufficient to effect a severance. In *Burgess v Rawnsley* [1975] 1 Ch 429 Pennycuik J referred to it as a “new method” which had not existed before, but Lord Denning MR maintained that the section was merely declaratory of the previous law. In *Williams v Hensman* (1861) 1 J & H 546; 70 ER 862 at 867 Page-Wood VC stated that in the case of inferred severance (that is, where there is no express act) an intention “declared only behind the backs of the other persons interested” would not be enough. Lefroy B in *Wilson v Bell* (1843) 5 Ir Eq R 501 speaking of the same situation, still talks of an “agreement to sever”.

⁶¹ Severance in equity could be more quickly and easily achieved than severance of the legal estate, and it would therefore be suitable in an urgent case such as where the joint tenant wishing to sever is dying.

⁶² For earlier discussion of unilateral severance in the case of a husband and wife who held the family home as joint tenants and have separated, see *Law Reform Commission Report on Land and Conveyancing Law (5) General Proposals* LRC 44-1992, p. 7-8.

the property rights of the other joint tenants. This is so even where, originally, the parties have all agreed to hold as joint tenants and where discrepancies in their ages may have made the right of survivorship particularly significant. Yet this flies in the face of the basic idea of contract law (possibly because this area of property law developed long before the law of contract became established), which is also a basic moral principle, namely that agreements freely entered into should be honoured. We ask, therefore, whether a joint tenant should continue to be allowed unilaterally to sever the joint tenancy.

5.08 One proposal which is worth considering is that, under the present law, it is open to judges to draw the following distinction.⁶³ On the one hand, there is the situation where the joint tenancy was created by agreement between the present parties. In this case, since the joint tenancy arose by their mutual agreement, it might not be justifiable for one joint tenant to go back on their agreement. On the other hand, there is the case in which the joint tenancy arose by the act of someone other than the present party who wishes to sever. In this case, there is a social value in favour of the freedom to arrange one's property rights and it may be argued that this should lead to the result that if a party does not wish to maintain the principle of survivorship as against the other parties, he or she should have the right to sever unilaterally. There is no need to consider whether this is a correct statement of the present law. Here, we are interested in the distinction as a basis for possible reform. Accordingly, the Commission considered whether to distinguish between the situation where the joint tenancy is imposed on the parties and where they agree to it, unilateral severance being permitted only in the former situation. However, this proposal was rejected for the reasons set out below at paragraphs 5.09 and 5.10.

5.09 As stated already, with a joint tenancy, each interest is subject to the right of survivorship and each joint tenant has the chance of ultimately ending up with the entire property. It seems unjust that a joint tenant may be deprived of this chance by the unilateral actions of a fellow joint tenant. The Commission is of the view that adopting a two-pronged approach to the issue of unilateral severance, that is, to allow it where the joint tenancy has been **imposed** on the parties, and to prohibit it where the parties have **agreed** to hold as joint tenants,

⁶³ See Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) at 442. Lyall discusses this option in the context of severance by unilateral notice.

would give rise to further complications and difficulties and do little to ameliorate the present law. One major difficulty would be to compose a finite list of situations where joint tenancies are imposed; examples include where they are imposed by will, or through a gift, or by statute.⁶⁴ It must also be borne in mind that the grantor may have had very good reasons for granting the property in a joint tenancy and his intention will be defeated if the parties are allowed to sever, which is especially important in the context of a disposition in a will.⁶⁵

5.10 Furthermore, disputes could arise as to whether the joint tenancy has actually come about by agreement, and these disputes might ultimately involve the intervention of the courts. For example, lending institutions used to adopt a policy of insisting that parties hold as joint tenants when obtaining a mortgage. It would be unrealistic to suggest that the parties in that situation agreed to the joint tenancy: for all lending institutions adopted the same policy at that time and so there was no element of choice. To avoid unnecessary complications and in the interests of simplicity and consistency, the Commission believes that a common approach to all joint tenancies, whether arising from agreement or imposed on the parties, is preferable. It should be noted that some Canadian provinces, including

⁶⁴ One example of the latter situation is under section 125 of the *Succession Act 1965*: “Where each of two or more persons is entitled to any share in land comprised in the estate of a deceased person, whether such shares are equal or unequal, and any or all of them enter into possession of the land, then, notwithstanding any rule of law to the contrary, those who enter shall (as between themselves and as between themselves and those (if any) who do not enter) be deemed, for the purposes of the *Statute of Limitations 1957* to have entered and to acquire title by possession as joint tenants (and not as tenants in common) as regard their own respective shares and also as regards the respective shares of those (if any) who do not enter.”

⁶⁵ In the case of a will, the courts have consistently held that the intention of the testator is of paramount importance. The courts’ primary function in construing a will is ascertaining and giving effect to the intention of the particular testator. The will must be regarded as the definitive expression of the testator’s wishes. For examples of the courts’ endeavours to implement the intention of the testator see *Re Stamp* [1993] ILRM 383, *Re Patterson* [1899] 1 IR 324 at 331; *Re Oliver* [1945] IR 6. See further Coughlan *Property Law* (2nd ed Gill & Macmillan 1998) at 400-405.

Saskatchewan and Alberta,⁶⁶ have also adopted this approach for similar reasons.⁶⁷

5.11 Finally, it is worth emphasising that the joint tenant who wishes to terminate the joint tenancy will not be left without a remedy. If he has failed to obtain the consent of his fellow joint tenants, he may seek an order under the *Partition Acts 1868 and 1876*.⁶⁸ Thus, the joint tenant may seek an order of partition, and the court “**may** if it thinks fit...direct a sale of the property” if it considers that a “distribution of the proceeds would be more beneficial for the parties interested than a division of the property among them.”⁶⁹ Where a party applying for partition is interested to the extent of a moiety or upwards in the property, the court **must** grant that order unless there is good reason to the contrary.⁷⁰ If he is successful in obtaining an order of partition, he will be free to dispose of his interest as he sees fit. If there is a sale of the property, he will be entitled to his share of the proceeds, and will be in virtually the same position as if he had unilaterally sold his interest to a purchaser.

⁶⁶ See section 240(2) of the *Land Titles Act 1978* (Saskatchewan) and section 68 of the *Land Titles Act 1980* (Alberta).

⁶⁷ The Law Reform Commission of British Columbia recommended the continuation of the present law that ordinarily joint tenants are free unilaterally to sever a joint tenancy, but also that the law should be changed to provide for the parties’ creation of joint tenancies that are only severable on consent; Law Reform Commission of British Columbia, *Report on Co-ownership of Land* (1988) at 40. The Ontario Law Reform Commission agreed that joint tenants should be free to bind themselves not to sever the joint tenancy, but stated that this could be achieved through a contract between the parties not to sever, as opposed to creating a special form of joint tenancy: Ontario Law Reform Commission *Report on Basic Principles of Land Law* (1996) at 117. The Ontario Law Reform Commission recommended that a joint tenant should only be able to effect unilateral severance on giving written notice to the other joint tenants. The Law Reform Commission of Western Australia made a similar recommendation: *Report on Joint Tenancy and Tenancy in Common* (Project No 78 1994) at 38. Neither of these reports addressed the question of what effect a failure to notify the other joint tenants would have on the purported transaction and the position of the third party, for example, the purchaser.

⁶⁸ The fact that the fellow joint tenants may be unreasonably withholding their consent would be a relevant factor for the court to consider in exercising its discretion under the *Partition Acts*.

⁶⁹ Section 3 of the *Partition Act 1868*.

⁷⁰ Section 4 of the *Partition Act 1868*.

However, at least in this situation, the court has a discretion which would allow any injustice to the non-disposing joint tenants to be taken into account.

5.12 *The Commission therefore recommends that unilateral severance by alienation (whether the alienation be to a nominal foffeee so as to retain an interest or to a third party) be prohibited in all cases: a joint tenancy may only be severed where all the joint tenants consent to the alienation and therefore agree to the severance.*⁷¹

5.13 The result of this recommendation would be that where a joint tenant purported to effect an alienation without the consent of the fellow joint tenants, the transaction would be void. This would affect the rights of the third party purchaser. The argument could be made that, as an innocent party, the purchaser's rights should not be affected by the failure on the part of the vendor joint tenant to obtain consent. From a general perspective, this is an example of a classic legal situation where there is a conflict between two innocent parties - in this case, the purchaser and the fellow joint tenants. The Commission takes the view that it is open to the purchaser to ascertain that the land is subject to a joint tenancy. This will be evident from the title deeds or folio. Indeed, the standard requisitions on title would reveal this information. We therefore see no reason to qualify in any way the principle that a conveyance by a joint tenant without the consent of the fellow joint tenants is void.

Unilateral Severance by Acquisition of Another Interest

5.14 As mentioned above at paragraph 5.03, the second way of effecting a severance is by acquisition of another interest. At present, the law is that if one of the joint tenants acquires another interest in the property, that will effect a severance of his interest. This would apply, for example, where land was conveyed "to X and Y for life to hold as joint tenants, remainder to Z in fee simple". If X subsequently acquires Z's interest, this subsequent acquisition by X would sever the joint tenancy between X and Y. X's half share for life would merge with the fee simple acquired from Z, thus destroying

⁷¹ This recommendation would also apply to a partial alienation, so that one joint tenant could not effect a severance by effecting a partial alienation, such as granting a charge or a lease, without the consent of his fellow joint tenants.

the unity of interest.⁷² Another possibility is that one of the joint tenants will release his interest to one of the other joint tenants. For example, there may be a conveyance “to X, Y and Z in fee simple”, and then a release by X of his estate to Y. A tenancy in common will then arise as between the one-third share in the property Y has acquired from X, and the other two-thirds Y still holds with Z. The other two-thirds of the property remain subject to the joint tenancy between Y and Z.

5.15 The same policy arguments outlined at paragraphs 5.09 to 5.11 in relation to unilateral alienation apply in this context. Why should it be possible for a joint tenant who is barred from unilaterally severing (as he would be under our recommendation), to achieve the same result indirectly by acquiring another interest? In the above examples, one of the joint tenants’ interests was effected by the unilateral act of a fellow joint tenant, or by the actions of two joint tenants in the case of a release. As stated above at paragraph 5.09, it seems unfair that if X releases his share to Y, the right of survivorship ceases to operate and Z loses his chance to get the entire property. To continue to allow this result would be unfaithful to the policy considerations set out at paragraphs 5.09 to 5.11. In fact, to permit it in a legal system in which the recommendation at paragraph 5.11 had been implemented would be to allow to be admitted by the back door, a possibility which had been ceremonially barred at the front door.

5.16 *The Commission recommends that a joint tenant should not be able to sever the joint tenancy by acquiring another interest without first obtaining the consent of all the other joint tenants to his acquisition and therefore to the severance.*

Summary of Recommendations

5.17 *The Commission recommends that unilateral severance by alienation (whether the alienation be to a nominal foffeee so as to retain an interest, or to a third party) be prohibited in all cases: a*

⁷² See discussion in Wylie *Irish Land Law* (3rd ed Butterworths 1997) at 438. Note, however, Wylie suggests that since the doctrine of merger is based on the intention of the party in whom the two estates have vested, it is open to that party to argue that no merger was intended and so the joint tenancy and the right of survivorship remain operative.

joint tenancy may only be severed where all the joint tenants consent to the alienation and therefore agree to the severance.

5.18 *The Commission recommends that a joint tenant should not be able to sever the joint tenancy by acquiring another interest without first obtaining the consent of all the other joint tenants to his acquisition and therefore to the severance.*

Draft Legislation

5.19 *The Commission recommends the following draft legislation:-*

Section () - Where two or more persons hold, or are entitled to hold, as between themselves title to any land as joint tenants then, notwithstanding any rule of law or of equity to the contrary, none of such persons shall be entitled to sever the joint tenancy whether –

(a) by alienation, or

(b) by acquisition of another interest in the land

unless the consent, as required by law, of each of the other joint tenants to such severance has been obtained.

Introduction

6.01 Under section 45(1) of the *Statute of Limitations 1957* as originally enacted, the limitation period in respect of any claim to the personal estate of a deceased person was twelve years from the time when the right to receive the share or interest accrued. The original section 45(1) provided as follows:-

“45.-(1) Subject to section 46 of this Act, no action in respect of any claim to the personal estate of a deceased person or to any share or interest in such estate, whether under a will or intestacy, shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued.”

6.02 Section 45 was replaced by section 126 of the *Succession Act 1965* which amends the earlier section in two significant respects.⁷³ Firstly, the section provides that the limitation period in respect of any claim to the estate of a deceased person shall be six years from the date when the right to receive the share or interest accrued. Secondly, section 126 refers to the “estate” of a deceased, whereas

⁷³ Section 126 of the *Succession Act 1965* provides that the *Statute of Limitations 1957* is amended by the substitution of the following subsection for section 45(1):-

“45.- (1) Subject to section 71, no action in respect of any claim to the estate of a deceased person or to any share or interest in such estate, whether under a will, on intestacy, or under section 111 of the Succession Act, 1965, shall be brought after the expiration of six years from the date when the right to receive the share or interest accrued.”

section 45 applied only to the “personal estate”, so that the new limitation period applies to both real and personal property.⁷⁴

6.04 The central problem is what time limit applies where it is a personal representative who is taking an action to recover property of a deceased. Judicial interpretation of section 126 has suggested that the new section does not extend to this situation and accordingly the twelve year period under section 13 of the 1957 Act applies. Looking at the genesis of the original section 45, the cases surveyed in the following paragraphs have noted that the provision is very similar to section 20 of the English *Limitation Act 1939* which itself derived from section 13 of the *Law of Property Amendment Act 1860* and section 8 of the *Real Property Limitation Act 1874*. Those provisions applied only to claims against a personal representative. The courts have held that it follows that the six year limitation period set out in the amended section 45 only applies to claims against a personal representative.

6.04 Prior to the High Court decision of McMahon J in *Drohan v Drohan*⁷⁵ it was generally assumed that section 126 had the effect of extinguishing all claims in respect of property forming part of the estate of a deceased person after the expiration of six years from the date of death. On this basis many applications for registration in the Land Registry pursuant to section 49 of the *Registration of Title Act 1964* were made on foot of an affidavit by an applicant that he had been in sole and exclusive occupation and possession of the property for a period of six years or more from the date of death of the registered owner.⁷⁶ However, the tide turned in *Drohan v Drohan*, McMahon J held that section 45 did not apply where the person seeking to recover the property was acting in the capacity of personal representative of the deceased owner. In such circumstances, the normal limitation period of twelve years provided in section 13(2) of the 1957 Act would apply.

⁷⁴ The distinction between real and personal property was abolished for succession purposes in the *Succession Act 1965*.

⁷⁵ [1984] IR 311.

⁷⁶ However, such applications were not successful. Often, where such applications were made, the Land Registry would offer to refer the matter to court under section 19(2) of the *Registration of Title Act 1964*. In many cases, the full twelve years would elapse while the application for registration was being processed.

6.05 In *Drohan*, the defendant was married to the son of the registered owner of certain lands who had died in 1966. The defendant had remained in possession of the lands following the death of her husband in 1975. The plaintiff, another son of the registered owner, was issued letters of administration intestate, and he sought to recover possession of the lands. The defendant contended that the plaintiff was statute barred by section 126 of the *Succession Act 1965*. McMahon J, having effectively decided the case on a different point,⁷⁷ went on to consider whether the limitation period established by section 126 was the one applicable to the plaintiff's claim. Considering the legislative history of section 126, it was held that the period of limitation in section 126 applied only to claims against a personal representative, and not to claims by a personal representative to recover assets of a deceased person from a person holding adversely to the estate. In the latter case, the relevant limitation period was the twelve year period prescribed by section 13(2) of the *Statute of Limitations 1957*.⁷⁸

6.06 The decision was followed by the Supreme Court in *Gleeson v Feehan*,⁷⁹ where it was unanimously held that while section 126 operates to bar actions against a personal representative brought after six years, it does not bar actions brought by a personal representative. This conclusion was not disputed when other aspects of the case were considered by the Supreme Court in *Gleeson v Purcell*.⁸⁰

⁷⁷ Notwithstanding the fact that the Act came into operation subsequent to the date of death of the registered owner, the defendant contended that section 126 came into operation on the date of the passing of the Act, that is, 22 December 1965 and that the plaintiff was therefore bound by it. However, McMahon J held that section 45 as amended by section 126 of the 1965 Act had not come into operation until the date of commencement of the latter Act, 1 January 1967. It therefore did not apply to the plaintiff's claim.

⁷⁸ McMahon J referred to *Re Diplock; Diplock v Wintle* [1948] Ch 465 at 509, which was affirmed under the name of *Ministry of Health v Simpson* [1951] 2 All ER 1137 by the House of Lords. In that case, the Court of Appeal explained the genesis of section 20 of the English *Limitation Act 1939* and held that section 20 applied to actions by an unpaid beneficiary against one who had been overpaid or wrongly paid and was not limited to claims by an unpaid beneficiary against the executor or administrator of an estate. Section 20 did not, however, apply to a claim by a personal representative.

⁷⁹ [1993] 2 IR 113.

⁸⁰ [1997] 1 ILRM 522 at 540-541.

6.07 In *Gleeson*, the son of the deceased registered owner, who died intestate in 1937, remained in possession of the land following his death, together with his nephew. Subsequent to the death of the son in 1971, the nephew sold the land to the first and second named defendants. In 1983, the plaintiff sought possession of all the lands as personal representative of the deceased registered owner and his son, at the behest of their next-of-kin. The defendants claimed that the taking out of a grant of representation at the behest of the next-of-kin was a device to revive a claim that was statute barred under section 126 of the 1965 Act; it would be unjust to allow the artificial revival of a claim in respect of those lands which the next-of-kin *qua* next-of-kin could not assert. Following the decision in *Drohan v Drohan*, Finlay CJ interpreted section 126 as excluding a claim by a personal representative against a stranger, and held that the terms of section 13(2) of the 1957 Act fitted precisely the form of action which was the subject of this case.⁸¹

6.08 The section as interpreted in these cases has been said⁸² to give rise to an outcome which frustrates the stated purpose of the amendment, the provisions of which were designed to:

“meet conditions peculiar to rural Ireland. [The provisions] are framed to cure difficulties that arise in regard to the title of land where, for example, some members of the family remain

⁸¹ [1993] 2 IR 113 at 121. Section 13(2) provides:

“(2) The following provisions shall apply to an action by a person (other than a State authority) to recover land—

(a) subject to paragraph (b) of this subsection, no such action shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person;

(b) if the right of action first accrued to a State authority, the action may be brought at any time before the expiration of the period during which the action could have been brought by a State authority, or of twelve years from the date on which the right of action, accrued to some person other than a State authority, whichever period first expires.”

⁸² See, for example, Brady *Succession Law in Ireland* (2nd ed Butterworths 1995) paragraph 10.112.

at home on the farm, while others leave to take up professions or to work in towns and cities at home and abroad.”⁸³

6.09 Following the *Drohan* and *Gleeson* decisions, the persons whom the section was designed to favour are not in fact safe from claims after six years because it remains open to other beneficiaries out of possession to take out a grant of administration, or to take action to compel an executor or administrator to take action on their behalf, between six and twelve years after the deceased’s death.

6.10 It might seem that an obvious way in which a person in possession could safeguard his or her interests would be to take out a grant himself so that, as personal representative, a six year limitation period would apply in respect of claims against him. Certain duties accrue, however, to the office of personal representative such as the duty to distribute the estate to those entitled to it. We are of the view that failure to discharge this equitable duty would preclude a personal representative from retaining the property for his own benefit. In addition, it should be noted that the provisions of section 126 are expressly subject to section 71 of the 1957 Act, which provides a statutory safeguard against the retention for his own benefit of the estate of the deceased by a personal representative who fails to discharge the duties of his office.⁸⁴

⁸³ Brian Lenihan TD, Minister for Justice *Dáil Debates* Volume 215 (25 May 1965) – Succession Bill Second Stage.

⁸⁴ Section 71 provides:

“(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either—

- (a) the action is based on the fraud of the defendant or his agent or of any person through whom he claims or his agent, or
- (b) the right of action is concealed by the fraud of any such person,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

(2) Nothing in subsection (1) of this section shall enable an action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed.”

6.11 The better course for a beneficiary or next of kin in possession would be to take no steps at all towards administration of the estate but simply to remain in possession for the limitation period of twelve years from the date of the deceased's death so that those out of possession, through lapse of time, would lose their right of action in respect of the land. Thus, the beneficiary in possession would be in the same position as a stranger squatting on the land.

Comment on the Case Law and Section 126

6.12 The cases just summarised demonstrate that the scope of section 126 is considerably narrower than was originally believed, in that the special six year period applies only to claims brought by those entitled to share in the estate as against a personal representative. It does not provide an alternative "adverse possession" period for all claims involving a deceased's land; if this were the case, a squatter would be placed in a more favourable position where the owner of land was deceased, a result which the legislature could not have intended. While the section was intended to benefit a next of kin remaining on the land, and therefore in adverse possession against those out of possession, it was not drafted in terms which achieved this. Nor does it necessarily promote the speedy pursuit of entitlements, given the uncertainty as to when the relevant statute of limitations begins to run. It would appear therefore that the aim of the amendment to section 45 of the *Statute of Limitations 1957* has not been fulfilled in practice. Instead, the amendment has only served to create further complications and inconsistencies in the law governing adverse possession claims against a deceased's estate.

Possible Reform

6.13 There are three principal issues arising out of the decisions in *Drohan* and *Gleeson* which require to be resolved. First, the point at which the right to receive a share or interest in the estate of the deceased accrues (that is, the point from which the limitation period should begin to run) needs to be clearly established. Secondly, we consider the nature of the duties of a personal representative and whether these duties may place limits on his or her capacity to plead a statute of limitation. Thirdly, it is necessary to decide what time limit or limits should apply to claims against the estate of a deceased person.

When does the “right to receive” a share or interest in realty accrue?

6.14 Section 13(2) of the 1957 Act provides that no action to recover land shall be brought after the expiration of twelve years from the date on which the right of action accrued to the person bringing it. Such an action is not deemed to accrue unless and until the land is in the possession of a person in whose favour the limitation period can run.⁸⁵ The crucial date in these circumstances is that on which adverse possession began.

6.15 However, different provisions apply where the claim involves the estate of a deceased person. There are two main possibilities here as to when the right to receive accrues: (a) the date of death or (b) the date when the right to receive the share or interest accrued.

6.16 Under sections 14 and 45 of the 1957 Act and prior to the enactment of the 1965 Act, different provisions applied depending on whether the property in question was realty or personalty in relation to the accrual of the right of action. Under section 14 of the 1957 Act, which applies to an action to recover land of a deceased, the relevant date was the date of death.⁸⁶ Section 45 applied to claims to

⁸⁵ Section 18(1) of the 1957 Act.

⁸⁶ Section 14(2) provides

“Where—

(a) any person brings an action to recover any land of a deceased person, whether under a will or on intestacy, and

(b) the deceased person—

the personal estate of a deceased person and provided that the action had to be brought within twelve years of the date when the “right to receive the share or interest accrued”. The section did not define the criteria by which accrual was to be determined, but it has long been accepted that in the case of a specific legacy the right accrues at the date of death even though the beneficiary may not take action to recover it until expiration of the “executor’s year”.⁸⁷ Where a contingent legacy is concerned, the right accrues at the date on which the contingency is satisfied. Finally, in the case of residuary interests or rights arising on intestacy, time begins to run from the date on which the assets in question come into the hands of the personal representative.⁸⁸

6.17 However, section 45 was replaced by section 126 of the 1965 Act. Section 126 applies to both personalty and realty and states that time runs from “the date when the right to receive the share or interest accrued.” The question now arises whether the accrual of a right of action in respect of land continues to be governed by section 14 of the 1957 Act (so that the limitation period runs from the date of death) or is the date of accrual governed by other variables? For example, certain judicial comments⁸⁹ on the matter suggest that the taking out of a grant or the taking of possession by the personal representative may be more appropriate triggers for the running of limitation periods in the context of succession.

6.18 The question of accrual of the right to receive has been addressed recently by the Law Commission of England and Wales,

(i) was on the date of his death in possession of the land or, in the case of a rentcharge created by will or taking effect upon his death, in possession of the land charged, and

(ii) was the last person entitled to the land to be in possession thereof,

the right of action shall be deemed to have accrued on the date of his death.”

⁸⁷ McGuire *The Succession Act 1965* (2nd ed Law Society of Ireland 1986) at 312.

⁸⁸ *Ibid.*

⁸⁹ See *Gleeson v Feehan* [1993] 2 IR 113 at 122 *per* Finlay CJ

which has commented that while it is widely accepted to be the law that the right accrues at the date of death, authority for this proposition is not at all strong.⁹⁰

Interpretation of section 126 by the Courts

6.19 The issue of accrual was referred to by Finlay CJ, albeit *obiter*, in his judgment in *Gleeson v Feehan*, where he questioned the assumption on which the anomaly alleged by the defendants was based. This assumption was that the right of a next-of-kin to claim a share in the estate of the deceased arose at the date of death and was therefore barred six years after that date.⁹¹

6.20 There was, he said, authority for the proposition that the right did not arise until the date at which the property in respect of which the claim was being made came into the hands of a personal representative. The Chief Justice added that similar considerations did not appear to apply where there was an executor of a will.⁹² He did not elaborate on this point. However, it may be assumed that he based the distinction on the fact that, while on intestacy the property of the deceased does not vest in the personal representative until a grant of administration is extracted, where an executor is appointed under a will, the property vests in that person automatically on the deceased's death.

6.21 The case of *Sly v Blake*⁹³ was referred to by Finlay CJ in *Gleeson* in support of the proposition that time began to run only when the property came into the hands of an administrator. In that case, it was held that, while the claim of a next of kin for general administration of the estate of an intestate was barred after the limitation period had run as from the date of death; claims in respect of assets, not received by the administrator, were not so barred since no “present right to receive” on the part of the next of kin arose, until

⁹⁰ *Limitation of Actions: A Consultation Paper* (Law Com No 151 1998) paragraph 4.36. In *Ministry of Health v Simpson* [1951] 2 All ER 1137 at 1148 Lord Simonds appeared to assume that time did not begin to run against legatees or next of kin until the expiration of the “executor’s year”; the comment was *obiter* however, and no authority was cited in support of it.

⁹¹ [1993] 2 IR 113 at 122.

⁹² *Ibid.*

⁹³ [1885] 29 Ch 964.

the assets had actually been recovered by the administrator. Chitty J pointed out that the right to a legacy and the right to receive a legacy were “obviously distinct rights”. Where the administrator was compelled to take proceedings to recover an outstanding asset, the next of kin had no present right to receive it until the asset had come into his possession.⁹⁴

6.22 It is important to note, however, that the principle adverted to by Chitty J was restricted to property which subsequently falls into the deceased's estate, such as a reversionary interest, a restriction to which Finlay CJ did not refer. It has been argued in this regard that:-

“[i]t can hardly be said that land of the deceased which was vested in possession at the time of his death and was subsequently recovered from a squatter "falls" into the estate on such recovery. As long as the title of the deceased has not been extinguished, the land forms part of the present estate, irrespective of whoever is in possession.”⁹⁵

The specific question of accrual in respect of the recovery of land was not addressed by the Chief Justice, so that it may be assumed that section 14 continues to govern in the particular circumstances with which it deals.

Reform

6.23 We consider first the issue of whether time should run from the same date irrespective of whether it is running against a beneficiary under a will or a next of kin on intestacy.

6.24 The Commission believes that there seems little practical reason for allowing time to run against a beneficiary from an earlier date than that which operates against a next of kin on intestacy, given that both may be equally unaware that they are entitled to share in a deceased's estate. We are therefore of the view that it is illogical to make the date of accrual of a right to receive dependent upon whether or not there was a will. *The Commission recommends therefore that*

⁹⁴ [1885] 29 Ch. 964, 971.

⁹⁵ Coughlan “Limitation of Actions - The Recovery of Land by Personal Representatives” (1991) 13 DULJ 165 at 169-170.

in the interests of certainty, the operative date should be the same whether there is a will or on an intestacy.

6.25 The next question is what that operative date should be. The Commission is of the view that certainty would be achieved by following section 14 of the 1957 Act so that time would run in respect of all claims against the estate of a deceased from the date of death. The date of death is easily ascertainable. This introduces consistency in all cases into the law, and removes the complications of determining when the right of action accrues.

6.26 Finlay CJ's comments in *Gleeson v Feehan* as to accrual voice concern that injustice would result from allowing a personal representative to bar the claims of those entitled within a short time after the death and retain the land for his own benefit or for the benefit of those with whom he acted collusively. We believe, however, that the appropriate means of avoiding this result is not to make the running of time dependent on a range of contingencies, but rather to fix it at the date of death (provided that the property was vested in the deceased at that time) and to prevent the personal representative from availing of the running of time in certain circumstances.

6.27 *The Commission recommends that the limitation period should run from the date of death where the property was vested in the deceased at that time.*

Should the Personal Representative lose the benefit of the limitation period in certain circumstances?

6.28 The next question is whether there should be an exception in the case of a personal representative, by virtue of that special office. The running of time against beneficiaries or intestate successors, and the gradual movement towards a loss of rights which this entails, need not necessarily mark the acquisition of concomitant rights on a personal representative. Should the personal representative be prevented from availing of the running of time in certain circumstances, or should he be capable of benefiting at all?

6.29 The comments of the Supreme Court in *Gleeson v Purcell*⁹⁶ support the conclusion that the office of personal representative is an onerous one. Keane J made clear that an executor or administrator does not hold the property vested in him for his own benefit; he is a trustee who must perform the duties of his office in the interests of those who are ultimately entitled to the deceased's property. Until such time as the extent of the residue after payment of debts is ascertained, however, the beneficiaries can not be said to be entitled in equity to any specific item forming part of that estate. They merely have a right to be paid the balance of the estate after debts have been discharged, a right enforceable against the personal representative.⁹⁷ Until that time, it would appear that the beneficiaries have merely a right in the nature of a chose in action which is unenforceable by them until the personal representative has discharged certain duties, in particular the payment of the debts of the estate. The effect of a personal representative's failure to discharge his obligations was not addressed, but, in light of Keane J's comments, it would appear that in the event of such failure, such a person would have difficulty retaining property of a deceased over which he has control qua personal representative.

6.30 A number of situations in which a personal representative may himself be in adverse possession of the land will now be considered.

Executor has not extracted grant

6.31 Where a personal representative goes into possession without having accepted his office as executor, the question arises whether he or she may obtain title by adverse possession after twelve years have elapsed.

6.32 No duties accrue automatically to a person named in a will; there is no requirement, for example, that such person takes steps to accept his office and administer the estate within a certain time. While a failure to do so can be remedied by the taking of action by those interested in the estate to compel the personal representative to accept or renounce his office, until they do so the personal

⁹⁶ [1997] 1 ILRM 522.

⁹⁷ [1997] 1 ILRM 522 at 537 *per* Keane J It should be noted that Keane J saw no distinction between the position of beneficiaries under a will and that of next of kin on intestacy.

representative is free to desist from acting. The outcome where an executor fails to take out a grant is in practice the same as where there is no will. As with an intestacy, the relevant factor will be whether there is another person prepared to take action to bring about administration of the estate.⁹⁸

6.33 A significant practical problem is that a personal representative may, by the doing of certain acts, be deemed to have accepted his office. McGuire comments in this regard that "if an executor wants to avoid office and all personal liability, he should not in any way interfere in the assets or affairs of the deceased."⁹⁹ This poses the question whether the taking of possession of the deceased's land is an act sufficient to constitute such interference.¹⁰⁰ If it is, then the personal representative will not be able to avail of the running of the limitation period unless he fulfils all the duties of the office. If this were the case a person, simply by virtue of being appointed under a will, would encounter obstacles to obtaining title by adverse possession to the deceased's estate even though he had not formally accepted that office. In practice, such persons are often next of kin of the deceased who have remained on in the home after the death.

6.34 *The Commission's conclusion is therefore that where the executor has not extracted a grant, we believe that there is no reason to prevent personal representatives from obtaining title by adverse possession in the ordinary way.*¹⁰¹ *As the executor has not accepted*

⁹⁸ An executor renounces probate by completion of the relevant form and lodging it in the Probate Office. Alternatively, he may be deemed to have renounced where he fails to appear to a citation to take out probate. In both cases, administration "shall devolve and be committed in like manner as if that person had not been appointed executor": section 17 of the *Succession Act 1965*.

⁹⁹ Section 23 of the *Succession Act 1965*; see McGuire *The Succession Act 1965: A Commentary* (2nd ed Law Society of Ireland 1986) at 50.

¹⁰⁰ McGuire refers to a case in which the taking of possession of the deceased's land was an act sufficient to constitute a person an executor *de son tort*: McGuire *op cit* at 58.

¹⁰¹ Since the property vests automatically in the executor upon death, there is a technical question of whom the personal representative is in adverse possession against. This could be of practical importance if (say) some relevant person were under an incapacity and the question, therefore, would be whether time did not run because of this incapacity. As the beneficiaries have an equitable interest in the estate, it is possible that the personal representative is in adverse possession against the beneficiaries out of

office, there is no responsibility to administer the estate, and the executor is therefore in the same position as a stranger squatting on the land. Time should run in favour of the executor from the date of death of the deceased, and the claim of the beneficiaries should be extinguished after twelve years.

Executor has extracted grant

6.35 The question arises as to whether a personal representative who has extracted a grant is capable of obtaining title by adverse possession. There is a certain amount of conflict between various provisions of the 1957 and 1965 Acts on this matter. In the first place, sections 43 and 44 of the 1957 Act provide special periods of limitation in respect of actions against trustees; in particular no limitation period is imposed on actions to recover trust property retained by trustees. Next, section 10 (3) of the 1965 Act specifies that personal representatives are to hold the property of the deceased as trustees for those entitled to it. These provisions may seem to suggest that time would never run in favour of the personal representative and so he could not retain property of the deceased for his own benefit.

6.36 But as against this, section 123 of the 1965 Act provides that a personal representative “by reason only of section 10” is not a trustee for the purposes of the Statute of Limitations. This raises the question whether a personal representative is in the same position as a stranger with regard to the acquisition of title to land by adverse possession. The Supreme Court in *Vaughan v Cottingham*¹⁰² (a decision which pre-dates the 1965 Act) held that a personal representative was not an express trustee and could therefore acquire title as against beneficiaries or intestate successors. This view, fortified by section 123 of the *Succession Act 1965*, suggests that a personal representative is in the same position as a stranger in terms of adverse possession rights. We believe that this is the better view.

possession. While Keane J stated in *Gleeson v Purcell* [1997] ILRM 522 at 537 that the beneficiaries are not entitled in equity to any *specific* item forming part of the estate, the Commission is of the view that they have a sufficient equitable interest in the estate for the executor to be in adverse possession against them.

¹⁰² [1961] IR 184.

6.37 The Commission considered making a recommendation that once the personal representative has taken out a grant, he would not be able to acquire by adverse possession. This was based on the theory that the extraction of the grant was an acknowledgement that he was going to administer the estate, and an indication that the personal representative did not have the requisite *animus possedendi*. However, to so provide would discourage people from taking out a grant, which is clearly not desirable. The taking out of a grant does not *per se* amount to an acknowledgement within the meaning of the *Statute of Limitations 1957*. The proposal also fails to acknowledge the fact that, in practice, a grant may be extracted for some reason totally unrelated to the administration of the estate, such as to avail of milk quota payments, woodland grants or to deal with financial institutions. It therefore may not impinge upon the requirement of *animus possedendi*.

6.38 *The Commission recommends that the extraction of the grant should not prevent a personal representative from acquiring rights by adverse possession.*

Fraud by a personal representative

6.39 Is there any danger that the above recommendation could encourage or facilitate fraud by the personal representative? The answer would seem to be no. Section 46 of the *Statute of Limitations 1957* provided that no limitation period applied to an action against a personal representative, where the claim was founded on a fraud to which he was party or privy. The section was repealed by section 8 of the 1965 Act, but the general provision, section 71 of the *Statute of Limitations 1957*, continues to apply.¹⁰³ Where there is fraud on the part of the defendant or his agent or the plaintiff's right of action has been concealed by the fraud of such person, section 71 postpones the running of a limitation period established under the Act. Time does not run until the plaintiff has discovered the fraud or could with reasonable diligence have so discovered. This provision would apply to a personal representative, so that if he behaved, in any way,

¹⁰³ The substituted section 45 is expressed to be "subject to section 71". Egan J commented in *Gleeson v Feehan* [1993] 2 IR 113 at 130 that the repealed section 46 was probably unnecessary since section 71 would include fraud by a personal representative.

fraudulently in administering the estate, the running of the twelve year period would be postponed.

6.40 The Commission also examined the possibility of imposing an obligation on the personal representative to notify beneficiaries within a reasonable period of their entitlement, on the basis that it is possible that the beneficiaries may be entirely unaware of the death, especially those who are abroad. However, the Commission decided not to recommend a general statutory obligation to notify beneficiaries of their entitlement as the twelve year period gives the beneficiaries ample time to become aware of the death and of their entitlement and to make a claim against the personal representative. In addition, it is always possible that failure to notify beneficiaries could constitute fraudulent behaviour in certain circumstances. Given that a personal representative is required to act in a *bona fide* manner, failure to notify coupled with other factors which cast doubt on such person's bona fides – such as evidence that he took steps to conceal the fact of entitlement from the next of kin – might be sufficient to trigger section 71 of the 1957 Act.

Options as to length of limitation periods

6.41 We are now in a position to return to the issue, mentioned earlier, of the length of the period of limitation. The Commission has considered three options for the resolution of the anomalies arising under section 126:-

- (a) Reduce the limitation period for the recovery of property forming part of the estate of a deceased to six years (which would extend to all cases the special period currently applicable only to claims against personal representatives).
- (b) Provide that claims against the estate of a deceased must be brought within twelve years from the date of death or six years from date of extraction of a grant, whichever is shorter.
- (c) Increase the limitation period from six to twelve years in all cases (which would dispense with the special period currently applicable to claims against personal representatives and mark a return to the pre-Succession Act position).

6.42 To take these possibilities in sequence: the reduction of the period to six years would confer an unfair advantage on a squatter, who could obtain title by adverse possession in half the normal time merely because the owner was deceased. A second objection to a shorter period is that it constitutes a significant departure from the twelve year period in respect of claims against land with which most people are familiar.

6.43 One purpose of the section was to encourage the taking out of grants in order to achieve certainty of title. The second option would encourage those who remained on the land to take out a grant, since by doing so they would be able to avail of the shorter limitation period. If they did not take out a grant, they would be compelled to wait the full twelve years before they would be safe from claims by absent next of kin. As we have seen, the taking out of a grant gives rise to certain duties; the price of the shorter period would be the fulfilment of these duties. However, the introduction of an alternative period would only serve to complicate the law further and create uncertainties as to what time period applies in a particular case and when time begins to run. We prefer the third option, to provide for a twelve year long stop in all cases, whether it be an action by a personal representative or an action against a personal representative. This would align this area with the general law on adverse possession.

6.44 To return to a period of twelve years in all cases would arguably be to abandon the policy behind section 126, which was to quieten titles as soon as possible after the owner's death and thereby benefit those who remain on to run the family farm or business. However, surely a return would lead to greater simplicity and consistency within the general law of adverse possession, and would remove the anomalies which have arisen since the passing of section 126.

6.45 *The Commission recommends that there should be a single long stop limitation period of twelve years. Time should begin to run from the date of death.*

Draft Legislation

6.46 *The Commission recommends the following draft legislation to amend the Statute of Limitations 1957:-*

Section () - The Statute of Limitations, 1957, is hereby amended by the substitution of the following section for section 45 (as inserted by section 126 of the Succession Act, 1965):

“45. (1) Subject to section 71, no action in respect of any claim to the estate of a deceased person (“the deceased”) or to any share or interest in such estate, whether under a will, on intestacy or under section 111 of the Succession Act 1965, and whether brought by a personal representative or by any other person, shall be brought after the expiration of twelve years from the date of the death of the deceased.

(2) No action to recover arrears of interest in respect of any legacy or damages in respect of such arrears shall be brought after the expiration of three years from the date on which the interest became due.”

CHAPTER 7 SUMMARY OF RECOMMENDATIONS

7.01 The recommendations in this Report may be summarised as follows:

Chapter 1 Enforceability of Positive Freehold Covenants

7.02 In Chapter 1 we discuss the difficulties of enforcing covenants relating to freehold land. The existence of freehold covenants may be an important factor in preserving the value of the land retained where an owner sells off part only of his land. We observe that the law relating to leasehold covenants is generally satisfactory, but the shift towards freehold conveyancing in recent times requires that this problematic area be addressed. The practical problems to which the defects and limitations in the law governing the enforceability of freehold covenants give rise in conveyancing transactions make the case for reform overwhelming.

7.03 At common law, only the **benefit** of the covenant, that is, the right to enforce it, could, in certain circumstances, pass to a successor in title to the covenantee; the burden could not pass to a successor in title to the covenantor. The rule in *Tulk v Moxhay*¹ is unsatisfactory in many respects. It permits the burden of only “restrictive” or “negative covenants” to pass to successors in title to the original covenantor. The rule is based on equitable principles, so that the person seeking to enforce the covenant may only invoke equitable remedies which will be granted at the discretion of the court. The right to enforce the covenant is at most an equitable interest in the landowner enjoying the benefit of the covenant and a freehold covenant may thus cease to be enforceable because the burdened land has passed to a *bona fide* purchaser of the legal title without notice of the covenant.

¹ (1848) 2 Ph 774.

7.04 In Chapter 1 we also quote in full the legislation enacted in Trinidad and Tobago and in Northern Ireland dealing with the enforceability of freehold covenants generally, providing critical analysis and suggested how any legislation enacted here could improve on those provisions. The Commission recommends that statutory provision be made for the enforceability of freehold covenants by and against successors in title. [paragraph 1.14]

7.05 It is noted that the proposed provision will cause no problems in the context of registered land, as the covenant will be entered on the folio and therefore successive owners of the “servient” land will be aware of it. In the context of unregistered land, however, there is the risk that, over time, freehold covenants will become interests hidden in the “pre-root” title. It was concluded, however, that this risk would seem to small, as conveyancing practice is likely to dictate that the covenants will be repeated or referred to in all conveyances subsequent to the one in which the covenants were originally created. Conveyancers have always had to deal with such problems because rights like easements and profits may have been excepted or reserved in earlier deeds. Also, the risk would only arise some decades after the enactment of the legislation, when, in light of the rapid advances now being made in the Land Registry, much more land will be registered land, where the problem does not arise.

7.06 We observe that the legislation enacted in Trinidad and Tobago and in Northern Ireland enabled a landowner whose land is burdened with the obligation to comply with covenants to apply to a tribunal to secure a discharge or modification of the covenant. This provision was based on the fact that appurtenant rights like restrictive covenants can outlive their usefulness. In view of the greater enforceability of freehold covenants which we are recommending, and the fact that such covenants could remain a burden on the title indefinitely, consideration must be given to whether some legislative provisions for discharge and modification should be introduced here. Any legislation to be enacted should be confined to freehold covenants whose enforceability is provided for by the legislation recommended in this Report. No application should be made unless the covenant has been in existence for at least twenty years, and compensation should be payable where appropriate. Jurisdiction should be vested in the county registrars. [paragraph 1.20]

Chapter 2 Definition of “Purchaser” in the Succession Act 1965

7.07 In Chapter 2, we discuss the obligation imposed on a purchaser to make all reasonable enquiries and inspections when buying property either from a personal representative of a deceased owner, or from a person who has acquired the property from a personal representative by an assent. This obligation is imposed by virtue of the inclusion of the words “in good faith” in the definition of “purchaser” as set out in section 3 of the *Succession Act 1965*.

7.08 The requirement that the purchaser act in good faith is inconsistent with many of the statements in the explanatory memorandum to the Act and contradicts many of the provisions of the Act. The tenor of Part V of the Act suggests that a personal representative should have the power to dispose of any part of the deceased’s estate in due course of administration, with minimal restrictions. The deletion of the words “in good faith” would offer no additional protection to a purchaser where there has been fraud or actual notice.

7.09 The Commission recommends that the definition of “purchaser” in the *Succession Act 1965* should be amended by the deletion of the words “in good faith”. [paragraph 2.11]

Chapter 3 Commorientes and Joint Tenancies

7.10 In Chapter 3 we discuss the problem which arises where joint tenants die in circumstances where it is unclear which of them died first. At common law, it was deemed that the parties had died simultaneously. This was given statutory force in section 5 of the *Succession Act 1965*.

7.11 Where the parties are joint tenants, the sequence of deaths is crucial in determining the question of devolution, due to the operation of the right of survivorship. The courts have held that where joint tenants perish by one blow, the estate will remain in joint tenancy in their respective successors. There may be numerous respective successors, and the right of survivorship will operate between them even though they may have little or nothing to do with each other.

7.12 The Commission recommends that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, any property held by them in a joint tenancy will be deemed to have been held under a tenancy in common, and will pass to their respective successors under a tenancy in common. [paragraph 3.06]

Chapter 4 Compulsory Registration and the Irish Church Act 1869

7.13 In Chapter 4 we discuss the question of compulsory registration of interests which arose pursuant to the *Irish Church Act 1869* which provided in section 11 that all Church of Ireland property became vested in the Commissioners for Church Temporalities in Ireland. We survey some of the interests to which the provisions of the 1869 Act applied, including rent charges, fee farm rents, tenanted lands, and reacquisitions by the Church.

7.14 The *Local Registration of Title (Ireland) Act 1891* first gave effect to the notion of compulsory registration. Following further developments in the law, it became apparent that the interests that arose by virtue of the 1869 Act were in fact compulsorily registrable, with any doubts being removed finally by the *Registration of Title Act 1964*.

7.15 There can be no doubt that the number of properties affected by the compulsory registration requirements, by virtue of their inclusion under the 1869 Act, is relatively large. It is understood that the obligation to register has often been ignored. This problem is significant as the 1964 Act precludes the estate or interest purported to be conveyed from passing to the purchaser, where registration has not occurred. The prospect of this fundamental defect in title applying to substantial areas of land is a grim one.

7.16 In outlining its recommendation, the Commission had to bear in mind the interests of two groups: those who had complied with the compulsory registration requirements and registered their interest, and those who were obliged to register, as far back as 1891, but failed to do so. The principle aim of the amendment is to cure any existing defective title, where the defect is attributable to the requirement of

compulsory registration. It is important in doing so not to disrupt or devalue the title of those who have complied with the compulsory registration requirements. [paragraph 4.27]

Chapter 5 Unilateral Severance of Joint Tenancies

7.17 In Chapter 5 we outline the difficulties under the present law of effecting a unilateral severance and raise the question of whether unilateral severance should in fact be permitted. The Commission concludes that it is unjust that one joint tenant can act independently in a manner which effects the property rights of the other joint tenants. Under a joint tenancy, each interest is subject to the right of survivorship and each joint tenant has the chance of ultimately ending up with the entire property. A joint tenant should not be deprived of this chance by the unilateral actions of his fellow joint tenant. Under our recommendation, a joint tenant who wished to sever a joint tenancy would not be left without a remedy in the event that he failed to obtain the consent of his fellow joint tenants, as he could apply for an order for partition or sale under the *Partition Acts 1868 and 1876*.

7.18 The Commission recommends that unilateral severance by alienation (whether the alienation be to a nominal foffeee so as to retain an interest or to a third party) be prohibited in all cases. Therefore, a joint tenancy could only be severed where all the joint tenants consent to the alienation and therefore agree to the severance. Similar considerations apply where a joint tenant purports to effect a severance by acquisition of another interest. We therefore recommend that a joint tenant should not be able to sever the joint tenancy by acquiring another interest without first obtaining the consent of all the other joint tenants to his acquisition and therefore to the severance. [paragraphs 5.12 and 5.16]

Chapter 6 Section 126 of the Succession Act

7.19 The Commission recommends that the operative date on intestacy ought to be the same as where there is a will and recommends that in the interests of certainty, the operative date should be the same whether there is a will or on an intestacy. [paragraph 6.24]

7.20 The Commission recommends that the limitation period should run from the date of death where the property was vested in the deceased at that time. [paragraph 6.27]

7.21 The Commission recommends that the extraction of the grant should not prevent a personal representative from acquiring rights by adverse possession. [paragraphs 6.34 and 6.38]

7.22 The Commission recommends that there should be a single long stop limitation period of twelve years. Time should begin to run from the date of death. [paragraph 6.45]

APPENDIX A DRAFT LEGISLATION

Number __ of 2003

LAND LAW AND CONVEYANCING BILL, 2003

ARRANGEMENT OF SECTIONS

Section

1. Interpretation.
2. Enforceability of positive freehold covenants.
3. Variation of covenants affecting freehold land.
4. Provisions in relation to costs.
5. Register of orders to pay compensation.
6. Powers of court in relation to applications and court jurisdiction.
7. Amendment of Succession Act, 1965.
8. Amendment of Registration of Title Act, 1964.

9. Amendment of Statute of Limitations, 1957.
10. Unilateral severance of joint tenancies.
11. Regulations.
12. Expenses.
13. Guidance on interpretation.
14. Short title and commencement.

ACTS REFERRED TO

Companies Acts, 1963 to 1990

Irish Church Act, 1869

32 & 33 Vict., c. 42

Land Act, 1927

No. 19 of 1927

Landlord and Tenant (Ground Rents) (No. 2) Act, 1978

No. 16 of 1978

Planning and Development Act, 2000

No. 30 of 2000

Registration of Deeds Act, 1707

6 Anne, c. 2

Local Registration of Title (Ireland) Act, 1891

54 & 55 Vict., c. 57

Registration of Title Act, 1964

No. 16 of 1964

Succession Act, 1965

No. 27 of 1965

LAND LAW AND CONVEYANCING BILL, 2003

BILL

entitled

AN ACT TO PROVIDE FOR CERTAIN
LAND LAW AND CONVEYANCING
MATTERS, AND TO AMEND THE
STATUTE OF LIMITATIONS, 1957, AND
TO AMEND THE REGISTRATION OF
TITLE ACT, 1964, AND TO AMEND THE
SUCCESSION ACT, 1965

BE IT ENACTED BY THE OIREACHTAS AS FOLLOWS:

Interpretation **1.** – In this Act-

“land” includes –

- (a) land of any tenure;
- (b) land covered by water;
- (c) houses or other buildings or structures
 whatsoever and parts of any such houses,
 buildings or structures whether divided
 vertically, horizontally or otherwise;
- (d) mines and minerals, whether held apart
 from the surface or not;

(e) incorporeal hereditaments;

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

“prescribed” means prescribed by the Minister by Regulations made under this Act.

Enforceability
of positive
freehold
covenants

2. —(1) Any covenant to which this section applies that imposes in respect of land (referred to subsequently as “the servient land”) for the benefit of other land (referred to subsequently in this Act as “the dominant land”) an obligation to do or abstain from doing any act or thing shall be enforceable -

(a) by –

(i) the owner for the time being of the dominant land, or any part thereof, or

(ii) a person who has ceased to be the owner for the time being of the dominant land, or any part thereof, in respect of any period when he or she was such owner, and

(b) against –

(i) the owner for the time being of the servient land or any part thereof, or

(ii) a person who has ceased to be the owner for the time being of the servient land, or any part thereof, in respect of any period when he or she was such owner.

(2) This section applies to a covenant –

(a) affecting freehold land (but not including land held under a fee farm grant or otherwise held under a contract of tenancy or any land to which section 28 of the Landlord and Tenant (Ground Rents) (No.2) Act, 1978 applies), entered into after the commencement of this section;

(b) in so far as no contrary intention is expressed in the covenant or otherwise in the deed containing it.

Variation of covenants affecting freehold land

3. —(1) On the application made in the prescribed form of any person interested in land affected by a covenant (“the servient land”), the county registrar for the area in which the land is situate may, if satisfied that compliance with the covenant would involve an unreasonable interference with the use and enjoyment of the land, make an order varying or setting aside the covenant in whole or in part.

(2) Notice of an application under this section shall be given by the applicant –

(a) to the owner of the dominant land, and

(b) to such other persons as the county registrar may direct:

Provided, however, that the county registrar may dispense with service under this subsection where the applicant satisfies him that it is not reasonably practicable to effect such service.

(3) Service of a notice under *subsection (2)* may be effected –

(a) by registered post, or

(b) in such other manner (including pre-paid post) as the county registrar may direct.

(4) The county registrar, in determining whether to make an order under *subsection (1)*, may have regard to the following matters, namely:

(a) the period when, the circumstances in and the purposes for which the covenant was entered into;

(b) any change in the character of the land or its neighbourhood;

(c) any public interest in the land, particularly as exemplified in any development plan made under the Planning and Development Act, 2000 for the area in which the land is situate and in force at the time of the application;

(d) any trend shown by planning permissions granted under that Act in respect of any land in the vicinity of the land or by refusals to grant such permissions;

(e) whether the covenant secures any practical benefit to any person and, if so, the nature and extent of that benefit;

(f) where the covenant creates an obligation to execute any works or do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether compliance with that obligation has become unduly onerous in comparison with the benefit to be derived from such compliance;

(g) whether the person entitled to the benefit of the covenant has agreed, expressly or by implication, to the covenant being varied or set aside;

(h) any representations made by any person served with notice of the application;

(i) any other matter which the county registrar considers relevant.

(5) Where the county registrar makes an order under *subsection (1)* he or she may include a condition in the order that the applicant pay to any person who, as a consequence of the making of the order, loses any benefit under the covenant such amount as the county registrar considers appropriate to compensate the person for such loss.

(6) Where an order is made under *subsection (1)*, the county registrar concerned shall, in the case of registered land, furnish the Registrar of Titles with notice of the order and the Registrar of Titles shall thereupon cause an entry to be made in the register under the Registration of Title Act, 1964, inhibiting, until such time as the order is discharged, any dealing with any registered land or charge which appears to be affected by the order.

(7) Where notice of an order has been given under *subsection (6)* of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall thereupon cause the entry made under *subsection (6)* of this section to be varied to that effect.

(8) Where notice of an order has been given under *subsection (6)* of this section and the order is discharged, the county registrar concerned shall furnish the Registrar of Titles with notice to that effect and the Registrar of Titles shall cancel the entry made under *subsection (6)* of this section.

(9) Where an order is made under *subsection (1)* of this section, the county registrar concerned shall, in the case of unregistered land, furnish the Registrar of

Deeds with notice of the order and the Registrar of Deeds shall thereupon cause the notice to be registered in the Registry of Deeds pursuant to the Registration of Deeds Act, 1707.

(10) Where notice of an order has been given under *subsection (9)* of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cause the entry made under *subsection (9)* of this section to be varied to that effect.

(11) Where notice of an order has been given under *subsection (9)* of this section and the order is discharged, the county registrar concerned shall furnish the Registrar of Deeds with notice to that effect and the Registrar of Deeds shall thereupon cancel the entry made under *subsection (9)* of this section.

(12) Where an order is made which applies to an interest in a company or to the property of a company, the county registrar concerned shall furnish the Registrar of Companies with notice of the order and the Registrar of Companies shall thereupon cause the notice to be entered in the Register of Companies maintained under the Companies Acts, 1963 to 1990.

(13) Where notice of an order has been given under *subsection (12)* of this section and the order is varied, the county registrar concerned shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cause the entry made under *subsection (12)* of this section to be varied to that effect.

(14) Where notice of an order has been given under *subsection (12)* of this section and the order is discharged, the registrar of the High Court shall furnish the Registrar of Companies with notice to that effect and the Registrar of Companies shall thereupon cancel the entry made under *subsection (12)* of this section.

(15) References in this section to the county registrar for the area in which any land is situate shall, where the land is situate in the areas of two or more county registrars, be construed as references to the county registrar for the area in which the larger or largest portion of the land is situate.

(16) A county registrar shall have, for the purpose of and in relation to the making of an order under *subsection (1)* of this section, the same power of making orders in respect of—

(a) security for costs,

(b) discovery and inspection of documents and interrogatories,

(c) the giving of evidence by affidavit,

(d) examination on oath of any witness,

as the Court has for the purpose of and in relation to any action or matter in that court.

(17) Whenever it appears to a county registrar for any county that a matter falling to be determined under *subsection (1)* of this section, cannot properly be dealt with by the county registrar by reason of the fact that the county registrar has a personal interest therein or such personal knowledge of the facts or of the parties as might prejudice the determination of the matter, the county registrar shall nominate the county registrar for an adjoining county to hear and determine the matter and, upon such nomination, the matter may be heard and determined accordingly.

Provisions in
relation to costs

4. —(1) Where an order is made under *section 3* of this Act, the county registrar making the order shall direct to and by whom and in what manner the costs of the

application shall be paid and shall tax or settle the amount of costs to be so paid.

(2) A county registrar shall not direct fees of counsel retained on behalf of a party to an application under *section 3* of this Act to be paid by another party to the application unless the application was of such a kind as, in the opinion of the county registrar, rendered it necessary to retain counsel.

(3) References in this section to the costs of an application under *section 3* of this Act are references to party and party costs.

Register of orders to pay compensation

5. —(1) A county registrar shall establish and maintain a register in the prescribed form of all orders made by him or her in applications under *section 3* of this Act.

(2) A county registrar may, as occasion requires, amend or delete an entry in the register.

(3) Registers kept under this section shall be made available for public inspection and copies of entries in the registers shall be made available to the public and the Minister may prescribe the places at which and the times during which the registers shall be so made available and, with the concurrence of the Minister for Finance, the fees to be charged for such inspection and for such copies.

(4) A copy of an entry in a register kept under this section by a county registrar purporting to be signed by the county registrar shall, without proof of the signature of the person purporting to sign the copy or that he was the county registrar, be evidence until the contrary is proved of the matters stated in the entry.

Powers of court in relation to applications

6. — (1) An appeal shall lie to the Court against an award, order or other decision of a county registrar in an application under *section 3* of this Act.

and court
jurisdiction

(2) The Court may remit, before giving its decision, any matter the subject of an appeal to it under this section to the reconsideration of the county registrar who heard the application in question or remit the matter to the rehearing of another county registrar.

(3) An order of a county registrar in an application under *section 3* of this Act may, by leave of the Court, be enforced as an order of the Court to the same effect and, where leave is so given, judgement may be entered in terms of the order.

(4) [The jurisdiction of the High Court and Circuit Court under this section will be in accordance with the new system of valuation and court jurisdiction currently being prepared by the Department of Justice, Equality and Law Reform]

Amendment of
Succession Act,
1965

7. —The Succession Act, 1965, is hereby amended —

(a) in section 3, by the deletion in subsection (1) thereof of “in good faith” from the definition of “purchaser”, and

(b) in section 5, by the insertion of “and any property held by any or all of them in a joint tenancy shall be deemed to have been so held under a tenancy in common and shall pass to their respective heirs under a tenancy in common” after “simultaneously”.

Amendment of
Registration of
Title Act, 1964

8. —The Registration of Title Act, 1964, is hereby amended in subsection (1) of section 23 thereof-

(a) by the substitution in paragraph (c) for “.” of “:”, and

(b) by the addition of the following proviso:

“Provided that where any sale, conveyance or vesting has or is deemed to have occurred under any provision of the Irish Church Act, 1869, and the ownership of the land involved in such sale, conveyance or vesting has not at the date of the commencement of the Land Law and Conveyancing Act 2003 been registered in accordance with –

(i) paragraph (a) of this subsection,

(ii) section 22 of the Registration of Title Act, 1891, or

(iii) section 51 of the Land Act, 1927

registration of the ownership of such land shall be deemed not to be and never to have been compulsory under the said paragraph.”.

Amendment of Statute of Limitations, 1957 **9.** —The Statute of Limitations, 1957, is hereby amended by the substitution of the following section for section 45 (as inserted by section 126 of the Succession Act, 1965):

“45. (1) Subject to section 71, no action in respect of any claim to the estate of a deceased person (“the deceased”) or to any share or interest in such estate, whether under a will, on intestacy or under section 111 of the Succession Act, 1965, and whether brought by a personal representative or by any other person, shall be brought after the expiration of twelve years from the date of the death of the deceased.

(2) No action to recover arrears of interest in respect of any legacy or damages in respect of such arrears shall be brought after the expiration of three years from the date on which the interest became due.”.

Unilateral
severance of
joint tenancies

10. —Where two or more persons hold, or are entitled to hold, as between themselves title to any land as joint tenants then, notwithstanding any rule of law or of equity to the contrary, none of such persons shall be entitled to sever the joint tenancy whether –

(a) by alienation, or

(b) by acquisition of another interest in the land;

unless the consent, as required by law, of each of the other joint tenants to such severance has been obtained.

Regulations

11.—(1) The Minister may by regulations provide for any matter referred to in this Act as prescribed or to be prescribed.

(2) Regulations under this Act may contain such incidental, supplementary and consequential provisions as appear to the Minister to be necessary or expedient for the purposes of the regulations.

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

Expenses

12.—Any expenses incurred by the Minister in the administration of this Act shall, to such extent as may

be sanctioned by the Minister for Finance, be paid out of moneys provided by the Oireachtas.]

Guidance on interpretation **13.** —The Law Reform Commission Report (LRC 70-2003) 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 **14.** —(1) This Act may be cited as the Land Law and Conveyancing Act, 2003 .

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

**APPENDIX B PROPERTY (NORTHERN IRELAND)
ORDER 1978**

Property (Northern Ireland) Order
1978

SI 1978/459 (NI 4)

[21st March 1978]

PART I

INTRODUCTORY

Title and commencement

1. (1) This Order may be cited as the Property (Northern Ireland) Order 1978.

(2) *Commencement*

Interpretation

2. The Interpretation Act (Northern Ireland) 1954 shall apply to Article 1 and the following provisions of this Order as it applies to a Measure of the Northern Ireland Assembly.

PART II

IDENTIFICATION, AND MODIFICATION OR EXTINGUISHMENT OF CERTAIN IMPEDIMENTS TO THE ENJOYMENT OF LAND

Application and interpretation of Part II

3. – (1) Subject to paragraph (2), the provisions of this Part apply to any of the following impediments to the enjoyments of land (whether the impediment exists at the commencement of those respective provisions or comes into existence thereafter, and whether the land affected by the impediment is registered or unregistered):

(a) a restriction, whether general or specific, arising –

(i) under a covenant, condition or agreement contained or implied in a deed, will or other instrument (but not in a mortgage), or

(ii) under a statutory provision of a local or personal character (not including a provision contained in a statutory instrument made or deemed to be made by a government department or a district council):

(b) any of the following obligations, not being an obligation imposed under a statutory provision of a public general character, namely –

(i) an obligation to execute works or do any thing, or to permit works to be executed or any thing to be done, on the land for the benefit of, or to facilitate the better enjoyment of, the land or specified land which includes the land:

(c) an easement:

(d) a profit appurtenant to other land: or

(e) a profit in gross.

(2) Articles 5 and 6(2) (a) do not apply –

(a) to an impediment created or imposed for naval, military or air force purposes (other than one created or imposed in connection with the use of any land as an aerodrome), so long as the impediment is enforceable by or on behalf of the Crown: or

(b) to an impediment created or imposed for civil aviation purposes or in connection with the use of any land as an aerodrome, so long as the impediment is enforceable by or on behalf of the Crown, a district council, a public body or an international authority.

(3) In any provision of this Part –

“enjoyment” in relation to land includes its use and development:

“government department” includes a department of the Government of the United Kingdom:

“impediment” means an impediment to which, by virtue of paragraphs (1) and (2), that provision of this Part applies:

“lease” includes a sub-lease:

“mortgage” includes a charge:

“mortgagee” includes a charge and any person deriving title under the original mortgagee:

“public body” means a body established by or under a statutory provision:

“statutory instrument” means an instrument (as defined by section 1(c) of the Interpretation Act (Northern Ireland) 1954 made under an Act of the Parliament of Northern Ireland or a Measure of the Assembly, an Order in Council having the effect of such an Act or Measure or an Act of the Parliament of the United Kingdom:

“statutory provision” has the meaning given by section 1(f) of the Interpretation Act

(4) Any reference in this Part to a person interested in land includes a person who is contemplating acquiring an estate in the land and a person who has an interest in the proceeds of any future sale of the land.

Power of Lands Tribunal to define scope, etc., of impediments

4. – (1) The Lands Tribunal, on the application of any person interested in land, may make an order declaring –

- (a) whether or not the land is, or would in any given event be, affected by an impediment:
- (b) the nature or extent of the impediment:
- (c) whether the impediment is, or would in any given event be, enforceable, and, of so, by whom.

(2) Where a question of law arises in connection with an application under this Article, the Lands Tribunal may refer the question to the Court of Appeal for decision.

(3) Paragraph (2) does not prejudice section 8(6) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 (requirement for case stated following decision).

(4) Where an application is made to the Lands Tribunal under this Article in connection with any impediment, no proceedings for the establishment or enforcement of the impediment shall be taken in any court without leave of the court until the application has been disposed of.

Power of Lands Tribunal to modify or extinguish impediments

5. – (1) The Lands Tribunal, on the application of any person interested in land affected by an impediment, may make an order modifying, or wholly or partially extinguishing, the impediment on

being satisfied that the impediment unreasonably impedes the enjoyment of the land or, if not modified or extinguished, would do so.

(2) Except with the permission of the Lands Tribunal, no application shall be made under this Article to modify or extinguish an impediment arising under any provision contained in a lease until the expiration of 21 years from the beginning of the term created by the lease.

(3) On an application under this Article, the Lands Tribunal –

(a) may direct such enquiries, if any, to be made of any government department, district council or public body, and

(b) may direct such notices, if any, to be given –

(i) to the occupier of the land (where the application is made by a person other than the occupier), to mortgages of the land, to occupiers or mortgagees of land benefited by the impediment and to such other persons, and

(ii) in such manner, whether by advertisement or otherwise, as the Tribunal thinks fit.

(4) Where, on an application under this Article, there arises before the Lands Tribunal a question involving any matter mentioned in paragraph (a), (b) or (c) of Article 4(1), the provisions of that Article shall have effect in relation to that question as if the application were one made to the Lands Tribunal under that Article.

(5) In determining whether an impediment affecting any land ought to be modified or extinguished, the Lands Tribunal shall take into account-

(a) the period at, the circumstances in, and the purposes for which the impediment was created or imposed:

(b) any change in the character of the land or neighbourhood:

- (c) any public interest in the land, particularly as exemplified by any development plan adopted under Part III of the Planning (Northern Ireland) Order 1972 for the area in which the land is situated, as that plan is for the time being in force:
 - (d) any trend shown by planning permissions (within the meaning of that Planning Order) granted for land in the vicinity of the land, or by refusals of applications for such planning permission, which are brought to the notice of the Tribunal:
 - (e) whether the impediment secures any practical benefit to any person and, if it does so, the nature and extent of that benefit:
 - (f) where the impediment consists of an obligation to execute any works or to do any thing, or to pay or contribute towards the cost of executing any works or doing any thing, whether the obligation has become unduly onerous in comparison with the benefit to be derived from the works or the doing of that thing:
 - (g) whether the person entitled to the benefit of the impediment has agreed either expressly or by implication, by his acts or omissions, to the impediment being modified or extinguished:
 - (h) any other material circumstances.
- (6) Where the Lands Tribunal makes an order modifying or extinguishing an impediment –
- (a) the Tribunal may add or substitute such new impediment as appears to it to be reasonable in view of the modification or extinguishment of the existing impediment:
 - (b) the Tribunal may direct the applicant to pay the person entitled to the benefit of the impediment, either –
 - (i) a sum to compensate him for any loss or disadvantage which, notwithstanding any new impediment which maybe added or substituted under sub-paragraph (a), he suffers in consequence

of the modification or extinguishment of the impediment, or

- (ii) a sum to make up for any effect which the impediment had at the time when it was imposed, in reducing the consideration then received for the land affected by it.

or, where it appears to the Tribunal that the modification or extinguishment of the impediment, the Tribunal may direct payment of any such sum as is mentioned in head (i) or head (ii) to the mortgagee, or, if there is more than one mortgagee, to the first mortgagee, who shall, in either case, apply the amount so paid as if it were proceeds of sale.

(7) A new impediment shall not be added or substituted under paragraph (6)(a) without the agreement of the applicant: but this provision does not affect the discretion of the Lands Tribunal to refuse an application where such agreement is not forthcoming.

Powers of court

6. – (1) Where proceedings for the establishment or enforcement of an impediment are taken in the court –

- (a) the court may refer to the Lands Tribunal any question which, in the opinion of the court, could have been disposed of on an application under Article 4 or 5 (and the Lands Tribunal, on the reference, may exercise any power which it could have exercised on such an application): or
- (b) the person against whom the proceedings are taken may in the proceedings apply to the court for an order giving leave to apply to the Lands Tribunal under Article 5 and staying the proceedings in the meantime.

(2) In any proceedings for the establishment or enforcement of an impediment, the court may –

- (a) make an order modifying or extinguishing the impediment on any ground, and on any terms, on which the Lands Tribunal could have done so on an application under Article 5: or

- (b) refuse to make an order where the plaintiff's interest is not materially affected by the breach (if any), or where, for some other reason, it would be unjust to make one: or
- (c) where the impediment consists of a positive obligation, make an order for specific performance of the obligation.

(3) In this Article "the court" means the High Court or, in matters within the limit of jurisdiction for the time being exercisable by county courts in actions in which the title to any land comes in question, the county court.

Supplementary provisions

7. – (1) An order made by the Land Tribunal under Article 4 or 5 or by the court under Article 6(2)(a), is binding on all persons, whether ascertained or of full age or capacity or not, then entitled or thereafter capable of becoming entitled to the benefit of the impediment, and whether those persons are parties to the proceedings or have been served with notice or not.

(2) An order may be made under Article 4 or 5 notwithstanding that any instrument which is alleged to impose the impediment may not have been produced to the Lands Tribunal, and the Lands Tribunal may act on such evidence of that instrument as it thinks sufficient.

Registration of orders

8. When an order is made under Article 4 declaring the existence of an impediment not created by an instrument, or an order is made under Article 5 or Article 6(2)(a) in relation to an impediment, -

- (a) where any registered land is affected by the order (as being subject to, or entitled to the benefit of, the impediment) a copy of the order shall be transmitted by the applicant, or, where the order is made by a court, by the person in whose favour the order is made, to the Registrar of Titles for registration in

the Land Registry (and, without prejudice to Land Registry Rules made under section 79(2)(b) of the Land Registration Act (Northern Ireland) 1970, where the land certificate is not in the possession of the person transmitting the order the Lands Tribunal or, as the case may be, the court may order its production by the person in possession of it to the Registrar of Titles for the purposes of such registration): and the order may be registered in the appropriate register –

(i) in any case, in relation to registered land which is subject to the impediment:

(ii) where the impediment is modified or extinguished by the order, in relation to registered land which the impediment has been registered as benefiting (that is to say, land to which the impediment belongs or is attached or is appurtenant):

(iii) where the impediment is a new impediment added or substituted by the order, in relation to registered land benefited (as mentioned in sub-head (ii)) by the impediment:

(b) where any unregistered land is so affected by the order –
(i) a copy of the order shall be caused by the applicant or the person in whose favour the order was made to be registered in the Registry of Deeds, and

(ii) a memorandum of the order shall, if the Lands Tribunal or, as the case may be, the court so directs, be endorsed on such instrument as the Tribunal or the court directs.

**APPENDIX C LIST OF LAW REFORM COMMISSION
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prí 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) (Prí 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27
Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harboursing of a Spouse (December 1978)	€1.27

Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95
First Report on Family Law - Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95
Report on Civil Liability for Animals	

(LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (PI 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90
Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (PI 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (PI 3313)	€1.27

Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81
Report on the Hague Convention on the Civil Aspects of International Child Abduction and Some Related Matters (LRC 12-1985) (June 1985)	€2.54
Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985) (July 1985)	€3.17
Report on Offences Under the Dublin Police Acts and Related Offences (LRC 14-1985) (July 1985)	€3.17
Report on Minors' Contracts (LRC 15-1985) (August 1985)	€4.44
Report on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (LRC 16-1985) (August 1985)	€2.54
Report on the Liability in Tort of Minors and the Liability of Parents for Damage Caused by Minors (LRC 17-1985) (September 1985)	€3.81
Report on the Liability in Tort of Mentally Disabled Persons (LRC 18-1985) (September 1985)	€2.54

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

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

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

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

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