

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

Report
(LRC 30-1989)

REPORT ON
LAND LAW AND CONVEYANCING LAW:
(1) GENERAL PROPOSALS

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St. Stephen's Green, Dublin 2

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THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the Law Reform Commission Act, 1975 on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General twenty-nine Reports containing proposals for reform of the law. It has also published eleven Working Papers, one Consultation Paper and Annual Reports. Details will be found on p. 42.

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NOTE

This Report was submitted on 13 June, 1989 to the Attorney General, Mr. John L. Murray, S.C., under Section 4 (2) (c) of the Law Reform Commission Act, 1975.

While these proposals are being considered in the relevant Government Departments, the Attorney General has requested the Commission to make them available to the public at this stage, in the form of this Report, so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

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CHAPTER 1: INTRODUCTION

1. On the 6th March, 1987, the then Attorney General, in pursuance of section 4 (2) (c) of the *Law Reform Commission Act, 1975*, requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

“Conveyancing law and practice in areas where this could lead to savings for house purchasers”.

The Commission recognised that a comprehensive review of land law and conveyancing law was not feasible within the limited resources available to them at the time, and accordingly established a Working Group which was asked to identify a number of areas in which reform of land law or conveyancing law could be brought about more easily. The Working Group was asked to concentrate on areas where it could recommend changes in the law which would remove anomalies or redundant provisions.

The members of the Working Group appointed were Mr. John F. Buckley, Commissioner (Convener), Miss Justice Mella Carroll, Professor J. C. Brady, Mr. George Brady, SC., Ms. Mary Laffoy, SC, Mr. Ernest B. Farrell, Mr. Rory McEntee, Solicitors. Miss Justice Carroll resigned from the Working Group in November 1988 following her appointment as a judge of the Court of the International Labour Organisation.

The Commission would like to record its deep appreciation of the contribution which the members of the Working Group have made to the Commission’s examination of this difficult and technical area of the law. Their knowledge and experience were invaluable in enabling the Commission to formulate practical proposals for alterations in the law. As usual, however, the Commission emphasises that it alone is responsible for the contents of this Report.

2. The Commission noted that two reports had been published in recent years by An Foras Forbartha and by the Restrictive Practices

Commission on the system of conveyancing with particular relation to house purchase transactions.

The Working Group had the benefit of seeing submissions which had been made by the Law Society to the Department of Justice in 1981 recommending certain changes and of receiving submissions from various other bodies and members of the legal profession. A list of those who submitted recommendations appears in Appendix I.

The Working Group took the view that it is difficult in practice to separate areas of land law and conveyancing law which relate to house purchase and those which relate to the transfer of other types of property or interests in property. Accordingly while some of their suggestions relate primarily to transfer of residences, others are of more general effect. The Working Group has identified a number of areas where it believes that there are anomalies in the law, the origins of which vary from the continuing existence of obsolete provisions to unforeseen difficulties which have been created by more modern legislation.

After the Working Group had carried out their initial consideration of certain aspects of the law they consulted with judges, practitioners, academics, the Law Society and relevant Government Departments in relation to these matters and are grateful to those who responded to this consultation. A list of those consulted appears in Appendix II.

The Working Group concentrated on those matters which occur in a significant number of conveyancing transactions which give rise to unreasonable delays in the completion of those transactions.

3. Before we set out in detail our recommendations, one overriding problem must be mentioned which, until it is satisfactorily resolved, will limit the effectiveness of any changes in legislation. That problem is the delay attaching to transactions in the Land Registry. Figures recently supplied by the Department of Justice show that the overall average delay in the registration of transfers of part of the lands in a folio (which are most commonly of a site for a residence) was then 12.6 months. A person who has purchased such a site will have considerable difficulty in effecting any other transaction relating to that site during the period in which it is awaiting registration.

When the *Registration of Title Act, 1964* was introduced it was intended that compulsory registration of land would be extended gradually to all counties. Some twenty-two years after the Act came into force in January 1967 only the original three counties, Carlow, Laois and Meath, have been brought within the ambit of the compulsory registration process. It is understood that there are delays of at least twelve months in effecting first registration of titles within those counties. Considerable progress has been made in recent years in the Registry, with the introduction of computerisation of its records, and in the counties where such computerisation has been introduced the improvements are remarkable. Although there has been no decline in the work load of the Registry during the 1980's the numbers employed in the Registry have declined by over 20%. It is unfortunately clear that such reduction in staffing has not resulted in improvements in efficiency, and it would appear that considerable resources will have to be devoted to the Land Registry to enable it to

become efficient and provide the public with an effective service.

4. A factor which is frequently overlooked by those who are not directly involved in the process of the transfer of land and property is that neither the entitlement to ownership nor the nature of the land or property remain immutable. Changes in the legal status of the "owner" through mental incapacity, marriage or marital difficulties will require investigation. The adding of extensions to houses or conversions of portions of houses, including garages or roof space, into habitable areas raise the question of the need for planning permission. The use of a dwelling house partially for commercial or professional purposes also raises these questions. In addition, in some major urban areas, bye-law approvals may well have been required for certain internal alterations to the properties.

5. The increasing complexity of house transfers in recent years has been exemplified by the fact that the Law Society's Conveyancing Committee found it necessary to advise solicitors that the traditional four week period between contract and completion had become impractical and that a six week period would be more realistic in the majority of cases.

6. The acquisition of the fee-simple, particularly of houses where the titles are not registered in the Land Registry, is likely to add to the complexities of the title which has to be shown when the property is being sold.

7. We have grouped the recommendations under four separate headings:

- (1) *Removal or modification of archaic doctrines and the simplifying of conveyancing generally.*
- (2) *Rectification of anomalies arising from modern legislation.*
- (3) *Amendments to the Statutes of Limitation.*
- (4) *Amendments to Landlord and Tenant Law.*

CHAPTER 2: REMOVAL OR MODIFICATION OF ARCHAIC DOCTRINES AND THE SIMPLIFYING OF CONVEYANCING GENERALLY

(1) Reduction of Statutory Period of Title from Forty Years to Twenty Years

8. Historically it is the vendor's obligation to show good title to property and it is the purchaser's subsequent duty to investigate that title. Most sales of land are carried out under written contracts for sale which are either negotiated, or at least prepared, by or on behalf of the parties. The most common conditions of sale in use in the Republic are the Law Society's Conditions of Sale. These are prepared on the basis that the particular title to be offered by the vendor will be set out in those conditions.

If parties reach an agreement to sell land other than under such conditions, perhaps by an exchange of letters, then that contract will be regarded as an "open" contract.

Under open contracts, s. 1 of the *Vendor and Purchaser Act, 1874* provides that the vendor must trace back his title for forty years. In fact the vendor must start his title with a good root of title, normally a deed transferring the property on a sale, which frequently requires the vendor to show a great deal more than forty years' title. This section of the Act can, of course, be avoided by any stipulation to the contrary in a contract for sale and it is commonplace where sales of freehold land are concerned for considerably less than forty years' title to be offered and accepted, though of course the statutory forty year period establishes a bench-mark by reference to which lesser periods of title may be agreed. In sales of leasehold property the root of title must always be the lease but it is commonplace for the vendor to be allowed to "skip" from the original lease to an assignment of property considerably less than forty years old. The difficulties which presented themselves in 19th century conveyancing have largely disappeared though they have been replaced by more modern difficulties, and the reasons which made it reasonable to require a forty years period of title in the 1870s are no longer appropriate. Other jurisdictions have reduced the statutory period of title considerably and there are very strong arguments for doing so in this jurisdiction.

In England, for example, the period was reduced in 1925 to 30 years and to 15 years by s. 23 of the *Law of Property Act, 1969*. This latter reform was a result of the Law Commission's Interim Report on Root of Title to Freehold Land in 1966.² 15 years has also been recommended for Northern Ireland (see Survey of the *Land Law of Northern Ireland (1971)*, para 162).

9. We feel that the current period of 40 years is too long. There are no longer the uncertainties about pure title that existed in the nineteenth century and legislation should be introduced to reflect the common practice of providing for less than 40 years' title. It is interesting to note that the Land Registry Rules (1972) in rule 19 provide that, in an application for first registration, the title to be shown by an applicant may commence with a disposition of the property made not less than 30 years prior to the date of the application. As far back as 1972, therefore, the need to reduce the period was recognised.

The Commission has examined the possibility of 15 years as an appropriate period. We are of the opinion, however, that 15 years is uncomfortably close to the 12 year statutory limitation period for interests in land.³ People (those under a disability in particular) might lose their rights without any possibility of redress. We feel that 20 years would be a more appropriate period and would also accord with the prevailing practice.

We recommend that the term for which title must be shown under the Vendor and Purchaser Act, 1874 be reduced from 40 years to 20 years.

(2) Introduction of Doctrine of Partial Merger of Leasehold Interests in the Reversion

10. For over twenty years lessees holding under certain long leases paying what are colloquially described as "ground rents" have been entitled to acquire the fee-simple of their property including the acquisition of any intermediate interest between their leasehold interest and the ultimate fee-simple. Although the legislation provides that a person who is so entitled may "enlarge his interest into a fee-simple", which appears to imply that merger takes place and that there is only a fee-simple estate in existence after the acquisition of the fee-simple, doubts have continued to be expressed as to whether the effect of the acquisition of the fee-simple, whether by a conveyance of all the outstanding interests to the person entitled, or by the issue of a vesting deed by the Registrar of Titles, does effect merger of the various levels of interest into a single fee-simple or whether the various interests still survive, all being vested in the person entitled. If the latter is the position then in subsequent dealings with the property it may be necessary to treat each interest separately.

11. It is generally believed that at common law a lease was regarded as being indivisible and merger could only take place when the entire of the land held under the lease became vested in the person who was entitled to the fee-simple in the entire of the land.⁴ It was argued that the lease had to remain in existence in order to protect the rights of the lessor to enforce the lease against any persons holding other parts of the property under the same lease.

12. *It is recommended that, to avoid doubt, a statutory provision should be introduced confirming that where a person entitled to a leasehold interest in portion only of property held under that lease acquires any superior interest in that property that person shall be entitled, if he so desires, to merge the leasehold interest in the next or all superior interests held by him. The provision should confirm that any such merger shall not in any way derogate from the rights of the lessor in respect of any land that may still be subject to the lease.*

(3) Retention of the Fee Tail Estate

13. The fee tail is an estate which is limited in succession, usually to the eldest son. This arrangement is continued from generation to generation by means of a disentailing assurance followed immediately by the creation of a new fee tail. It is an instrument by which conveyancers ensured that land and estates were kept within the same family.

The Commission had originally intended to recommend the abolition of this estate as it is, for various reasons, very seldom used in practice. We have however, decided, following certain submissions that we received, not to recommend its abolition. The fee tail estate is not causing any harm and, although it is rarely used, we feel that some people may wish to avail of it from time to time.

14. *The Fines and Recoveries (Ireland) Act, 1834* provides that a disentailing assurance, which is a document by means of which the entail is barred, has to be enrolled in the Central Office of the High Court within six calendar months of its execution. Failure to comply with this requirement results, it seems, in the creation of a base fee. The Commission takes the view that the enrolment requirement is unnecessary and that the effect of failure to enrol is excessive. It proposes that the requirement to enrol in the Central Office of the High Court should be abolished and replaced by a requirement that the disentailing deed, if it is of unregistered land, should be registered in the Registry of Deeds. This will have the effect of giving sufficient notice to all those wishing to enquire into the title to the property. For registered land it will still be necessary to register the deed in the Land Registry for it to be effective.

15. *We recommend that the fee tail estate should not be abolished. We recommend, however, that the requirement that disentailing assurances must be enrolled in the Central Office of the High Court should be abolished. This requirement should be replaced by a requirement that the disentailing deed be registered either in the Registry of Deeds or the Land Registry depending on whether the land is registered or not.*

(4) Restoration of Statutory Power of Partition of Land

16. In *O'D v O'D*,⁵ Murphy J expressed considerable doubts as to whether there remained any jurisdiction enabling the High Court to order the partition of property held by joint tenants or tenants in common. He took the view that the repeal of the Act for Joint Tenants of 1542 by the *Statute Law Revision (Pre-Union Irish Statutes) Act*,

1962 appeared to remove the statutory jurisdiction and he had reservations as to whether an equitable jurisdiction might survive.

In *FF v CF*,¹⁶ Barr J, to whom *O'D v O'D* was opened, appears to have taken the view that the equitable jurisdiction did survive the repeal.

It is unsatisfactory that in such a significant matter there should be a doubt as to what the law is and it is suggested that to avoid doubt the statutory power of partition should be restored.

It is interesting to note that the *Judicial Separation and Family Law Reform Act, 1989* in s. 16 (f) expressly empowers the court, on granting a decree of judicial separation and on application to it by either spouse, to make an order for the partition of property under the *Partition Acts, 1868 and 1876*. This Act obviously applies only to married couples and is not, therefore, of universal application. It comes into operation on the 13 October, 1989.

17. It has been suggested to the Commission that the restoration of the power of partition will not of itself solve all the difficulties that present themselves, particularly in the cases of matrimonial property, and that the court should also be given power to order a sale of the property as an alternative to partition.

We therefore recommend that in order to resolve doubt a statutory provision should be introduced restoring the statutory power of partition and empowering the court to order a sale of the property in lieu of partition.

(5) Amendment of the Rule Against Perpetuities as it affects Options, Easements and Other Incidents in Land

18. Throughout history, landowners have attempted to determine the ownership and enjoyment of their property through succeeding generations and the law has consistently tried to keep this desire within reasonable bounds. There has always been something of a battle between landowners on the one hand and the legislature and judges on the other. Various legislative measures ranging from statutes as far back as *Quia Emptores* in 1290 to the *Fine and Recoveries Act, 1834* have been passed. Following the introduction of statutes, the conveyancers would seek various loopholes in the legislation so as to facilitate landowners who wanted to control the ownership of their land in perpetuity, the most notable of these being the system of uses which was itself countered by subsequent legislation.

The result of this continuous conflict was that several rules restricting the powers of landowners to tie up lands in the future evolved which seek to restrict the power to postpone the vesting of property beyond a certain time in the future.

19. The Rule Against Perpetuities is one of the rules which was devised by the courts. The Rule is that any future interest in property, whether real or personal, must "vest" within the perpetuity period. This period was settled by the courts as being that of a life or lives in being, plus a further period of 21 years (allowing also for periods of gestation). A future interest is any interest in land with respect to which the enjoyment of the land is postponed to some time in the future.

The Rule Against Perpetuities is still governed by the common law in the Republic of Ireland. In England and Wales, the rule was first altered by legislation in the *Law of Property Act, 1925*, more substantial changes being effected by the *Perpetuities and Accumulations Act, 1964*. Considerable changes were also brought about in Northern Ireland by the *Perpetuities Act (N.I.), 1966*.

It has been questioned whether in modern circumstances there is any need at all for the Rule. At the very least, the rule in general requires to be amended. Various options have been adopted in other jurisdictions and the Commission is examining these with a view to recommending the most suitable for Ireland. The Rule, however, affects certain interests in land which should in our view be freed from its operation.

20. The most immediate and pressing question, we feel, arises in the area of easements and other future rights over land including *profits à prendre* and rights of common. At present, if, for example, a landowner sells portion of his land to a builder and wishes to reserve a right of way over roads in the housing estate which are yet to be built, the rights must be reserved over such roads as may be built within the perpetuity period. In practice the reservation is usually made over such roads as may be built in the 21 years. Failure to include such a reference will result in the reservation of the right of way being void.

The Rule was radically altered in Northern Ireland by the 1966 Act. Section 9 of the Act lists a series of rights which may operate outside the Rule — including any rights to carry out certain works to the property such as inspecting, felling trees, executing repairs and alterations and other routine maintenance. These are mostly rights which would be exercised only in respect of and ancillary to other interests in land which are clearly valid at law. It is with some surprise that we note that there is no mention of the creation of rights of way or roadways in the future nor the erection of lighting standards or any other items that would be appropriate to a future roadway in that legislation.

We recommend that easements, options, profits à prendre and rent charges over land should be removed from the effect of the Rule Against Perpetuities and that any such amendment should provide that the Rule never applied to those interests in land.

(6) Proposal to Introduce Statutory Definitions of Certain Words for use in Documents Connected with Interests in Land

21. The decision of the Supreme Court in *Vone Securities v Clarke*² that, in the absence of any other definition in the document, the word “month” in a lease had to be construed within the common law meaning of a “lunar” month, drew our attention to the absence of any statutory definitions of words frequently used in documents relating to interests in land. The definitions contained in the *Interpretation Act, 1937* apply only to statutes or subordinate legislation and have no application to documents entered into between private parties. The *Sale of Goods Act, 1893* contained certain definitions but these apply only to transactions involving the sale of goods and do not apply to transactions relating to interests in land.

22. It is suggested that it would be in ease of all parties and might lead to the shortening of some documents if a number of terms used regularly in documents relating to interests in land could be given statutory definitions, subject, of course, to the rights of the parties to exclude the operation of the statutory definitions and to choose their own definitions for particular transactions. It is recommended that certain definitions contained in Part III of the *Interpretation Act, 1937* should be prescribed for use in documents relating to interests in land.'

Recommended Definitions

- (a) Singular and Plural: *every word importing the singular shall be construed as if it also imported the plural. Plural shall be construed as importing the singular.*
- (b) Masculine and Feminine: *every word importing the masculine gender shall be construed as if it also imported the feminine gender.*
- (c) Person: *shall be construed as importing a body corporate and an unincorporated body of persons as well as an individual.*
- (d) Distance: *words and expressions relating to distance shall be construed as relating or referring to such distance measured in a straight line on a horizontal plane.*
- (e) Periods of Time: *where a period is expressed to begin on a particular day that day shall be deemed to be included in such period, and likewise when a period is expressed to end on a particular day.*

23. *It is also recommended that the definition of the word "month" in the schedule to the Interpretation Act should be used in documents. The word "month" is defined as "calendar month" and it is suggested that "calendar month" be defined as meaning a date in one month to the same date in the next, minus one.*

In addition it is recommended that a definition of "year" meaning "any period of 12 calendar months" should be adopted. A further definition which we recommend is that "pound" should mean "Irish pound".

Apart from the fact that it seems logical that the definitions of terms used in Statutes should, where appropriate, be used in other documentation, it is thought that the definitions suggested above carry the normal everyday meanings of the words and there is no longer any justification for the retention of the lunar periods or other old common law definitions in contemporary documents.

(7) Amendment of the Position of Judgment Mortgages Registered Between the Making of a Contract for Sale and Completion of the Transaction

24. A question which has caused considerable controversy, confusion and disagreement both amongst commentators and the judiciary is that of the exact nature of the interest that both the vendor and

purchaser have during the period between contract and completion. This question is of fundamental importance when a judgment mortgage is registered against the vendor's estate during this time.

A judgment mortgage is a creature of statute introduced in the nineteenth century. Under the *Judgment Mortgage (Ireland) Acts, 1850 and 1858*, a creditor who obtains a judgment in a court against a land owner is enabled to convert his judgment into a mortgage against the land of the judgment debtor. He thus becomes a secured creditor with the usual rights of a conventional mortgagee, including the right to obtain an order for sale of the land. He is, however, a mortgagee with a difference, since, unlike a conventional mortgage, a judgment mortgage is not the result of an agreement between the mortgagor and the mortgagee.

In the case of unregistered land, the result is that the judgment mortgage only captures whatever interest the debtor had in the lands at the date of its registration and the judgment mortgagee takes the land subject to whatever "equities" may affect it, even though they have not been registered and the judgment mortgagee has no notice of them.

Such equities would seem to include the right of a purchaser of land to specific performance of the contract for sale. It should, accordingly, follow that where there is a contract for the sale of land and a judgment mortgage is registered against the land before the sale is completed, the purchaser should take the land free of the judgment mortgage. The decision of the Supreme Court in *Tempany v Hynes*¹⁰ has, however, raised doubts as to whether this is so, at least in the case of registered land.

25. In *Tempany v Hynes*, two judgment mortgages had been registered against the land after the date of the contract but before the purchaser was registered as owner of the land. The defendant purchaser did not accept the plaintiff vendor's contention that he was not obliged to discharge the judgment mortgages and the plaintiff claimed specific performance of the contract. The Supreme Court was divided on the issue, conflicting judgments being given by Kenny J (with whom the Chief Justice concurred) and Henchy J. Kenny J decided that under a contract of sale the vendor becomes a trustee of the beneficial interest to the extent only to which the purchase price is paid i.e. if, for example, the purchaser pays a 15% deposit, he merely becomes beneficial owner of 15% of the property. He is not a trustee of the entire beneficial interest merely because he signs a contract. The judge cited a number of old authorities in support of his view.¹¹ It follows from his approach that until the whole of the purchase money has been paid, the vendor has, in Kenny J's opinion, a beneficial interest in the land which can be charged by a judgment mortgage. In the present case only a deposit had been paid and the mortgages therefore affected whatever beneficial interest the vendor had in the land.

Henchy J, on the other hand, considered that when a binding contract for the sale of land has been made, whether the purchase money has been paid or not, the law treats the beneficial *ownership* as having passed to the purchaser from the time the contract was made.

The vendor, however, still has the legal estate in the land coupled with a transient *beneficial interest* in the property: he has, for example, an equitable lien over the land for the unpaid purchase money, a right to remain in possession, etc. This residual interest would, however, pass out of existence once the sale has been completed, the purchase money paid and (in the case of registered land) the purchaser registered as owner. It follows, in Henchy J's view, that once a sale is completed, post contract judgment mortgages no longer affect the lands and, in the case of registered land, the purchaser is entitled to have the entry relating to them in the folio cancelled. He accordingly held that the plaintiff was entitled to a decree of specific performance.¹² The defendants could not object to the judgment mortgages as the sale was to be completed and the judgment mortgages would not survive completion.

26. The *ratio decidendi* in this case is difficult to ascertain and it has caused severe problems in practice. The Commission prefers the view of Henchy J that the entire beneficial ownership in the property passes to the purchaser under a contract subject to the condition subsequent that he completes the sale.¹³ Under these circumstances where a contract is entered into prior to a judgment mortgage being registered and the sale is subsequently completed, the purchaser would be entitled to assume that the judgment mortgage is of no significance. We feel that there is no logic in the view of Kenny J and that Henchy J's view is the most practical one. Parties to a contract for sale would have a clear "cut off" date which is very important in practice.

It also occurs to us that Kenny J's view is inconsistent with the possibility of a sub-sale, that is, where the purchaser sells on his interest before the completion of the sale. This has long been recognised as being possible¹⁴ and it has never been suggested that the interest which the primary purchaser can sell is limited to a fraction represented by the amount of purchase money he has paid.

27. *We recommend, that, for the purpose of judgment mortgages, when a binding contract for the sale of land has been entered into, the law should treat the beneficial ownership as having passed to the purchaser from the time the contract was made, subject to the condition subsequent that he completes the sale. The provision should be stated to be notwithstanding the provisions of the Judgment Mortgage (Ireland) Acts, 1850 and 1858.*

(8) Severance of Joint Tenancies

28. A joint tenancy is one of four categories of co-ownership recognised in Ireland, co-ownership being where property is owned by two or more persons concurrently. The word "tenancy" is something of a misnomer as the concept of joint tenancy is not confined to leasehold interests but applies to all interests and estates in land — freehold or leasehold, legal or equitable, present or future.

The central feature of a joint tenancy is that when one joint tenant dies, his undivided share in the land passes to the surviving joint tenants; this is called the right of survivorship. In a tenancy in common, each tenant is entitled to dispose of his interest either by deed or will.

29. At common law, various events can occur which are regarded as “severing” the joint tenancy, for example, bankruptcy, resulting in a tenancy in common. A joint tenancy may also be expressly severed by the joint tenants. At present, it appears that a joint tenancy of freehold may only be severed and converted to a tenancy in common between the same co-owners by way of a conveyance to uses under the 1535 Statute of Uses, whereby a third party is utilised as a conduit. It is possible so to sever a leasehold joint tenancy without having recourse to this medieval procedure.

It has been suggested to us that the solution to this problem may be to abolish the 1535 Statute altogether. This would have rather far reaching consequences, an examination of which is not within the scope of this Paper but which the Commission hopes to undertake at a future date.

In the meantime, we recommend that legislation should provide that freehold land may be severed and converted into a tenancy in common by a simple deed between the parties in the same way as a leasehold estate may be severed.

(9) The Abolition of the Rule in *Bain v Fothergill* Under Which Damages Cannot be Awarded in an Action for Breach of Contract Against a Vendor who has Failed to Show Good Title.

30. A contract for the sale of land is generally governed by the ordinary law of contract. Thus, when there has been a breach of contract by the vendor, the purchaser is entitled to recover damages. This is, however, subject to one major restriction commonly known as the rule in *Bain v Fothergill*.¹⁵ The rule is that where the breach relied upon by the purchaser is the vendor's failure to show good title to the property in question, then, provided the vendor was not fraudulent and did not act otherwise in bad faith, the purchaser is not entitled to recover damages for loss of bargain but is limited to recovery of his deposit with interest together with any expenses incurred in investigation of the title — i.e. his solicitor's conveyancing costs. This principle was first expanded in *Flureau v Thornhill*¹⁶ and was applied in this jurisdiction some twenty years before *Bain v Fothergill*.¹⁷ The rule has been sharply criticised by the judiciary and commentators alike. It has been described as anomalous, archaic and as a peculiarity. It has nevertheless been followed consistently in Ireland¹⁸ and it can confidently be stated that it represents the law here. It must also be said that judges have reluctantly followed the rule.

31. It is generally accepted that the rationale of the rule is the principle that the vendor ought not to suffer, provided he acts in good faith, where his default results from the complexity of titles to land. In the nineteenth century, there were considerable difficulties in showing good title to lands¹⁹ and uncertainty on the part of the vendor as to whether in fact he had title to pass. Prior to 1874²⁰ at least sixty years title had to be deduced on an “open” contract. Since then the period has been forty years. If the Commission's recommendations as to the reduction in the statutory period of title are implemented,²¹ only twenty years title will be necessary. It is interesting to note that in several Commonwealth countries the rule has been abrogated in so far

as registration systems are in operation. Given that the position which gave rise to the rule in the first place no longer prevails, the Commission wonders if there is any reason why the rule should remain part of our law.

It has been argued that the rule provides something of a shield for practitioners, solicitors in particular, as it limits the amount of damages which might be recoverable against them by their clients. If a vendor was obliged to pay damages to a purchaser because of the vendor's failure to show good title it is likely that such vendor would have a right of action against his solicitor for negligence in the preparation of the contract. Since however a vendor's solicitor is under a duty to investigate or at least to check carefully the title which a vendor is offering in any contract for sale prepared by such solicitor it is difficult to see why the protection of the solicitor should be a valid argument for the retention of the rule.

The rule is not, however, without its defenders.¹ C. T. Emery suggests that it fulfils today precisely the role that it fulfilled in the past in that it assists a vendor whose title turns out unforeseeably to be defective. He argues that a lay-vendor in particular cannot be expected to know the intricacies of his title. Mr. Emery concludes that there remain circumstances in which it will play a beneficial role in the conveyancing process.

32. We are aware that the decision to abolish such a well established rule ought not be taken lightly. We are encouraged by the fact that its abolition has been recommended by a great number of judges, Law Reform Commissions and commentators.² The Commission has considered the arguments in its favour but we have decided that they do not outweigh those made against the rule.

We accordingly recommend that the rule in Bain v Fothergill be abolished.

(10) Proposal to Amend Section 8 of the Forfeiture Act, 1870 to Remove the Restrictions on "Convicts" Disposing of Land

33. Under the provisions of s. 8 of the *Forfeiture Act, 1870*, which has not been repealed in this jurisdiction, a "convict" cannot make any disposition of property while in prison. It must be very doubtful whether these provisions would withstand a challenge to their constitutionality.

Section 8 of the Forfeiture Act was repealed in Northern Ireland by the *Criminal Justice Act of 1953*. That legislation provided that in an individual case the court might make an order prohibiting a convicted prisoner or any person acting on his behalf from disposing or dealing with all or any property of the prisoner, other than in accordance with the judgment or order of a Civil Court of competent jurisdiction. The Commission, at the request of the Attorney General, is considering the possible introduction of legislation under which the proceeds of crime might be forfeited. There might well be a case in particular circumstances for restraining a convict from disposing of property save in accordance with the order of the relevant court.

There is a reference in s. 48 (1) of the Statute of Limitations 1957, which provides that for the purposes of that Act a person shall be under

disability while . . . (c) he is a convict subject to the operation of the *Forfeiture Act, 1870*, in whose case no administrator or curator has been appointed under that Act". It would seem appropriate that any repeal of s. 8 of the *Forfeiture Act, 1870* should also contain a provision for the repeal of s. 48 (1) (c) of the *Statute of Limitations, 1957*.

34. The present blanket restriction on convicts disposing of property can only present unnecessary difficulties during the course of their sentences to prisoners who wish to dispose of their dwelling or other property which may be in no way connected with the particular crime for which they were convicted.

Accordingly it is recommended that s. 8 of the *Forfeiture Act, 1870* be repealed subject to the possible introduction of a provision conferring a right on a court in particular circumstances to impose a restriction on disposal of individual properties.

¹S. 99 (1) *Law of Property Act, 1925*.

²Report No. 9 — esp. paras. 34–6.

³S. 13 (2) of the *Statute of Limitations, 1957*.

⁴See, for example, the remarks of O'Keeffe P at first instance in *Perry v Woodfarm Homes Ltd.*, (1975) IR 104.

⁵Unreported, judgment delivered 18th November, 1983.

⁶Unreported, judgment delivered 4th December, 1985.

⁷See, for example, Maudsley, *The Modern Law of Perpetuities* (1979) and Land Law Working Group Discussion Document No. 2 (Estates and Interests and Family Dealings in Land) (1981), at p. 41.

⁸(1979) I.R. 59.

⁹The Commission has decided not to include any recommendation as to the definition of time because s. 1 (1) (a) of the *Standard Time (Amendment) Act, 1971* provides for the definition of time in both statutes and legal documents.

¹⁰[1976] I.R. 101.

¹¹For example, *Rose v Watson*, [1869] 10 H.L. Cas. 672; *Re Kiscock and Currie's Contract*, [1916] 1 I.R. 376. Kenny J dismissed the contrary views of textbook writers such as Cheshire and Megarry and Wade and cases such as *Shaw v Foster*, [1872] L.R. 5 H.L. 321; *Lysaght v Edwards*, (1878) 2 Ch. D. 499 and *Re Strong*, (1940) I.R. 382 as incorrect.

¹²As did the majority, but for different reasons.

¹³See Keane, *Equity and the Law of Trusts in Republic of Ireland*, pp. 61/66.

¹⁴*Gordon Hill Trust Ltd. v Segall*, (1941) 2 All E.R. 379.

¹⁵(1874) L.R. 7 H.L. 158.

¹⁶(1776) 2 Wm. Bl. 1078.

¹⁷See, for example, *Buckley v Dawson*, (1854) 4 I.C.L.R. 211.

¹⁸For example, *McDonnell v McGuinness*, [1939] I.R. 223 and *McQuaid v Lynham*, [1965] I.R. 564.

¹⁹See Harman J in *Elliott v Pierson*, [1948] 1 All E.R. 939 at p. 942.

²⁰*Vendor and Purchaser Act, 1874*.

²¹At paragraph 9 above.

²²See, for example, C. T. Emery, "In Defence of the Rule in *Bain v Fothergill*", (1978) Conv. 338.

²³*Sharneyford Supplies Ltd. v Edge*, [1985] 1 All E.R. 976; Law Commission Report No. 166 — Transfer of Land — The Rule in *Bain v Fothergill*; British Columbia Law Reform Commission, *The Rule in Bain v Fothergill*, 1976 (No. 28). O'Driscoll, "A Note on the Rule in *Bain v Fothergill*", 10 Ir. Jur. 203. "No More Pain and Botherfull", [1987] Conv. 1–4; "Banning Bain", (1986) 130 S.J. 733; Howel Lewis, "*Bain v Fothergill* and the Maggots", 136 N.L.J. 1129; The Rule in *Bain v Fothergill*, An Early Demise?, (1987) 84 L.S. Gaz. 26.

CHAPTER 3: RECTIFICATION OF ANOMALIES ARISING FROM MODERN LEGISLATION

(1) Proposed Amendments to Section 27 of the Local Government (Planning and Development) Act, 1976

35. Section 27 (1) of the *Local Government (Planning and Development) Act, 1976* provides that the High Court may prohibit the continuance of the development of land for which permission is required and which is being carried out without permission and may prohibit the continuance of an unauthorised use of land on the application of a planning authority or any other person.

Section 27 (2) provides that, where a development authorised by a permission has been commenced but has not been or is not being carried out in conformity with the permission, the High Court may, on the application of a planning authority or any other person, order any person to do or not to do or cease to do anything which the court considers necessary to ensure that the development is carried out in conformity with the permission.

36. Two difficulties have presented themselves as a result of these provisions, the first being that s. 27 (1) cannot be invoked if a development for which permission was required, but in respect of which permission has not been obtained, has actually been completed. It is not apparent whether the absence of any provision in s. 27 to enable the planning authority or any other person to bring an application to the court for an order under that section in respect of a development for which permission should have been obtained but was not obtained, and which has in fact been completed, was deliberate. It may be that the draftsman or the Legislature felt that the provisions contained in s. 31 of the *Local Government (Planning and Development) Act, 1963* which provides for the service of an Enforcement Notice where unauthorised development has been carried out were sufficient. It is generally agreed that the provisions of s. 31 and the other enforcement provisions contained in the 1963 Act are not satisfactory and it was for those reasons that ss. 26 and 27 of the 1976 Act were enacted enabling

planning authorities and third parties to bring applications to the court promptly for orders under those sections rather than await the more cumbersome procedures under the 1963 Act, which of course could only be invoked by planning authorities. It seems to be generally agreed that the 1976 Act provisions, subject to the reservations we have expressed, operate more satisfactorily than the 1963 Act provisions.

The effect of s. 27 is that there is no time limitation on the bringing of any application either by a planning authority or by any third party. The fact that no application can be brought in respect of a development which has been completed in the absence of planning permission effectively provides a time limit in respect of completed developments but there is no time limit in respect of unauthorised uses. Accordingly on the sale of property it is commonplace for vendors to be asked to provide evidence of the use of the property from the 1st October, 1964, the date of the coming into operation of the *Local Government (Planning and Development) Act, 1963*, in order to ensure that there is no unauthorised use of the property.

It is becoming increasingly difficult to ascertain the precise uses which have been made of property, and particularly of portions of property, for periods extending back over twenty-four years. The obtaining of an Order from the High Court under this section has been held to be discretionary and it might be considered unlikely that an Order would be obtained where a use, though unauthorised, has been continuing for a long period without any complaint having been made by the planning authority or by neighbouring residents or occupiers or, indeed, by any other interested parties. However, it cannot be assumed with certainty that there is no risk of an order being made. Much time and effort frequently have to be devoted to try to ascertain the particular user of premises since October 1964. It is suggested that a five year time limit should be applied to the bringing of applications under s. 27 (1) (b) of the 1976 Act.

We would recommend that s. 27 of the Local Government (Planning and Development) Act, 1976 be amended, first by extending the provisions of s. 27 (1) (a) to cover development which has been completed without the necessary planning permission and secondly to include in the section a five year limit on the bringing of applications whether in respect of developments or unauthorised uses. The five year limitation in respect of development will, of course, be identical with the period provided for in s. 31 of the 1963 Act.

(2) Amendment of Section 45 of the Land Act 1965 to Restrict its Operation to Agricultural or Pastoral Land

37. Section 45 of the *Land Act, 1965* requires any person, not being a qualified person within the meaning of the section, who acquires an interest in land not situate in a county borough, borough, district or town to obtain the consent of the Land Commission to the vesting of that interest in him. While qualified persons include Irish citizens and persons ordinarily resident in the State during the preceding seven years, it does not include the great majority of trading companies. The limitation to lands in county boroughs, boroughs, urban districts or towns means that a great many properties which are in "built up" areas, particularly in the suburbs of the larger cities, are affected

by the Act. Units in shopping centres in Dundrum, Rathfarnham and Stillorgan in County Dublin (which is not a County Borough) are examples of properties which are affected by the section.

The purpose of the section was presumably to enable the Land Commission to exercise control over the vesting of interests in agricultural land in persons other than Irish citizens. The section was the last in a series of provisions, some of them fiscal, which endeavoured to restrict the vesting of land in non-nationals.

38. The same Act contained in s. 12 a restriction on the sub-division or sub-letting of land without the consent of the Land Commission, again being the re-enactment and extension of previous statutory restrictions.

The application of s. 12 is confined to agricultural holdings which are holdings substantially agricultural or pastoral or substantially agricultural and pastoral in character. It is not at all clear why this definition could not have been used in s. 45: it would avoid the necessity of a large number of applications being made to the Land Commission, whose consent is almost a formality since the lands in question are neither agricultural nor pastoral but, as mentioned above, form part of "built up" areas.

If it is considered advisable to retain the control contained in s. 45 over agricultural or pastoral land then it is suggested that the section should be amended to provide that consent would not be necessary where the land is not agricultural or pastoral or is agricultural but is less than 2 hectares in area. Provision should also be made for the completion of a certificate by the person in whom the interest purports to vest to the effect that the property comes within one of these exceptions. This latter provision would obviate the making of a significant number of applications for consent to the Land Commission and speed up the process of transfers of interests in land which technically fall within the section but which are of no interest or concern to the Land Commission.

We recommend that s. 45 of the Land Act be amended by the inclusion of a provision that the section shall not prevent the vesting of an interest in any land where the land is neither agricultural nor pastoral or is less than 2 hectares in area and the instrument effecting the vesting contains a certificate to that effect.

(3) Proposed Amendment of the Family Home Protection Act to Avoid the Need for Enquiry into the Giving of Consents in Prior Transactions

39. Under the provisions of the *Family Home Protection Act, 1976* the prior written consent of a spouse must be given to any "conveyance" of a family home. Where such consent is required and not obtained, the purported conveyance is void. The legal profession have, correctly it would seem, adopted the practice of requiring that the prior written consent of the spouse is endorsed on both the contract for sale and the actual deed under which the property is transferred, (both of which fall within the definition of "conveyance" under the Act), and also that satisfactory supporting evidence of the identity of the person executing the consent is furnished. The practice which has

grown up is for a statutory declaration to be made, usually by both spouses, stating that they are lawfully married to each other and exhibiting a copy of their marriage certificate in support of the declaration. In respect of land the title to which is registered in the Land Registry, this supporting evidence is furnished to the Land Registry and the registration by the Registry of the transferees under the purported deed of transfer is binding. This was so held by Gannon J in *Guckian v Brennan*, a case which primarily concerned the provisions of the *Registration of Title Act, 1964* as opposed to being directly concerned with the Family Home Protection Act. In respect of unregistered land where the title documents to the property remain in the custody of the persons entitled to them, it is the practice of the legal profession to check all transfers of the property which have taken place since 1976 in order to ensure that the appropriate consents were given and the relevant supporting documentation as to the identity of the person consenting is available.

Where property being transferred is not a family home, the practice has developed of furnishing declarations, by the vendor or the vendor and the vendor's spouse, stating that the property is not their family home and often indicating where their family home is.

40. The practice of seeking supporting evidence in particular did not commence immediately after the introduction of the Act but grew slowly as practitioners considered the implications of the legislation. There are therefore numbers of cases in which appropriate supporting declarations are not available in respect of transfers of family homes which took place in the late 1970s. In some cases, particularly where parties had been married overseas, difficulties presented themselves about the nature of the evidence available to support the declaration. There are also cases in which doubts may exist as to the validity of second "marriages" which may have been entered into by persons resident in Ireland who have obtained divorces in other jurisdictions. In addition there are cases of properties which were not family homes which were transferred after the commencement of the Act and in respect of which no supporting evidence was obtained.

41. The stated purpose of the legislation was to prevent a person who was the owner of a family home selling or mortgaging that property without the consent of his or her spouse so as to deprive that spouse of his or her right to have a "roof over their heads". The possibility that such transactions might proceed with the tacit consent of the spouse but without appropriate consent having been formally and explicitly given under the Act was apparently taken into account during the passage of the bill through the Oireachtas. Section 3 (3) (b) of the Act was introduced to cope with the situation where there had been a conveyance of a family home which was technically void under the Act but which had been put into effect. Subsection 3 provides that:

"no conveyance shall be void by reason only of subsection (1):

(a) if it is made to a purchaser for full value;

- (b) if it is made by a person other than the spouse making the purported conveyance referred to in subsection 1 to a purchaser for value”.

It is understood that it was the intention of the draftsman that this provision would cover cases where the initial conveyance was void but there was a subsequent sale by the purchaser under the void conveyance. In the cases in which this provision has been considered, this construction does not seem to have been applied by the courts nor has it generally been accepted by the legal profession. It is probable that the explanation for that is that the concept introduced by these provisions, i.e. that there could be a void conveyance of property, and that the person to whom that void conveyance was purported to be made could subsequently show valid title to the property, is completely foreign to the basic doctrines of the law of property in Ireland under which estates in land must always be vested in some person. They cannot be in suspense. Indeed under those doctrines it could be argued that in the case of a fee simple the effect of a void conveyance would be that the property would vest in the State.

The Legislature have, of course, the power to introduce a law which would have the effect of providing that the estate in the property which purported to pass under a void conveyance went into suspense, as it were, and could be revived by a subsequent valid conveyance but unfortunately the provisions of the Act as enacted did not spell out this sufficiently clearly.

42. Rather than suggest an amendment to the Act which would clarify the position, the Commission would recommend that where there has been a conveyance of a family home which has been implemented without any objection from the spouse for over six years, such conveyance should no longer be deemed to be void and that evidence of any consent by the spouse or supporting evidence for any such consent should no longer be required. By the word conveyance in this context, we mean conveyance in the strictest sense of the word — i.e. the conveyance of the fee simple estate and assignment or surrender of a leasehold estate or tenancy.

We also recommend that such conveyances should be deemed always to have been valid once the six years have expired.

The Commission is of the opinion that its recommendation would have a significant effect on conveyancing practice. At present, a great deal of a conveyancer's time is spent obtaining and checking spouses' consents. Our recommendations would simplify the conveyancing process and would therefore reduce the cost for the individual.

(4) Amendment of Sections 3 and 23 of the Registration of Title Act, 1964 to Avoid the Necessity to Register Certain Titles

43. Section 23 of the *Registration of Title Act, 1964* deals with compulsory registration of title, that is, it provides that certain types of title must be registered in the Land Registry. Section 23 (1) (a) provides that land sold and conveyed to or vested in or deemed to have been sold to any person under the Land Purchase Acts must be so registered. The *Irish Church Act, 1869* is expressly included in the

definition of Land Purchase Acts. It has also been argued by conveyancing counsel that the *Church Temporalities Act, 1833* is also included in the definition. There is, however, some disagreement about this: the submissions that we received conflicted in this respect.

The definition of "land" in s. 3 of the Act includes "incorporeal hereditaments", a category which includes rent charges. Rent charges were frequently created over lands affected by the *Church Temporalities Act*.

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.

It has also been suggested that an inferior interest, such as a sub-fee farm grant may be registrable because the superior interest, a fee farm grant, falls within the definition.

It is understood that in some cases the obligation to register has been overlooked and that there are substantial areas of land throughout the country which have been developed as housing estates and also substantial commercial properties where the need for registration has not been adverted to. In a significant number of cases, house purchase and mortgage transactions have been seriously delayed because it appeared that the vendor's title should have been registered in the land registry but had not been. Even where the need has been adverted to, a great deal of delay and expense had been experienced by owners.

44. The compulsory registration requirement of s. 23 carried on from the *Local Registration of Title Act, 1891* was designed to ensure that land which had been acquired by or vested in tenants under various Land Purchase Acts, where the purchase money had been advanced by the State, should be registered in the Land Registry. Because of the wording of s. 3 of the 1964 Act, certain interests in land which the policy of the 1891 and 1964 Acts would not have required to be registered were caught by the requirement. It is proposed to amend s. 3 (e) of the 1964 Act so as to limit its application by the addition of the following words "except for the purposes of s. 23".

In addition it would be advisable to amend s. 23 (1) (a) of the Act by the deletion of the words "or is deemed to have been". This would have the additional benefit that no person could query a title on the grounds that while registration was no longer required (assuming s. 3 to have been amended in accordance with our recommendation) it had been compulsory at a time in the past and accordingly should now be registered. Such amendments, on which we have consulted the Registrar of Titles, would appear to avoid the difficulties which have arisen while maintaining the policy of extending compulsory registration of land in the State.

It had been suggested to us that we should recommend that registration would be deemed never to have been compulsory by reason of the Irish Church Acts or the Church Temporalities Acts, but it was

also suggested to us that we should not disturb the titles to any lands already registered in accordance with the law as it stood at the time of registration. We agree and recommend that the amendments should operate from a current date to exempt any such lands, which until now were compulsorily registrable but have not in fact been registered, from the compulsory provisions of the *Registration of Title Act*.

We therefore recommend that s. 3 (e) of the Registration of Title Act, 1964 should be amended by the addition of the following words "except for the purposes of s. 23" and that s. 23 (1) (a) of the Act be amended so as to delete the words "or is deemed to have been".

(5) Amendments of Section 117 of the Succession Act, 1965

(a) Extending the Time Limit for Applications Under s. 117 (6)

45. S. 117 of the 1965 Act empowers the court to make an order for such provision for a child out of a deceased person's estate as it thinks just, where the court is of the opinion that the testator has "failed in his moral duty to make proper provision for the child in accordance with his means". S. 117 (6) states that an order under the section shall not be made except on an application made within 12 months from the first taking out of representation to the deceased's estate. It will be noted that the subsection says "shall not" be made, with the result that the court cannot judge an application on its merits even where the defence of effluxion of time has not been raised. In the case of *MPD v MD*, Carroll J dealt with this aspect of s. 117. An application had been made more than one year after the Grant of Probate issued but it was not argued that the claim was barred by lapse of time. Carroll J reluctantly concluded that s. 117 (6) lays down a strict time limit which goes to the jurisdiction of the Court and despite the fact that she felt it was an appropriate case in which to make an order, she felt unable to do so. The judge was sure that there were compelling reasons why the time limit should be mitigated in some way. Other commentators have suggested that the lack of any mitigation may have been an oversight.⁴

The constitutionality of s. 117 (6) was not raised in *MPD v MD*. There is a distinct possibility that the section would not withstand a constitutional challenge. In *O'Brien v Keogh*⁵ the constitutionality of s. 42 (2) (a) (ii) of the *Statute of Limitations 1957* was successfully challenged. The Supreme Court held that the right to litigate was a property right protected from unjust attack by Article 40.3.2° of the Constitution. S. 42 did not adequately protect or vindicate the right to litigate of an infant in the custody of a parent.⁶ Since the right of a child to apply under s. 117 is undoubtedly a property right, it is difficult to see how the imposition of a one year time limit in the case of an infant child can be other than an unjust attack on that right. Since the section cannot be construed so as to confine its operation to "adult" children, it follows that in the event of a constitutional challenge the entire section would almost certainly have to fall. The undesirable result would be that there would be no effective time limit for s. 117 applications.

On the basis that s. 117 (6) is still the law, the argument which can be advanced for a strict time limit for such applications is that of the need

for speedy distribution of estates. This desirable aim seems to have been given priority over the at least equally laudable object of ensuring that parents cannot opt to fail to provide properly for their children in their wills.

46. The solution which has been adopted in the English legislation dealing with provision for dependants has been to give the court an unfettered discretion to extend the six month time limit provided in the English legislation without requiring the personal representatives to delay distribution because of the possibility that the court may make an order for provision (see *The Inheritance (Provision for Family and Dependants) Act, 1975*, ss. 4 and 20). The sections also protect personal representatives from any liability for having distributed before such an order was made.

47. The Commission feels that the need to enable estates to be distributed without unreasonable delay has been given too great a priority in this situation.

All of the submissions that the Commission has received have been in favour of the reform of s. 117 (6). The alternatives would seem to be either to prescribe a longer period within which such applications must be made or to introduce a provision giving the court power to extend the time limit without a particular revised time limit being set. The vast majority of the submissions are in favour of the latter alternative. Some suggested that the discretion should be limited to a situation where a child is under a disability at the time of the death, and some would go even further and allow an application to be made during a period ending one year after the expiry of the disability. The general consensus is, however, that the discretion should only be exercised in the limited numbers of cases which give rise to concern, that is, for example, not just because a child did not consult solicitors in time or was unaware of the time limit.

We recommend that s. 117 (6) of the Succession Act be amended so as to give a discretion to the court to extend the one year time limit within which applications may be made.

It has been suggested to us that the introduction of the amendment outlined above could cause a number of problems, mainly delay in the administration of estates. Even at present, it has been described as "unwise" for a personal representative to wind up an estate where the present time limit under s. 117 has not elapsed. A personal representative would be unwilling to wind up an estate if there was a possibility of a claim by a child against it. We would be in favour of the introduction of a provision similar to that in England and Wales, namely that the personal representative would not be required to delay distribution because of the possibility of a claim.* We would also recommend protection for the personal representative similar to that contained in the English legislation.*

One of the submissions that we received suggested that, given that the class of persons who may apply under s. 117 is a narrow and ascertainable one, perhaps the personal representative should be under a duty to inform adult children (or parents or guardians of infants) of their right to apply. At present, the personal representative

is under no duty to notify the children and indeed it has been argued that he would be imprudent to do anything by way of notification. Such an obligation could place an unfair burden on personal representatives in that it could require them to make enquiries of the known next-of-kin as to the possible existence of others. A Personal Representative is most likely to publish a notice under s. 49 of the Succession Act addressed to creditors and other claimants against the Estate. We accordingly do not adopt this proposal.

(b) Extension of s. 117 to Intestacies

49. The present law is that s. 117 deals exclusively with a situation where the deceased person has made a will. The result of this is that a child cannot apply to the court for increased provision beyond his statutory share provided for in s. 67 of the Act, namely (usually) an equal share of one third of the estate if there is a surviving spouse, or of the whole estate where there is no surviving spouse.

It seems to us that this may give rise to injustice. For example, a farmer or business person dies intestate (perhaps having deliberately refrained from making a will), predeceased by his or her spouse, and all the children are entitled to an equal share in the estate. One of the children has stayed at home working and looking after the intestate in expectation of a promised inheritance, while the rest of the children have not. At present, such a child would be unable to bring an application on the grounds that the intestate has "failed in his or her moral duty". One of the submissions we received described such a situation as "anomalous", a sentiment with which we would agree. Statistics furnished to us by the Probate Office show that while the percentage of Grants of Administration as against all Grants issued is showing a steady decline over the last ten years, about 40% of Grants are in intestacies.

50. When the *Status of Children Act, 1987* was being debated in the Dail an amendment was moved seeking to extend the provisions of s. 117 to intestacies. In his reply at the Committee Stage, the Minister for Justice indicated that the rules for distribution on intestacy were designed to apply a fair distribution of a person's estate among his or his surviving family where the deceased did not specify by will how it was to be distributed. He indicated that one of the "most satisfactory aspects of their operation has been that they provided a clear-cut and unambiguous set of rules which apply without the need to resort to court proceedings in the event of a dispute". He added "the rules of distribution on intestacy guarantee a fair and equitable share to each child where no will has been made". He went on to say that "the principle of the proposal is unsound in that it contemplates unnecessarily introducing scope for legal proceedings in the area of intestates' estates and that this would be a retrograde step as it would increase the prospects of estates being whittled away on legal costs".

At the Report Stage when a similar amendment was proposed the Minister appeared to adopt a somewhat less firm view but indicated that the rules of intestate succession were designed to ensure that children were entitled to a share of the estate, adding that the

entitlement was clear-cut and did not need the intervention of a court. He expressed reservations that, if the law were to be changed, we would have to face the reality that in some cases at least the cost of obtaining "fairer distribution" might place an unfair burden on the estate and might leave a significantly reduced amount to be shared.

51. We have given careful consideration to the arguments advanced by the Minister, but are satisfied that there are other factors which should prevail. The policy underlying the provisions of the *Succession Act 1965* which we are examining is that persons with the means to do so should make proper provision for their dependants. Justice and logic both require that this policy should apply whether the person concerned dies testate or intestate. It is difficult to justify a situation in which the child of a testate parent who has been unjustly treated has the means of redress while the child of an intestate parent has none. While we appreciate the argument advanced that there should be a clear-cut entitlement to succeed in cases of intestacy so as to avoid unnecessary litigation, it should be remembered that the manner in which an intestate's estate is shared among the next-of-kin cannot be regarded as more than a rough and ready attempt to do justice between them. The legislature could hardly have treated children other than equally in a statutory provision. It is, moreover, noteworthy that the share given to a surviving spouse as opposed to the children was altered radically by the *Succession Act 1965*.¹¹ This of itself is cogent evidence that an immutable scheme of division of property among dependants on intestacy can be seen to work injustice.

Nor do we think that the proposal now under consideration would lead to significant and costly litigation. The number of contested cases which have been brought to the court since the *Succession Act* came into force over twenty-two years ago can hardly be regarded as excessive.

On balance, having weighed the arguments advanced against the proposal, we are satisfied that the real possibility of serious injustice under the present law should be remedied.

We accordingly recommend that s. 117 of the 1965 Act be extended to include applications on an intestacy.

(1981) I.R. 478.

Section 25.

[1981] ILRM 179.

¹⁶Brady and Kerr, *The Limitation of Actions in the Republic of Ireland*, (1984), page 26.

¹⁷[1972] I.R. 144.

¹⁸The Supreme Court later expressly reserved the question of whether *O'Brien v Keogh* was correctly decided in *Moynihan v Greensmith* ([1977] I.R. 551) as certain authorities had not been opened to the court. However, in the even later case of *Blake & Madigan v Attorney General* ([1982] I.R. 117) the court disapproved of the approach taken in those authorities and it would now seem that the decision in *O'Brien v Keogh* can be regarded as correctly stating the law.

¹⁹McGuire and Pearce, *The Succession Act*, (1986 Ed.), at p. 288.

²⁰Section 20 of the Inheritance (Provision etc.) Act, 1986.

²¹See above paragraph 46.

²²McGuire and Pearce, *supra*, at page 288. The reason is that his first duty is to administer the estate in accordance with the directions in his testator's will.

²³The comparison between the pre-1965 and post-1965 position is less clear than it might be because of the abolition of the descent of realty to the heir-at-law and the provisions of the *Intestates' Estates Act* which applied prior to 1965.

CHAPTER 4: AMENDMENTS OF PERIODS OF LIMITATION

(1) Amendment of the Statute of Limitation 1957 to Provide that the Intention of the Dispossessed Owner is not to be a Decisive Factor in Determining if Adverse Possession has been Established

52. The doctrine of adverse possession has been said to be one of the most controversial features of modern land law. The modern doctrine of adverse possession is provided for in the Statute of Limitations 1957.

As a general rule, twelve years uninterrupted adverse possession of land will result in the dispossession of the original owner. S. 18 of the 1957 Act states that "no right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run". The question then arises as to when possession is adverse.

Difficulties have arisen as to the precise meaning and effect of the expression "adverse possession". In *Murphy v Murphy*³ it was held to mean simply that the possession claimed to be adverse must be inconsistent with the title of the true owner, such inconsistency necessarily involving an intention by the occupier to exclude the true owner from enjoyment of the estate or interest in question. In *Cork Corporation v Lynch*,⁴ however, it was held that where the true owner of the land intended to put the land to a specific use at some time in the future and the defendant's occupation was not inconsistent with that intended use, adverse possession would not be established. In that case, Egan J found as a fact that the plaintiff local authority had at the time of the acquisition of the plot in dispute intended to use it for road widening or building a new road and that the defendant's occupation was not inconsistent with that intended use. Accordingly, following an old decision of *Leigh v Jack*,⁵ he concluded that the statute had not run in favour of the defendant. In *Durack Manufacturing v Considine* in 1987,⁶ however, where the plaintiff's predecessor in title had purchased the field in question with the intention of building a factory on it and it

had been used by the defendant for grazing cattle for the whole of the limitation period. Barron J found that adverse possession within the meaning of the statute had been established. In his view, where the owner is not making any use of the land but the claimant knows that he intends to use it for a specific purpose in the future, this is merely one factor to be taken into account in determining whether the requisite *animus possidendi* (intention to possess) to establish adverse possession has been established. It was not, in his view, necessarily conclusive of the issue. On the other hand, in *Dundalk UDC v Conway*,⁵³ Blayney J held that as the user of the land by the squatter was not in any way inconsistent with the purpose for which the plaintiff required the plot, he could not be said to be in adverse possession of it.

Various commentators have suggested that it is unsatisfactory to determine whether or not possession is adverse by reference to a subjective test as to the intention of the true owner to use the land for some purpose.⁵⁴ It is also worth noting that the test in New Zealand is an objective one.⁵⁵

On one view of the authorities to which we have referred, the position would appear to be that the true owner can stand by and allow any one to have the use of the land without risking the loss of his title, provided he can show that the squatter's use was not inconsistent with the purpose for which he (the owner) intended to use the land and which, of course, may be known only to him. This would seem significantly to reduce the number of cases in which an owner could be dispossessed by virtue of the Statute of Limitations.

The element of uncertainty implicit in this subjective approach is inconsistent with the rationale of the principle of limitation as regards actions for the recovery of land which is "to quiet the possessors of land in the estates which they had long enjoyed".⁵⁶

53. *We recommend that for the avoidance of doubt and for the sake of clarity, a statutory provision should be enacted to give force to the decision in Murphy v Murphy.*¹⁰ *The Court should not in future regard the intention of the true owner as a decisive factor when considering whether or not he has been dispossessed. Adverse possession should be defined as being possession inconsistent with the title of the true owner and not possession inconsistent with the intention of the true owner.*

This recommendation would also appear to be consistent with the present position in England. In *Buckinghamshire Co. Co. v Moran*¹¹ the Court of Appeal held it was necessary to prove in establishing adverse possession merely factual possession together with the requisite intention to possess.

(2) Amendment of the Statute of Limitations 1957 so as to Abolish the Distinction Between Tenancies from Year to Year Created in Writing and those Created Orally

54. Section 17 (2) of the 1957 Act provides that a tenancy from year to year or other period without a lease in writing is to be deemed to be extinguished at the expiration of the first year or other period.

As a result, where there is an *oral* periodic tenancy, the tenancy automatically comes to an end at the end of the first year or whatever

the period may be. In these circumstances, if the tenant remains on in possession without paying rent, he will normally acquire the landlord's title at the end of the statutory period of limitation. What is the position where the periodic tenancy is in writing and the tenant remains on in possession without paying any rent?

The question has been considered in two recent cases. In *Foreman v Mowlds*,¹² the question arose as to whether when there is a periodic tenancy *in writing* the tenant can, by possessing the demised premises without payment of rent for upwards of (in this case) forty years, acquire the title of the lessor by adverse possession. Barrington J found that there was clear evidence on the facts that the tenancy was determined for some time, and as there was no effort to enforce the landlord's interest for over 50 years, the vendors (the tenants) had acquired title to the lessor's interest by long term possession. The learned judge thus did not have to answer the key question. Had he not come to the conclusion that he did, the remarkable result would have been that, however long rent had been unpaid and the tenant and his successor remained in possession without acknowledging the title of the landlord, the landlord could recover possession if the tenancy agreement had been *in writing*. This would lead to the anomalous situation that in the case of a lease for a term certain time may begin to run in favour of an erstwhile tenant while in the case of a periodic tenancy time may never so run.

In *Sauerweig v Feeney*¹³ there had been a written contract in 1942 under which the defendant acquired a tenancy from week to week. No rent had been paid since 1950, but the landlord's solicitor had requested payment of the rent in 1977, 1978 and 1981. The plaintiff landlord brought a civil process for ejectment for overholding. A case was stated to the Supreme Court asking whether the defendant's submission that he had acquired the plaintiff's title by adverse possession was valid.

Henchy J held that the case was not one of a tenancy from year to year but one from week to week with a lease in writing, since the documentary tenancy from week to week ranked as a lease for the purpose of the Statute of Limitations; there was therefore no artificial determination of the tenancy under s. 17 (2).

55. The latter case affirmed the principle that time cannot run in favour of a tenant where the tenancy was originally created in writing. The Commission is of the opinion that this is inconsistent with the rationale of the principle of limitation as it applies to actions for the recovery of land, namely the quieting of title. All of the submissions that we received are in favour of reforms of this anomaly in the law.¹⁴

We recommend that the distinction between periodic tenancies in writing and those created orally contained in s. 17 (2) of the 1957 Act should be abolished.

NOTE: Section 17 (3) of the 1957 Act provides that where a person is in possession of land under a lease in writing reserving rent of not less than one pound and the rent as received by some person wrongfully claiming to be entitled to the landlord's interest and no rent is subsequently received by the person rightfully entitled to it, the right of the true landlord to recover the land was to be deemed to have accrued at the date when the rent was first received by the wrongful recipient. We see no reason to amend this provision.

- Wylie, *Irish Land Law*, para. 23-01.
 [1980] I.R. 183.
 Unreported, judgment delivered, 26th July, 1985.
 65 Ex. D. 264.
 Unreported, judgment delivered, 27th May, 1987.
 Unreported, judgment delivered, 15th December, 1987.
 Brady, "Adverse Possession and Animus Possidendi", (1986) Gaz. 141. Omotola.
 "Adverse Possession and the Intention of the True Owner", (1974) 38 Conv. 172. Stratton.
 "Adverse Possession and Possessory Title", (1978) N.L.J. 367.
 Per Chapman J in *Martin v Brown*, (1912) 31 NZLR 1084, at p. 1092. See also *Techtek Ltd v Chamberlain*, (1969) 20 P. & C.R. 633.
 See *Perry v Woodfarm Homes Ltd*, (1976) I.R. 104 at p. 126.
 Supra, footnote 2.
 The Times, 16th February, 1989.
 High Court, extempore, 28th January, 1985. See note at (1985) 3 I.L.T. 47.
 Supreme Court, 7th July, 1986.
 See also Brady, "Periodic Tenancies in Writing and the Running of Time", (1986) Gaz. 253.

CHAPTER 5: AMENDMENTS OF THE LAW OF LANDLORD AND TENANT

(1) Passing of Guarantor's Covenants on Transfer of Landlords' Interests in Tenancies when there is a Guarantee of the Tenants' Obligations

56. A question which arises for consideration when a landlord transfers his interest in property, subject to and with the benefit of the lease or letting agreement, is whether the benefit of any guarantor's covenants automatically passes to the purchaser. There is no statutory provision in Ireland covering the position.

It is quite usual for landlords of property, both commercial and residential, to seek guarantees of payment of the rent reserved by leases of such property. These covenants, which secure the payment of rent and performance and observance of the terms of the lease by third parties, are sometimes called "surety covenants" but may be referred to as guarantor's covenants.

57. A covenant is an agreement between parties to a deed to do or not to do something. At common law, the benefit of a covenant, whether positive or restrictive, will "run at law with the land" to which it relates provided the covenant is one which affects the nature, quality or value of the land and has been entered into with the person holding a legal estate in the land,¹ and provided the assignee who seeks to enforce the covenant has the same legal estate as the original covenantee.² Traditionally, it was said that the benefit will run only if the covenants "touch and concern" the land. Covenants which do not touch and concern the land are merely personal covenants which bind only the persons entering into the covenants and their estates.³

Following litigation in recent years, it is now clear that in England a covenant by a guarantor guaranteeing the tenant's payment of rent does "touch and concern" the land and is therefore enforceable by the lessor's successor in title even if not expressly assigned. This was held to be so by the Court of Appeal in *Kumar v Dunning*.⁴ The basis of the decision was that although a guarantor's covenant can be said to be a

covenant "at first remove" (in that it relates to the tenant's covenants, which in turn relate to the land) this does not mean it cannot touch and concern the land. Brown-Wilkinson V-C pointed out that the guarantor's covenant increases the value of the reversion in that the landlord can look not only to the tenant but also to the guarantor for payment of a sum equal to the rent and that no one other than the landlord can enforce the guarantor's covenant. This decision was recently approved by the House of Lords in *P. A. Swift Investments (a firm) v Combined English Stores Group plc* and in *Coronation Street Industrial Properties v Ingall Industries*.

The Commission welcomes the case law developments in England and, although we believe that Irish courts might well have reached the same conclusion as their English counterparts, we recommend that, to avoid the need to have the issue determined in our courts, a statutory provision be enacted to provide that the benefit of a guarantor's covenant should pass with the transfer of the lessor's interest.

(2) Evidence of Consent of Landlord to Assignment of a Tenant's Interest in Property

58. Section 16 of the *Landlord and Tenant Law Amendment, Ireland, Act, 1860* (Deasy's Act) provided that where the estate or interest of any original tenant in any lease was assigned with the consent of the landlord "testified in manner specified in Section 10" the landlord was to be deemed to have released and discharged the said tenant from all actions and remedies in respect of any future breach of the agreements contained in the lease.

The effect of this provision was to provide significant relief to the first tenant holding under a long lease who otherwise would have remained liable for the performance and observance of the tenant's covenants in the lease even though the tenant's interest was now vested in a successor in title. Section 10 of the same Act provided that it was not to be lawful to assign lands held under any lease which contained a restriction or prohibition on assignment without the consent in writing of the landlord or his agent "testified by his being an executing party to the instrument of assignment or by an endorsement on or subscription of such instrument".

59. Section 10 of the Act was repealed by s. 35 of the *Landlord and Tenant (Ground Rents) Act, 1967*. There appears to be a widespread misconception that because of the repeal of s. 10, the reference to the requirements of that section contained in s. 16 became a nullity. There is, however, a strong legal argument that the provisions of s. 10, even though the section itself has been repealed, are kept alive in so far as they are required for the operation of s. 16. It must be very doubtful whether it was the intention of the Legislature when making such a significant change in the law as the repeal of s. 10 that any of its provisions should continue to operate even for the purposes of another section in the same Act, to the possible detriment of tenants.

The effect of the manner of the repeal appears to be that even where a landlord's consent to assignment has been obtained, and even if that consent is in writing, the fact that the consent is not "testified by the

landlord executing the instrument of assignment or by an endorsement on or subscription of such assignment" is that the original tenant may still remain liable under his covenants to the original lessor. It may be a great deal more convenient for the parties to assignments of lessee's interests, including the lessor, to arrange to have the consents executed separately and it is not uncommon for such consents to be in letter form only. There seems no valid reason why the consent should be required to be endorsed on the instrument of assignment and *we recommend that s. 16 of Deasy's Act be amended so as to provide that the consent of a lessor need merely be in writing executed by the lessor or the lessor's lawfully authorised agent.*

(3) Amendment of Section 28 of the Landlord and Tenant (Ground Rents) Act, 1978 dealing with the Abolition of Covenants Affecting Land

60. *The Landlord and Tenant (Ground Rents) Acts, 1967 and 1978* provided the ultimate solution to the problems of many occupational and building or proprietary leases under the various Landlord and Tenants Acts, namely, the right to acquire the fee simple in the land. Under these Acts the lessee can enlarge his interest to what is in effect absolute ownership, with or without the lessor's consent. Many house owners have taken advantage of the legislation and acquired the fee simple in their properties.

There are various types of covenants in leases. S. 28 of the *Landlord and Tenant (Ground Rents) (No. 2) Act, 1978* provides that certain of these covenants will continue in force even when the fee simple has been acquired. The section states that, where a person having an interest in land acquires the fee simple, *all* covenants subject to which he held the land other than a covenant specified in sub-section (2) of s. 28 shall thereupon cease to have effect and no new covenant shall be created in conveying the fee simple. Subsection (2) lists the covenants which continue in force, including ones which protect or enhance the amenities or relate to rights of way over the land.

61. The following example illustrates a difficulty that may arise from the wide effect of this section. A is a holder of a leasehold estate in a house and land and sells part of the land to B and in the assignment to B, B enters into restrictive covenants under which B agrees not to build any houses on the plot of land acquired from A. B then buys out the fee simple from C, a common landlord of A and B. Under the provisions of s. 28, the covenant contained in the assignment from A to B would cease to have effect.

We note that the provisions of the section which s. 28 replaced, s. 31 of the *Landlord and Tenant (Ground Rents) Act, 1967*, only operated in respect of covenants, conditions or agreements contained *in the lease* and did not affect covenants which might have been entered into otherwise than in the lease, as, in the example, between A and B.

The Commission feels that s. 28 of the 1978 Act is too widely drafted and believes that it may present constitutional problems. We are of the opinion that covenants entered into by a person with another to protect the amenities of that other person's land should not be capable of being abolished without that person's consent.

We accordingly recommend that s. 28 of the Landlord and Tenant (Ground Rents) Act, 1978 be amended so as to limit its operation so that it does not affect covenants which have been entered into by landowners with third parties

(4) Contracting Out of the Provisions of the Landlord and Tenant Act

62. In modern times, the relationship of landlord and tenant has been to a great extent governed by statute rather than the terms actually agreed between two parties.

One of the principal Acts governing the relationship in this jurisdiction is the *Landlord and Tenant (Amendment) Act, 1980*. Part II of this Act gives tenants of certain "tenements" the right to a new tenancy once they have satisfied certain conditions. A "tenement" is defined in s. 5 as land covered wholly or partly by buildings. The right to a new tenancy is granted where a tenement has been continuously in the occupation of a tenant for three years and has been *bona fide* used wholly or partly for the purpose of carrying on a business. The requisite period is 20 years for non-business user and rights are also given to tenants who have carried out a considerable amount of improvements to the tenements — see s. 13 of the Act.

63. Section 85 of the 1980 Act prohibits contracting out of the provisions of the Act and provides that any contract which attempts to do so shall be void. It is arguable that on a strict interpretation of s. 85 a contract would have to mention expressly a provision of the Act so as to render it void. Concern as to its applicability has, however, led to practitioners devising various methods of avoiding the provisions of the Act, most notably the "Gatien device", so called after the case of *Gatien Motor Co. Ltd. v Continental Oil Co. Ltd.* In that case the landlord granted a lease that fell short of the statutory time which would have entitled the tenant to a new tenancy at its expiry. He then entered into a caretaker's agreement with the tenant for six days and then executed a new lease for a further period. The Gatien case concerned the provisions of the *Landlord and Tenant Act, 1931* which contained a similar prohibition on contracting out of its provisions. The Supreme Court held that the device used in that case did not constitute contracting out of the 1931 Act because the tenant had not satisfied the prerequisites for entitlement to a new tenancy as he had not been a tenant for the required amount of time. There appears to be some doubt about the effectiveness of this device under the 1980 Act due to the difference in the wording of the respective provisions giving rise to entitlement. The 1931 Act required an applicant to have been a tenant for the statutory period, while the 1980 Act merely requires continuous occupation during that time.

The 1980 Act provides that properties held under lettings which are made and expressed to be made for the temporary convenience of the landlord and tenant, stating the nature of the temporary convenience, do not fall within the provisions of the Act. We are aware, however, that practitioners have a reservation about relying on these lettings for periods which run much beyond the three year qualification period.

It has been represented to the Commission that the provisions of the Act and the reservations about relying on the temporary convenience letting have led to a petrification of the business letting market. Landlords are only prepared to grant either lettings for less than three years, usually in fact for two years and nine months, or for periods of twenty years or more. It is believed that many landlords would be prepared to let properties for periods of up to five years and possibly more if they could be sure that the tenants would not be entitled to a new lease at the expiry of the initial term. It is also believed that many tenants would wish to be able to obtain lettings for more than three years even at the expense of not being entitled to a renewal of the tenancy at its expiry.

The Commission is of the opinion that there is no reason why two parties entering an agreement "at arm's length" should not be allowed contract out of the provisions of the Act.

64. It is interesting to note that the *Landlord and Tenant (Amendment) Act, 1989* provides that the right to a new tenancy will not apply in cases where leases are made with companies carrying on a relevant trading operation in the Custom House Docks Area. This will have effect only in relation to leases made during the period of five years after the passing of the Act unless renewed by the Minister for Justice by regulations approved by both Houses of the Oireachtas.

In the English legislation equivalent to our 1980 Act, the *Landlord and Tenant Act, 1954*, contracting out is also prohibited, by s. 38 (1). However, contracting out may be authorised by the court on the joint application of the landlord and tenant in the form of an agreement which either excludes the 1954 Act provisions as to the continuation and renewal of tenancies or else provides for surrender in specified circumstances. This provision is now s. 38 (4) of the 1954 Act and was inserted by s. 5 of the *Law of Property Act, 1969*.

The Commission has considered the English option and believes that where the parties are in agreement there seems no point in requiring them to incur the expense of an application to the court in order to obtain its formal approval of the "contracting out". We feel, however, that it is important that both parties are aware of the implications of contracting out and would therefore recommend that the parties should receive independent legal advice before doing so.

We recommend that the Landlord and Tenant (Amendment) Act, 1980 be amended so as to allow parties contract out of the provisions of Part II of the Act as it applies to business tenancies provided that both parties have independent legal advice.

(5) Proposal for a Minimum Term of Five Years for a New Tenancy Under the Landlord and Tenant (Amendment) Act, 1980

65. Section 23 of the *Landlord and Tenant (Amendment) Act, 1980* provides that the court shall fix the duration of the new tenancy to which a tenant is entitled at thirty-five years or such less term as the tenant may nominate. The previous legislation, section 29 of the *Landlord and Tenant Act, 1931*, provided that in the absence of agreement between the landlord and the tenant the court would grant a fixed term of twenty-one years to the tenant. This latter provision

was found to be too rigid but it is suggested that the provisions of section 23 are not entirely satisfactory. A tenant could in theory seek a new lease for as little as one month and indeed it is understood that tenants have in fact sought leases for periods as short as one year.

A tenant who obtained such a renewal would, presuming that he continued to qualify for a new lease under the Act, be entitled to seek a further renewal for as short a period as he wished and so on as the terms of these renewed leases expire.

66. If a tenant does take a new tenancy for a short period, then the inevitable result will be that further applications for new tenancies will have to be brought with considerable frequency. The policy behind successive Landlord and Tenant Acts has been to provide security of tenure for tenants. It is suggested that a landlord is equally entitled to be secure in the knowledge that a tenancy renewed under legislation protecting a tenant will be of reasonable length. It is unlikely that many landlords would be willing to grant a renewal of a lease for a term as little as one year and accordingly the opportunity is presented to the tenant of bringing frequent applications to the court. This does not seem to be reasonable.

67. The scheme of the Act provides that either party to a new tenancy can apply to the court for revision of rent every five years. It is suggested that in the light of that arrangement it would be more in keeping with the scheme of the Act if the minimum term which a tenant could seek under a new lease would be not less than five years. There would, of course, be nothing to stop a landlord and a tenant agreeing that the tenant should take a lesser term than five years but *it is recommended that, if the terms of the lease have to be fixed by the court, the term should be such a period being not more than thirty-five years and not less than five years as the court should determine.*

(6) Proposal to Establish a Time Limit for the Bringing of Appeals from Arbitrations by the County Registrar Under the Landlord and Tenant (Ground Rents) Act, 1967

68. Section 17 of the *Landlord and Tenant (Ground Rents) Act, 1967* confers jurisdiction on County Registrars to hold arbitration proceedings to determine whether applicants are entitled to acquire the fee simple interest in properties under the Act. Order 62 of the Circuit Court Rules was added to the Circuit Court Rules for the purpose of regulating the procedure to be followed in relation to appeals from the County Registrar under the Act. Neither the Act nor the Rules contain any time limit for the bringing of an appeal.

In *Tassel Ltd. v Kauai Investment Co. Ltd.*,¹ O'Hanlon J held that neither Order 15 Rule 7 nor Order 59 Rule 14 of the Circuit Court Rules, which had been invoked as Orders under which time limit could be imposed, were relevant and that there were no time limits for the bringing of an appeal against an arbitration award of a County Registrar.

It is clearly unsatisfactory that there should be no time limit. A person who has obtained an award from the County Registrar of entitlement to acquire the fee simple in a property may well wish to

dispose of the property and it is unreasonable that there should be uncertainty as to such a person's ability to dispose of the fee simple interest in the property by reason of the possibility of an appeal being brought.

It is recommended that the Landlord and Tenant (Ground Rents) Act, 1967 should be amended by the addition of a provision requiring appeals from the award of a County Registrar to be brought within twenty-one days of the publication of the award to the parties.

Rogers v Hosegood, [1900] 2 Ch. 388 at page 395.

Webb v Russell, (1789) 3 Term. Rep. 393; *Westhoughton UDC v Wigan Coal and Iron Co*, [1919] 1 Ch. 159.

Ricketts v Enfield (Churchwardens), [1909] 1 Ch. 544; *Deu ar v Goodman*, [1909] AC 92.

[¶][1987] 1 All E.R. 801. This case overturned recent first instance decisions to the contrary in *Pinemain Ltd v Welbeck International Ltd*, [1984] 272 E.G. and *Re Distributors and Warehousing Ltd*, [1986] 278 E.G. 1363.

[¶][1988] E.G.C.S. 104.

[¶][1988] E.G. 55.

[¶][1979] I.R. 406.

[¶]See note by Eoghan Fitzsimons, SC, 1986 Law Society Gazette, p. 100.

[¶]Unreported, judgment delivered 26th October, 1988.

CHAPTER 6: SUMMARY OF RECOMMENDATIONS

1. The statutory period for which title must be shown on an open contract for the sale of land should be reduced from 40 years to 20 years.
2. For the avoidance of doubt, it should be provided that where a person entitled to a leasehold interest in portion only of property held under the lease acquires any superior interest in that property, he shall be entitled to merge the leasehold interest in all the superior interests held by him.
3. The fee tail estate should be retained, but the requirement that the disentailing deed be enrolled in the Central Office of the High Court should be abolished and replaced by a requirement that it be registered in the Registry of Deeds or the Land Registry as may be appropriate.
4. To resolve doubts, a statutory provision should be introduced restoring the statutory power of partition.
5. Easements, options, *profits à prendre* and rent charges over land should be removed from the effect of the rule against perpetuities and it should also be provided that the rule never applied to such interests in land.
6. Certain definitions of words contained in the *Interpretation Act, 1937* should be prescribed for use in documents relating to interests in land subject to the rights of the parties to exclude the operation of the statutory definitions.
7. For the purpose of judgment mortgages, when a binding contract for the sale of land has been entered into, the law should treat the beneficial ownership as having passed to the purchaser from the time the contract was made, subject to the condition subsequent that the purchaser completes the sale.

8. It should be possible for freehold land to be severed and converted into a tenancy in common by a simple deed between the parties in the same way as a leasehold estate may be severed.
9. The rule in *Bain v Fothergill*, under which damages cannot be awarded in an action for breach of contract against a vendor who has failed to show good title, should be abolished.
10. S. 8 of the *Forfeiture Act, 1870*, under which a "convict" cannot make any disposition of property while in prison, should be repealed. Consideration should be given, however, to the introduction of legislation under which in particular circumstances a convicted person may be prevented from disposing of property save where authorised to do so by an order of a competent court.
11. S. 27 of the *Local Government (Planning and Development) Act, 1976* should be amended, first, by extending the provisions of s. 27 (1) (a) to cover development which has been completed without the necessary planning permission and, secondly, to include in the section a five year limit on the bringing of applications whether in respect of developments or unauthorised uses.
12. S. 45 of the Land Act which requires the consent of the Land Commission to the transfer of land to persons other than Irish citizens should no longer apply to non-agricultural land or holdings less than 2 hectares in area.
13. The *Family Home Protection Act, 1976* should be amended so as to provide that, where there has been a conveyance of a family home which has been implemented without any objection from a spouse for over six years, such conveyance should no longer be deemed to be void and that evidence of any consent by the spouse or supporting evidence for any such consent should no longer be required.
14. S. 3 (e) of the *Registration of Title Act, 1984* should be amended so as to provide that lands sold under the *Irish Church Act, 1869* or the *Church Temporalities Act, 1833* need no longer be registered.
15. S. 117 (6) of the *Succession Act, 1965* should be amended so as to give a discretion to the court to extend the one year time limit within which applications may be made. The section should also be extended to include applications on intestacy.
16. For the avoidance of doubt, it should be provided that, in determining whether a person has been in adverse possession of land for the purposes of the *Statute of Limitations 1957*, the court should not be bound to regard as a decisive factor the intention of the true owner when considering whether or not he has been dispossessed.
17. The distinction between periodic tenancies in writing and those created orally contained in s. 17 (2) of the *Statute of Limitations Act, 1957* should be abolished.

18. A statutory provision should be enacted that the benefit of a guarantor's covenant should pass with the transfer of the lessor's interest.
19. S. 16 of Deasy's Act should be amended so as to provide that the consent of a landlord to the assignment of a tenancy need merely be in writing executed by the landlord or his lawfully authorised agent and need no longer be testified by his executing or endorsing the assignment.
20. S. 28 of the *Landlord and Tenant (Ground Rents) Act, 1978* should be amended so as to limit its operation so that it does not affect covenants which had been entered into by land owners with third parties.
21. The *Landlord and Tenant (Amendment) Act, 1980* should be amended so as to allow parties contract out of the provisions of Part II of the Act as it applies to business tenancies provided that both parties have independent legal advice.
22. The *Landlord and Tenant (Amendment) Act, 1980* should be amended so as to provide for a minimum term of five years for a new tenancy under that Act.
23. The *Landlord and Tenant (Ground Rents) Act, 1967* should be amended by the addition of a provision requiring appeals from the award of a County Registrar to be brought within twenty-one days of the publication of the award to the parties.

APPENDIX I

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