

# Consultation Paper



## Reform and Modernisation of Land Law and Conveyancing Law

*October*

2004

LRC CP 34-2004



The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLI

**CONSULTATION PAPER**  
**ON**  
**REFORM AND MODERNISATION**  
**OF**  
**LAND LAW AND CONVEYANCING LAW**

**(LRC CP 34 – 2004)**

**IRELAND**

**The Law Reform Commission**

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

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## THE LAW REFORM COMMISSION

### Background

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

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

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

### Membership

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

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<i>Full-Time Commissioner:</i>	Patricia T Rickard-Clarke Solicitor
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## THE PROJECT

In late 2003 the Department of Justice, Equality and Law Reform and the Law Reform Commission established a joint project for the major reform and modernisation of land law and conveyancing law. This was seen as part of a larger programme of reform in this area of law that was already being undertaken by the Commission. The ultimate goal of that programme is the introduction of an e-conveyancing system similar to those being developed in other jurisdictions. The need to develop a system suitable to this jurisdiction means that the larger programme will take some years to develop. In the meantime, it was regarded as important to modernise the substantive law which underpins the conveyancing system. This concerns in particular the huge range of pre-1922 statutes which relate to land law and conveyancing law and remain as part of the legislation in force in the State.

It was envisaged that the project would involve three phases. The *first* phase would involve a screening of the pre-1922 statutes with a view to identifying those which can be repealed without replacement, as being obsolete or otherwise inappropriate in 21<sup>st</sup> century conditions. This phase would also identify those statutes, or parts of statutes, which remain of relevance to modern conditions, and would involve identification of what amendments would be required in order to ensure that they achieve their purposes as effectively as possible in modern conditions. It would also involve a review of the general law with regard to its need for reform. The *second* phase would consist of a consultation process initiated by the publication of a Consultation Paper. The *third* phase would involve the drafting of a Bill (or Bills) to give effect to the conclusions reached at the end of the second phase.

In February 2004 the Department appointed **Professor J.C.W. Wylie** the Legal Researcher responsible for carrying out the first phase of the project. Professor Wylie also chairs the Commission's Substantive Law Working Group, which is part of the e-Conveyancing Project. This Group, together with a representative of the Department, has provided advice and assistance in the carrying out of the first phase. Its members are:



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

Trevor Redmond, one of the Commission's legal researchers, was Secretary to the Group during most of the period leading to preparation of this Consultation Paper. His successor in this role is Mary Townsend, who assisted in the preparation of this Paper for publication.

On 29 June 2004 the Minister for Justice, Equality and Law Reform, Mr Michael McDowell TD, made a public announcement relating to the Joint Project. He stated that it was intended that it would:

- Simplify the law and improve its presentation, in order to make it easily understood and accessible for practitioners and the public alike
- Update the law to accommodate changing social, demographic and economic needs, *eg*, new forms of property ownership
- Make the conveyancing of property easier and faster with a view to reducing costs and delays.

The Minister drew attention to the three phases of the Joint Project referred to earlier and stated that the first stage would be completed by the publication by the Law Reform Commission of a Consultation Paper in October 2004. This is that Consultation Paper. He stated that the second phase would culminate in a Conference to be held on

25 November 2004. This would study the reform proposals made in the Consultation Paper as well as the ongoing modernisation of the Land Registry and preparations for e-conveyancing. The Minister also stated that it was the intention that the draft Bill (or Bills) to give effect to the reform proposals would be available as early as August 2005. Finally the Minister stated that reform of the law in this area would represent a major contribution to the Government's Programme of Regulatory Reform, as outlined in the 2004 White Paper *Regulating Better*.



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## INTRODUCTION

### A Scope of the Project

1. The publication of this Consultation Paper marks the completion of the first phase of the Joint Project.<sup>1</sup> It contains the results of the screening of those pre-1922 statutes<sup>2</sup> relating to land law and conveyancing law<sup>3</sup> that are still in force in the State. It also contains the results of a review of the general law<sup>4</sup> relating to this subject. As an initiation of the consultation process, and of the second phase of the project, the Consultation Paper sets out proposals for the reform and modernisation of both statutes and the general law.

2. In order to facilitate the completion of the third phase of the Joint Project, which involves the preparation of a draft Bill (or Bills) to implement the proposals for reform and modernisation,<sup>5</sup> the Consultation Paper deals with the subject by topic in accordance with what is anticipated would be the most logical order for parts of the draft Bill (or Bills).<sup>6</sup> The pre-1922 statutes and general law are dealt

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<sup>1</sup> See pages vi-vii above.

<sup>2</sup> For further details of the nature of these statutes, see paragraph 3 below.

<sup>3</sup> See further on the scope of this area, paragraphs 6-8 below.

<sup>4</sup> In essence this is a mixture of case law emanating from the courts and practice developed by practitioners specialising in land law and conveyancing. On land law generally see Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) and Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997). On conveyancing see Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996).

<sup>5</sup> See page vi above.

<sup>6</sup> For convenience the remainder of the Consultation Paper will proceed on the assumption that all the reform and modernisation proposals will be implemented by one Bill only. It is anticipated that it will be a very large Bill, but not necessarily as large as some recently enacted similar legislation designed to consolidate and reform the law, eg the *Taxes Consolidation Act 1997* (1104 sections). Many of the proposals in this



with according to the same arrangement, but full listings of the statutes which would be repealed altogether or replaced by the new legislation are set out in **Appendix A**. It is important to emphasise that it is not intended that the new legislation would codify the law. Although it would consolidate all pre-1922 legislation, much of the post-1922 legislation would remain in force. Furthermore, many principles based on the common law or developments in equity would remain, unless reformed by the new legislation.

## **B Pre-1922 Statutes**

3. As the listings of statutes set out in **Appendix A** make clear, over 150 pre-1922 statutes would be replaced by the new legislation. These statutes fall into four categories:

- (a) *Pre-Union Irish Statutes. These are statutes enacted by various Irish Parliaments prior to the Union of Ireland with Great Britain in 1801 (effected by the Act of Union 1800, which was enacted by the Westminster Parliament).*
- (b) *Pre-Union English Statutes. There are statutes enacted by the English Parliament between 1226 and 1707 that applied to Ireland, either under Poyning's Act 1495 (enacted by the Irish Parliament)<sup>7</sup> or by express or implied provision.<sup>8</sup>*
- (c) *Pre-Union British Statutes. These are statutes enacted by the Parliament of Great Britain between 1708 and 1800 that applied to Ireland.*
- (d) *Post-Union United Kingdom Statutes. These are statutes enacted by the then Parliament of the United Kingdom of*

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Consultation Paper envisage radical simplification of the law by removal of old legislation with either no replacement at all or much simpler replacement.

<sup>7</sup> Some pre-1495 statutes were transmitted to Ireland by royal writ and some were apparently enforced by the Irish courts even without any formal application: see Hand *English Law in Ireland 1290-1324* (Cambridge University Press 1967) at 164-165.

<sup>8</sup> Although not containing an express provision stating that the statute applied to Ireland, references within it (eg to Crown land in Ireland) may make it clear that it so applied.

*Great Britain and Ireland between 1801 and 1922 which applied to Ireland.*

## **C Guiding Principles**

4. The following principles<sup>9</sup> were adopted in carrying out the first phase of the Joint Project:

- (a) *updating the law, so as to make it accord with changes in society.*
- (b) *promoting simplification of the law and its language, so as to render it more easily understood and accessible;*
- (c) *promoting simplification of the conveyancing process, in particular the procedures involved, including the taking of security over land;*
- (d) *facilitating extension of the registration of title system, with a view to promoting a system of title by registration;*
- (e) *keeping in mind the overall aims of the e-Conveyancing Project<sup>10</sup> and facilitating introduction of an e-conveyancing system as soon as possible.*

5. The application of these principles to the numerous pre-1922 statutes examined as part of the first phase screening process resulted in one of three conclusions being reached with respect to each statute or, frequently, to individual sections or parts of particular statutes. The three possible conclusions were:

- (I) *Repeal without replacement.* In such instances the conclusion was reached that the statute, or particular part or section, should be repealed (as being obsolete or no longer of any practical use or benefit in modern times) without any replacement being included in the proposed new legislation.
- (II) *Replace with substantial amendment.* In such instances the conclusion was reached that the statute, or particular part or section, remained of some relevance, but it should be

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<sup>9</sup> Note also the aims outlined in the Minister's public announcement of 29 June 2004: see page vii above.

<sup>10</sup> See page vi above.

replaced in substantially modified form, so as to render it more effective or relevant.

- (III) *Replace without substantial amendment.* In such instances, the conclusion was reached that the statute, or particular part or section, remained relevant, but should be re-enacted in the new legislation without substantial amendment.

With respect to category (I) due consideration will have to be given in the third phase (the drafting of the Bill) to important matters such as the possible need for transitional provisions, savings for accrued rights under legislation being repealed and other consequences of repeals. As regards categories (II) and (III), it is envisaged that the replacement legislation will involve considerable recasting of old statutes in plain language, in accordance with the principles set out in the Commission's *Report on Statutory Drafting and Interpretation: Plain Language and the Law* (LRC 61 – 2000).

## **D Land Law and Conveyancing Law**

6. The work on the first phase of the Joint Project has been greatly assisted by the fact that over the past decade or so the Law Reform Commission has published several Reports relating to land law and conveyancing law. These were based upon the studies carried out by the Commission's Land Law and Conveyancing Law Working Group, and contained numerous recommendations on discrete points, many of which remain to be acted upon. The essential difference with the first phase of the Joint Project is that it involves looking at the whole area of land law and conveyancing law in the round. However, the opportunity was taken to reconsider the various recommendations contained in those earlier Reports, and for the most part they have been incorporated into this Consultation Paper. Hence, there is frequent reference to those Reports, and a full listing of them is given in **Appendix B**. The Commission also recently published a *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004) based upon the work of its e-Conveyancing Substantive Law Working Group. The recommendations contained in that Paper have also been incorporated into Chapter 10 of this Consultation Paper.

7. The area of land law and conveyancing law is an extremely broad one, as the scope of this Consultation Paper demonstrates. It is, however, important to draw attention to two aspects which would probably be regarded as coming within its scope, but have been excluded from it. One is the law of landlord and tenant, which is itself, a very broad area of the law, and in respect of which numerous pre-1922 statutes remain in force. The reason this area has been largely excluded from this Consultation Paper is that it is being dealt with in a separate exercise. The Commission established the Landlord and Tenant Project Group in July 2001 and engaged the services of Professor Wylie as its expert consultant and leader. Two Consultation Papers have already been published,<sup>11</sup> and others are in the course of preparation. One of these will identify pre-1922 landlord and tenant statutes to be repealed or replaced. Having said that, it should be noted that this Consultation Paper does deal with some aspects of leasehold law as part of its review of general land law and conveyancing law. For example, in considering the law relating to estates in land, it deals with the “hybrid” estates once so common in Ireland, such as leases for lives renewable for ever<sup>12</sup> and leases for lives combined with a term of years.<sup>13</sup> In considering the law relating to settlements of land, it deals with the numerous statutes conferring powers, including the power to lease settled land that was given to limited owners like tenants for life.<sup>14</sup> In relation to the law of adverse possession, it deals with the difficult issues relating to how that law applies to leasehold land.<sup>15</sup>

8. The reference to settlements of land in the previous paragraph points to the other area excluded from this Consultation Paper. Settlements of land can take several forms and frequently, but not necessarily, will involve the use of an express trust, with the land being held by trustees on behalf of specified beneficiaries. All forms

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<sup>11</sup> *Consultation Paper on Business Tenancies* (LRC CP 21-2003); *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 – 2003).

<sup>12</sup> See paragraph 2.34 below.

<sup>13</sup> See paragraph 2.35 below.

<sup>14</sup> See Chapter 3 below.

<sup>15</sup> See Chapter 12 below.

of settlement are dealt with by the Consultation Paper, so that it covers trusts of land,<sup>16</sup> but it does not deal otherwise with the general law of trusts. The reason for this is that the Commission has established a separate project on this, which will include a review of pre-1922 legislation dealing with trusts, such as the *Trustee Act 1893* and statutes concerning charitable trusts.<sup>17</sup>

## **E Outline of this Consultation Paper**

9. As indicated earlier,<sup>18</sup> the Consultation Paper deals with pre-1922 statutes and the general law relating to land law and conveyancing law on a topic by topic basis. These topics accord with what it is envisaged will be the separate Parts<sup>19</sup> of the Bill to be drafted in the third phase of the Joint Project to implement what is proposed in this Paper. However, the Paper begins in Chapter 1 with an outline of the historical background to our land law and conveyancing law, including the pre-1922 legislative underpinnings. The ensuing chapters then deal with the various topics corresponding to the envisaged substantive Parts of the Bill.

10. Chapter 2 deals with the concept of “tenure” and the various “estates” which can be held in land. This includes a consideration of the position of the State and the complications arising from the position of the British Crown prior to 1922. Chapter 3 deals with future interests and the various rules governing their creation and operation, such as the rule against perpetuities. Chapter 4 deals with settlements and trusts of land and Chapter 5 with powers of appointment. Chapter 6 deals with co-ownership. Chapter 7 deals with “appurtenant” rights over land, such as easements, *profits à prendre* and freehold covenants. Chapter 8 deals with the broad area of contracts and conveyances relating to land. Chapter 9 deals with mortgages and Chapter 10 with judgment mortgages. Chapter 11 deals with registration of deeds. Chapter 12 deals with the law of

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<sup>16</sup> See again Chapter 3 below.

<sup>17</sup> Eg the Statute of Charitable Uses (Ireland) 1634 (10 Chas 1 sess 3 c 1).

<sup>18</sup> See paragraph 2 above.

<sup>19</sup> *Ie* the main substantive Parts, excluding the technical, standard provisions relating to such matters as the short title, commencement date, power to make regulations, repeals and so on.

adverse possession. Chapter 13 deals with miscellaneous matters not falling naturally into one of the topics dealt with by the previous chapters, including some other pre-1922 statutes.

## **F            The Consultation Process**

11.        As indicated earlier,<sup>20</sup> this Consultation Paper not only marks the completion of the first phase of the Joint Project, it also prepares the ground for the consultation process which comprises the the second phase, and which includes the holding of the Conference to take place on 25 November 2004.<sup>21</sup> With the title “Modernising Irish Land Law and Conveyancing Law”, the conference will focus on the proposals contained in this Consultation Paper and, in recognition of the Joint Project’s place in the larger e-Conveyancing Project,<sup>22</sup> on the modernisation of the Land Registry and preparations for e-conveyancing. The preparation of the draft Bill to implement the proposals in the Consultation Paper, which is the third phase of the Joint Project, is already underway, but submissions on the proposals are welcome and will be taken into consideration as part of the third phase. Those who wish to make submissions should do so in writing to the Commission by **31 December 2004**.

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<sup>20</sup>        See paragraph 1 above.

<sup>21</sup>        In the O’Reilly Hall at UCD, Belfield, Dublin 4.

<sup>22</sup>        See page vi above.



## CHAPTER 1 HISTORICAL BACKGROUND

1.01 The history of Irish land law, and of its closely allied subject, conveyancing law, has been a long and tangled one. Fortunately, its details have been chronicled elsewhere<sup>1</sup> and need not be repeated here. What may be helpful, however, is a brief summary of some key features of the historical development of the law. The object of this is partly to illustrate how archaic much of our law remains and partly to explain the significance of the proposals for change contained later in the Consultation Paper.

### A The Feudal System

1.02 It is remarkable that much of our current law stems from the introduction of the Norman feudal system of land ownership. That system was imposed on England and Wales following the Norman Conquest beginning in the 11<sup>th</sup> century and was introduced to Ireland from the late 12<sup>th</sup> century. Its imposition on Ireland was a long drawn-out affair, and it was not until the early 17<sup>th</sup> century that the native Irish “Brehon” system was finally displaced.<sup>2</sup> Nevertheless, this imposition of the feudal system resulted in Irish land law and conveyancing law acquiring numerous fundamental features, many of which remain of significance in the 21<sup>st</sup> century.

#### (1) *The Concepts of Tenure and Estates*

1.03 Key features of the feudal system were the concepts that all land was held ultimately from the Crown (the concept of “tenure”) and that any person or body other than the Crown would hold (own)

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<sup>1</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000); Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997), especially Chapter 1.

<sup>2</sup> *Case of Gavelkind* (1605) Dav 49; *Case of Tanistry* (1607) Dav 28. See Pawlisch *Sir John Davies and the Conquest of Ireland* (Cambridge University Press 1985).



an “estate” in the land. It was the estate held which determined how long the person or body (or, if it was an estate of “inheritance”, heirs or successors in title) could own the land.<sup>3</sup> The feudal system did not recognise “allodial” ownership – absolute ownership of land (rather than holding it from a superior “lord”) by any person or body other than the Crown (or State) – and this remains a feature of our law.<sup>4</sup> Another feature of our law are the categories of “estates” developed under the feudal system, so that landowners today still own estates such as the “fee simple”, “fee tail”<sup>5</sup> and “life estate”. In strict theory no person or body owns “the land” (the physical entity comprising the surface of the earth,<sup>6</sup> as well as buildings and other structures erected upon it),<sup>7</sup> but rather, what is owned is the somewhat metaphysical notion of an estate or interest<sup>8</sup> in the land. It is the estate or interest in the land which can be bought and sold, leased and mortgaged, and several estates or interests can be owned by different persons at the same time in respect of the same piece of land.

1.04 As the feudal system was increasingly imposed on Ireland, its paraphernalia was imported, including much of its complex scheme of different forms of tenure and the various “services” and “incidents” owed to or enjoyed by the superior lord (grantor).<sup>9</sup> The

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<sup>3</sup> See Lyall *op cit* fn 1 Chapters 3 and 6-9; Wylie *op cit* fn 1, Chapters 2 and 4. See also Milsom *The Legal Framework of English Feudalism* (Cambridge University Press 1976)

<sup>4</sup> See paragraph 2.02 below.

<sup>5</sup> A creature of the *Statute of Westminster II 1285 c 1 (De Donis Conditionalibus)*, still on the Irish statute book. See paragraph 2.02 below.

<sup>6</sup> In fact land ownership includes the ownership of the land below the surface of the earth (*eg* minerals) and the airspace above it. See Lyall *op cit* fn 1 at 23-40; Wylie *op cit* fn 1 paragraph 4.022.

<sup>7</sup> Under the law of fixtures: see Lyall *op cit* fn 1 at 623-625.

<sup>8</sup> The distinction between “estates” and “interests” is often blurred, largely because sometimes “interests” is used as a generic expression encompassing “estates”, but at other times is used by way of distinction, to distinguish between substantial ownership (of an estate) and ownership of some minor interest falling short of an estate. Further confusion arises when reference is made to the distinction between “legal” and “equitable” ownership: see paragraph 3.03 and 6.17 below.

<sup>9</sup> See authorities cited in fn 3 above.

legislation enacted in England, which was designed to protect the position of the grantor, in particular, the most superior (or ultimate) grantor, the Crown, was made applicable to or was applied by the Crown courts in Ireland.<sup>10</sup> Even centuries later, when much of the old feudal system had crumbled<sup>11</sup> and had been supplemented by a different form of tenure (the modern leasehold system),<sup>12</sup> the Irish Parliament was still inclined to enact the equivalent of earlier English legislation.<sup>13</sup> Much of this legislation remains in force.

## **(2) The Concept of “Freehold”**

1.05 As a result of an English statute applicable to Ireland, *Quia Emptores* 1290,<sup>14</sup> and a much later Irish statute, the *Tenures (Abolition) Act (Ireland) 1662*,<sup>15</sup> the concept of a “freehold” owner of land developed. The 1290 statute conferred on all landowners holding under one of the forms of “free” tenure<sup>16</sup> the right to dispose of the land without having to obtain the superior grantor’s consent. This established one of the fundamental principles of our land law which survives to this day, the so-called rule against inalienability.<sup>17</sup> Unlike a leaseholder, upon whom it is common to impose restrictions on alienation,<sup>18</sup> an attempt to prevent a freehold owner from alienating the land will be void. The significance of the 1662 Act is that it abolished most forms of feudal tenure which had previously

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<sup>10</sup> Eg *Magna Carta* 1217 (18 John c 39) and the *Statute of Westminster III* 1290 (18 Edw 1 cc 1-3) (*Quia Emptores*). See Wylie *op cit* fn 1 paragraphs 2.40-2.47.

<sup>11</sup> See paragraph 1.05 below.

<sup>12</sup> See paragraph 1.10 below.

<sup>13</sup> Eg the *Statute of Uses (Ireland) 1634*, the equivalent of the English *Statute of Uses* 1535. See further paragraphs 1.23 and 8.20 below.

<sup>14</sup> Statute of Westminster III (18 Edw 1 c 1).

<sup>15</sup> The equivalent of the English *Tenures (Abolition) Act* 1660.

<sup>16</sup> A very common example was that known as “free and common socage”, the derivation of which has been a matter of dispute: see Wylie *op cit* fn 1 paragraphs 2.25-2.27.

<sup>17</sup> For a recent application of it see *Re Dunne’s Estate* [1988] IR 55.

<sup>18</sup> See the Commission’s *Consultation Paper on Business Tenancies* (LRC CP 21 – 2003), paragraphs 3.41 – 3.46 and 4.47.

existed and converted existing ones into a form of free tenure.<sup>19</sup> Furthermore, although the services that used to have to be performed under the various forms of tenure tended later to be commuted into money payments by way of rent, over time the need to make such payments fell into disuse. Thereafter the distinction between a freeholder and a leaseholder became clear, although some considerable blurring was to occur in Ireland later.<sup>20</sup>

### **(3) Subinfeudation**

1.06 Another important feature of the statute *Quia Emptores 1290* was that it prohibited further “subinfeudation” by landowners other than the Crown, *ie* the practice of sub-dividing the land by making sub-grants to others, who, in turn, might cause further sub-division by making sub-sub-grants and so on. Each sub-dividing rendered the collection of services due to superior owners very difficult and also diluted the value of many of the incidents attaching to the tenure.<sup>21</sup> The most superior of grantors, the Crown, had most to lose and so the statute provided that in future any dispositions by a landowner had to be by way of “substitution”, in effect an outright assignment of the landowner’s estate to a new owner who stepped into the assignor’s shoes. Although this resulted over time in most freehold land being held directly from the Crown (now the State), with no intermediate owners,<sup>22</sup> an important qualification has to be added for Ireland.

1.07 *Quia Emptores 1290* did not prohibit subinfeudation by the Crown and this became significant in Ireland during the turbulent 17<sup>th</sup> and 18<sup>th</sup> centuries. These times were marked by large-scale confiscation of land in Ireland by the English Crown, following various rebellions and uprisings,<sup>23</sup> and its “resettlement” in favour of

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<sup>19</sup> Free and common socage (see fn 16 above). See Wylie *op cit* fn 1 paragraphs 2.48-2.49.

<sup>20</sup> See paragraphs 1.12 and 2.17 below.

<sup>21</sup> See Wylie *op cit* fn 1 paragraphs 2.35 – 2.39.

<sup>22</sup> *Ibid* paragraph 2.44.

<sup>23</sup> The “rebels” were usually indicted for treason and *Acts of Attainder* were enacted causing the land to “escheat” (pass back) to the Crown by way of forfeiture. See, *eg* the Irish statutes 28 Hen 8 c 1 (1537) (attainder of Earl of Kildare and others); 2 Eliz 1 c 8 (1560) (Sir Oswald Massingberde); 11

English and Scottish settlers.<sup>24</sup> The Crown grants made in favour of these settlers frequently contained a “*non obstante Quia Emptores*” clause, authorising the grantee to make further sub-grants. The estate granted to the grantee was a freehold one, the fee simple. It may be questioned whether the Crown had the right to abrogate *Quia Emptores* in favour of other persons,<sup>25</sup> but that issue became largely academic because the Irish Parliament confirmed most of these Crown grants by passing various Acts of Settlement.<sup>26</sup> Furthermore, it was usual for such Crown grants in Ireland to reserve the payment of rent to the Crown. These Crown rents, or “quit” rents as they were known in Ireland,<sup>27</sup> remained a feature of our law until very recently.<sup>28</sup> A consequence of this was that there was created in Ireland a category of freehold owners who were liable to pay rent, hence the blurring of the distinction between freehold and leasehold ownership. In effect these early Crown grants, and sub-grants made subsequently under the “*non obstante Quia Emptores*” clauses, were an early form of a type of land grant which became very common in Ireland: the fee farm grant.<sup>29</sup>

#### **(4) Copyhold**

1.08 A key feature of the feudal system was the unit of landholding known as the “manor” – hence the expression “lord of

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Eliz 1 sess 3 c 1 (1569) (Shane O’Neill and others); 27 Eliz 1 c 1 (1585) (James Eustace, Lord Baltinglass); 28 Eliz 1 c 7 (1586) (Earl of Desmond and others).

<sup>24</sup> The most comprehensive resettlement was, of course, that which occurred in the North of the island, the so-called “Plantation of Ulster” which followed the failure of a rebellion led by the Earls of Tyrone and Tyrconnell (Donegal), who were forced to flee in 1607 (the “Flight of the Earls”): see Wylie *op cit* fn 1 paragraph 1.30.

<sup>25</sup> See Wylie *op cit* fn 1 paragraph 2.45.

<sup>26</sup> *Eg* the Acts of 1634 (10 Chas 1 c 3; 10 Chas 1 sess 3 cc 2 and 3), 1639 (15 Chas 1 sess 2 c 6), 1665 (17 & 18 Chas 2 c 2) and 1695 (7 Will 3 c 3). See the discussion of such legislation in *Moore v Attorney General* [1934] IR 44.

<sup>27</sup> See Wylie *op cit* fn 1 paragraph 6.010.

<sup>28</sup> See paragraph 7.08 below.

<sup>29</sup> See further paragraphs 1.13 and 2.17 below.

the manor”. This comprised the large manor house owned by the landowner and the immediate land attached to it (the “demesne”). It would usually have a number of “unfree” tenants (“villeins”), who would be permitted to cultivate a limited amount of land and be subject to the manor’s court for settlement of disputes. In due course transactions entered into by such tenants and the lord of the manor (usually through his steward or bailiff) were recorded on the manor’s court rolls. This led to the tenure of such tenants being referred to as tenure “by copy of the court roll”, or in shorthand, “copyhold”.<sup>30</sup> It is probable that some such system existed in parts of Ireland in the early centuries of imposition of the feudal system, but it is unlikely that it survived the upheavals of the 17<sup>th</sup> and 18<sup>th</sup> centuries’ process of confiscation and resettlement,<sup>31</sup> still less the land purchase schemes of the 19<sup>th</sup> century.<sup>32</sup> Nevertheless, there was much legislation enacted on the subject for Ireland, such as that relating to manor courts, which were not abolished until the enactment of the *Manor Courts Abolition (Ireland) Act 1859*. This Act, however, simply transferred the jurisdiction to the then petty sessions courts.<sup>33</sup> The Copyhold Acts, enacted at Westminster, provided for commutation of manorial rights and enfranchisement of copyhold tenants and applied expressly to Ireland.<sup>34</sup> Yet it may be significant that the Copyhold Act 1894, which consolidated the earlier Acts, expressly did not apply to Ireland.<sup>35</sup> That Act repealed all the earlier Acts, but, because it did not apply to Ireland, it would appear that the earlier Acts remained on the Irish statute book and still do!<sup>36</sup>

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<sup>30</sup> See Wylie *op cit* fn 1 paragraphs 2.30 – 2.33.

<sup>31</sup> See paragraph 1.07 above.

<sup>32</sup> See paragraph 1.19 below. See also *Delacherois v Delacherois* (1864) 11 HLC 62, which concerned the “manor” of Donaghadee in Co. Down. On the subject of manor copyholds Willes J stated: “We are not aware that these base tenures exist in Ireland.” (Page 83) In the same case Lord St Leonards (formerly Sir Edward Sugden, Lord Chancellor of Ireland) doubted whether the manor of Donaghadee retained its old manorial customs, such as its own court: *ibid* at 99.

<sup>33</sup> Section 5.

<sup>34</sup> See *eg Copyhold Act 1841* section 100.

<sup>35</sup> Section 99.

<sup>36</sup> See paragraph 2.08 below.

**(5) Crown Land**

1.09 Another consequence of the Norman Conquest and imposition of the feudal system of tenure was, of course, that the Crown acquired much land, some of which was retained rather than being re-granted or resettled on subjects. In Ireland the acquisition of land by the Crown was greatly increased by the confiscations of the 17<sup>th</sup> and 18<sup>th</sup> centuries mentioned earlier.<sup>37</sup> Over the centuries much legislation was enacted relating to the management of such land and much of this applied, expressly or by implication, to Crown land in Ireland. Any such land became vested in the State in 1922, but much of the old legislation has remained on the statute book. As is discussed later, this is no longer appropriate.<sup>38</sup>

**B Leasehold Tenure**

1.10 As the centuries following the Norman Conquest passed, the freehold owners holding land under the feudal system of tenure began to develop a different form of tenure. This new form of tenure was not part of the feudal system, and so was not governed by the principles, including those enshrined in statute law,<sup>39</sup> of that system. The new form of tenure was initially a purely contractual arrangement between the freehold owner and the person allowed to occupy and use some of the freeholder's land in return for a money payment by way of rent. This new form is what became known as leasehold tenure.<sup>40</sup> The notion of a leasehold owner (or tenant) holding an "estate" in the land, comparable to the estates held by a freehold owner,<sup>41</sup> only became established when the courts in the 17th century recognised that a leasehold tenant could also bring an action for recovery of possession of the land from someone who had taken possession of it

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<sup>37</sup> See paragraph 1.07 above.

<sup>38</sup> See paragraph 2.08 below.

<sup>39</sup> Eg the rule against inalienability: see paragraph 1.05 above.

<sup>40</sup> See generally Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998). Note the somewhat paradoxical return to the "contractual" basis of leasehold arrangements brought about by *Deasy's Act 1860*: see paragraph 1.15 below.

<sup>41</sup> See paragraph 1.03 above.

wrongfully. This was the action of ejectment,<sup>42</sup> which survives to this day in various forms.<sup>43</sup>

1.11 Following the large-scale confiscations and re-settlement of land in Ireland during the 17<sup>th</sup> and 18<sup>th</sup> century<sup>44</sup> the new settlers given freehold<sup>45</sup> grants of large tracts of land quickly realised the convenience and benefits of letting much of the land to leasehold tenants. Many of the freehold settlers became “absentee” landlords, leaving the running of their Irish estates in the hands of agents. This sowed the seeds of the “Irish land problem” which the Westminster Parliament struggled to solve during the latter half of the 19<sup>th</sup> century. This subject is taken up later,<sup>46</sup> but first more must be said about the leasehold system of tenure as it developed in Ireland.

### **(1) Confusion of Freehold and Leasehold**

1.12 One striking feature of the Irish leasehold system is the variety of the forms of leasehold arrangements which developed. Apart from the traditional forms, such as a tenancy for a fixed period of years or lesser fixed period and a periodic tenancy, like a yearly, monthly or weekly tenancy,<sup>47</sup> there emerged several categories which involved a mixture of freehold and leasehold concepts.

1.13 One category that has already been mentioned is the fee farm grant. Originally, this was essentially a freehold concept, in that the tenure created was freehold despite the prohibition on making further freehold grants contained in the early statute, *Quia Emptores 1290*. The estate granted to the grantee was also a freehold one, the

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<sup>42</sup> See Furlong *The Law of Landlord and Tenant as Administered in Ireland* (2<sup>nd</sup> ed La Touche 1869) Vol II, bk VI, Chapter II; Harrison *The Law and Practice Relating to Ejectments in Ireland* (Hodges Figgis 1903). See also Dowling *Ejectment for Non-Payment of Rent* (SLS Legal Publications (NI) 1986).

<sup>43</sup> See Wylie *op cit* fn 1 Chapter 27.

<sup>44</sup> See paragraph 1.07 above.

<sup>45</sup> Note, however, that many of them were, in fact, fee farm grantees liable to pay a “quit” rent to the Crown: see paragraphs 1.07 above and 7.08 below.

<sup>46</sup> Paragraph 1.18 below.

<sup>47</sup> See Wylie *op cit* fn 1 Chapter 4.

fee simple. As explained earlier,<sup>48</sup> this was made possible in Ireland because of the special dispensation contained in the Crown grants re-settling the land following the 17<sup>th</sup> and 18<sup>th</sup> century confiscations. The rent reserved in such “*non obstante Quia Emptores*” fee farm grants<sup>49</sup> was not therefore, in strict theory, a leasehold rent, but nevertheless was a “rent service” and probably recoverable like a leasehold rent.<sup>50</sup> Very few of such grants will have survived the operation of the late 19<sup>th</sup> and 20<sup>th</sup> century land purchase schemes.<sup>51</sup>

1.14 Much more common were the other categories of fee farm grants which involved a more obvious confusion of freehold and leasehold concepts. One such category was the various types of “conversion” grants facilitated<sup>52</sup> or created<sup>53</sup> by statute.<sup>54</sup> The key feature of such grants was that the grantee had originally been granted<sup>55</sup> a lease only, so that leasehold tenure only existed. The estate granted might or might not have been a leasehold one. In some

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<sup>48</sup> Paragraph 1.07 above.

<sup>49</sup> Known as a “quit rent” in Ireland: see Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 6.010 – 6.012.

<sup>50</sup> *Ibid* paragraphs 4.063 – 4.064.

<sup>51</sup> See paragraph 1.19 below.

<sup>52</sup> In the sense that a leaseholder was given the right to “convert” the lease into a fee farm grant.

<sup>53</sup> In the sense that a statutory provision automatically converted the lease into a fee farm grant. Thus section 37 of the *Renewable Leasehold Conversion Act 1849* provided that any post-1849 leases for lives or years renewable for ever operated automatically as a fee farm grant. Section 74 of the *Landlord and Tenant (Amendment) Act 1980* purports to bring about a similar automatic conversion of pre-1849 leases for *lives* (but not, be it noted, *years*) renewable for ever in respect of which the power to convert had not yet been exercised. The epithet “similar” is used because it would appear that the lessee does *not* obtain a fee farm grant, but nevertheless in substance it seems to be a statutory equivalent: see Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 211; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 4.081.

<sup>54</sup> For detailed treatment of the various categories of fee farm grant see Wylie *op cit* fn 53 paragraphs 4.057 – 4.111.

<sup>55</sup> Or in the case of post-1849 perpetually renewable leases caught by section 37 of the *Renewable Leasehold Conversion Act 1849*, the original grant *purported* to be a lease.



cases it would have been,<sup>56</sup> but in others it might have been a freehold one, as in the case of a lease for lives renewable for ever.<sup>57</sup> Once the conversion took place, however, the interest held by the grantee was clearly a freehold one, the fee simple. However, in most<sup>58</sup> other respects, the grantee remained a leaseholder, subject to the payment of rent and performance of other obligations contained in the original leasehold grant. The usual remedies for recovery of rent and enforcement of other obligations available to a landlord remained available to the fee farm grantor.<sup>59</sup>

1.15 Considerable stimulus for the creation of fee farm grants was provided by the *Landlord and Tenant Law Amendment Act, Ireland, 1860*. This Act, invariably known as “Deasy’s Act”,<sup>60</sup>

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<sup>56</sup> Eg “bishops’ leases” coming within the *Church Temporalities Acts 1833-1860*: see Wylie *op cit* fn 53 paragraph 4.079.

<sup>57</sup> The granting of a freehold estate (a life estate) had the advantage in earlier times of conferring the right to vote in parliamentary elections and this was probably a primary reason for the popularity of such leases. Another was that it would be provided that the landlord was entitled to a “fine” (a payment of a capital sum) every time one of the lives had to be renewed. See generally Lyne *Leases for Lives Renewable for Ever* (Hodges and Smith 1837).

<sup>58</sup> But not all, *eg*, it would appear that a subsequent assignment of the fee farm grantee’s estate is subject to the law governing conveyances of a freehold (fee simple) estate, *ie*, words of limitation must be used: see *Re Courtney* [1981] NI 58. *Cf* an original conversion grant, *eg*, a grant made under the *Renewable Leasehold Conversion Act 1849*: see *Re Johnston’s Estate* [1911] 1 IR 215. Note also that a fee farm rent is not treated like a leasehold rent by the *Statute of Limitations 1957*, so that non-payment of the fee farm rent may result in the grantor losing his title, as opposed to simply losing the right to recover arrears of rent (as is the position with a leasehold rent): see Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 23.30, fn 97.

<sup>59</sup> See Wylie *op cit* fn 53 paragraphs 4.083-4.086.

<sup>60</sup> The Bill, which became the 1860 Act, was piloted through the Westminster Parliament by Sergeant Deasy who was then the Attorney General for Ireland. In fact, the Bill was essentially the one drafted and introduced by the Irish law officers in 1852 (Attorney General Napier and Solicitor General Whiteside), but which had lapsed with the fall of Lord Derby’s Government that year. Although adopted by the new Liberal Government and passed by the House of Commons, it had been rejected by the House of Lords in 1853. See Dowling “The Genesis of Deasy’s Act”

introduced some radical changes to traditional leasehold land. One was to abolish the notion of tenure and, with it, the requirement that the landlord should hold a reversion in the land.<sup>61</sup> Instead, the relationship of landlord and tenant in Ireland was in future to be based upon the “contract” of the parties.<sup>62</sup> The precise effect of these provisions has long been controversial and the generally accepted view is that they were probably not as revolutionary as they had first appeared.<sup>63</sup> However, what is clear is that it facilitated the creation of a new category of fee farm grant, one where the grantee obtained a freehold estate (fee simple), but subject to payment of a perpetual rent and performance of various other perpetual obligations. The grantor would hold no reversion, but would be entitled to receive the rent and to enforce its payment, and performance of other obligations entered into by the grantee, by invoking all the usual landlord’s remedies for enforcing a leasehold tenant’s obligations.<sup>64</sup> Such grants grew in popularity and are still made in modern times.<sup>65</sup>

1.16 Other forms of confusion of the concepts freehold and leasehold occurred. Apart from leases for lives renewable for ever

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(1989) 40 NILQ 53.

<sup>61</sup> Section 3.

<sup>62</sup> The paradox of reverting to the original nature of leaseholds has already been noted: see paragraph 1.10 above.

<sup>63</sup> Thus, notwithstanding the apparent return to the contractual basis of the relationship (fn 62 above), it is clear that the tenant still has an estate in the land, which can be passed to successors in title, and successors to both the landlord and tenant are equally entitled to the benefit and burden of rights and obligations created by the lease or tenancy agreement. For full discussion of the impact of section 3 see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 2.07 – 2.38.

<sup>64</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed 1997) paragraphs 4.091 – 4.103. Note that it is possible to create another type of fee farm grant, which involves neither feudal tenure nor the relationship of landlord and tenant. In such instances the rent is a *rentcharge*, to be distinguished from a rent service: *ibid* paragraphs 4.104 – 4.111. See paragraph 7.11 below.

<sup>65</sup> One reason why they are still used is that the running of the burden of covenants is governed by leasehold law, so that the limitations of freehold law do not apply, *eg*, the rule that the *burden* of a positive covenant (*eg* to repair) will not run with freehold land: see paragraph 7.03 below.

discussed above,<sup>66</sup> it was also not uncommon to have a grant of a lease for lives (a freehold estate) combined with a term of years in the same grant.<sup>67</sup> It was often a matter of construction as to whether the term of years was concurrent with the lease for lives or was reversionary (*ie* ran from the dropping of the last surviving life).<sup>68</sup> Such leases are very rare nowadays.

## **(2) Landlords' Rights**

1.17 As more and more leasehold arrangements were entered into by owners of large estates, the initial response of the Westminster Parliament was to bolster the position of the landlord. Thus much of the legislation on landlord and tenant matters enacted during the 18<sup>th</sup> and early 19<sup>th</sup> century was designed to improve landlords' remedies against tenants.<sup>69</sup> This reached its zenith in *Deasy's Act 1860*, most of which is concerned with such matters<sup>70</sup> rather than the conceptual changes mentioned earlier.<sup>71</sup> It was only from the second half of the 19<sup>th</sup> century onwards that the balance was altered in favour of tenants.

## **(3) Tenants' Rights**

1.18 The Westminster response to agitation for alleviation of the increasingly grim position of Irish agricultural tenants, which was illustrated in the most appallingly graphic way by the famines of the 1840s, eventually developed in two stages.<sup>72</sup> The first was the

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<sup>66</sup> Paragraph 1.14.

<sup>67</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 4.177 – 4.178.

<sup>68</sup> Contrast *Duckett v Keane* [1903] 1 IR 409 (99-year term running concurrently with lease for three lives) with *Adams v McGoldrick* [1927] NI 127 (61-year term reversionary to sub-lease for the life of the surviving life named in the head-lease).

<sup>69</sup> Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 1.08.

<sup>70</sup> See the Commission's Consultation Paper on the General Law of Landlord and Tenant (LRC CP 28 – 2003).

<sup>71</sup> Paragraph 1.15 above.

<sup>72</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 15; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 1.39 – 1.56.

enactment of legislation to confer various statutory rights on tenants of agricultural and pastoral land. Thus the *Landlord and Tenant (Ireland) Act 1870* provided a right to compensation for improvements and for disturbance if the tenancy was not renewed. The *Land Law (Ireland) Act 1881* gave statutory recognition to what were known as the “Three Fs”, *ie*, the rights to be charged a fair rent (fixed by an independent body),<sup>73</sup> to make free sales of the tenancy<sup>74</sup> and to have fixity of tenure.<sup>75</sup> Such measures clearly improved the position of tenants considerably and the principle of conferring such statutory rights was followed subsequently with respect to urban tenants.<sup>76</sup> It was then continued in the post-1922 *Landlord and Tenant Acts*.<sup>77</sup> The operation of the post-1922 legislation, and, indeed, of the pre-1922 legislation still on the statute book, is being studied as part of the Commission’s separate Landlord and Tenant Project.

#### **(4) Land Purchase Schemes**

1.19 The bitter legacy left by the large scale 17<sup>th</sup> and 18<sup>th</sup> century confiscations of land meant that the conferring of rights on tenants was never likely to satisfy the demands for reform. The Irish wanted their land back. This led to the second stage, the land purchase scheme.<sup>78</sup> Under this scheme tenants of agricultural and pastoral land were given the right to buy out the landlords’ freehold. Early recognition of this principle followed from the disestablishment of the Church of Ireland by the *Irish Church Act 1869*. That Act vested the substantial holdings of land that had been previously vested in the Church in the Church Temporalities Commissioners. The Commissioners were authorised to sell off the land to the tenants,

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<sup>73</sup> Initially by the newly established Land Commission.

<sup>74</sup> Subject to the landlord’s right to object, but the reasonableness of this could be challenged in the courts.

<sup>75</sup> Tenants became entitled to 15-year judicial tenancies, which were renewable for further 15-year periods.

<sup>76</sup> The *Town Tenants (Ireland) Act 1906*.

<sup>77</sup> Initially with the enactment of the *Landlord and Tenant Act 1931*.

<sup>78</sup> See Lyall *op cit* fn 72 Chapter 15; Wylie *op cit* fn 72 paragraphs 1.51 – 1.57.

who were aided by loan of three-quarters of the purchase price, repayable by way of a 32-year mortgage.<sup>79</sup> The principle of land purchase was then extended to agricultural tenants generally by a series of Acts enacted at Westminster during the remainder of the 19<sup>th</sup> century<sup>80</sup> and early part of the 20<sup>th</sup> century.<sup>81</sup> It was then pursued with renewed vigour after 1922, with further legislation being enacted.<sup>82</sup>

1.20 It is worth noting some major consequences of the land purchase scheme at this point. One was that agricultural and pastoral land, which still constitutes most of the landmass of the State, became the subject of freehold tenure only and leasehold tenure largely disappeared. It is only in very recent times that it has started to reappear.<sup>83</sup> Of even more significance from the point of view of land law and conveyancing reform is that the freehold title vested in tenant purchasers under the scheme was required to be registered in the Land Registry.<sup>84</sup> The result is that most agricultural land is now registered

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<sup>79</sup> The idea for the scheme came from the English economist John Bright.

<sup>80</sup> Provisions were included in the *Landlord and Tenant (Ireland) Act 1870* and *Land Law (Ireland) Act 1881*, with various refinements being made by the *Purchase of Land (Ireland) Acts 1885 and 1891* and *Land Law (Ireland) Act 1896*.

<sup>81</sup> By the *Irish Land Acts 1903 and 1909*.

<sup>82</sup> See Wylie *op cit* fn 72 paragraphs 1.64-1.68. The scheme has now run its course and the Land Commission has been dissolved under the *Irish Land Commission (Dissolution) Act 1992*. That Act came into operation on 31 March 1999 and the vestiges of the Commission's functions then transferred to the Department of Agriculture and Food. For the latest move to wrap up outstanding matters (*eg* collection of land purchase annuities) see the *Land Bill 2004* (presented to the Senate on 13 July 2004 by Senator Mary O'Rourke).

<sup>83</sup> The attempt to boost agricultural tenancies by enactment of the *Land Act 1984* (section 2 of which "disapplied" to new agricultural leases the statutory rights contained in the 19th century 1870 and 1881 Acts: see paragraph 1.18 above) seems to have had very limited success: see Wylie *op cit* fn 72 paragraph 18.03.

<sup>84</sup> Initially under the *Local Registration of Title (Ireland) Act 1891* and subsequently under the *Registration of Title Act 1964* (section 23). See Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995).

land and this is a major contrast with much urban land, which remains unregistered land.<sup>85</sup>

#### **(5) Leasing Powers**

1.21 A major legislative development of the 18<sup>th</sup> and 19<sup>th</sup> centuries was the enactment of statutes conferring the power to lease land on persons or bodies who could not otherwise dispose of land.<sup>86</sup> Thus various ecclesiastical officeholders (such as bishops) and educational bodies were given statutory powers to lease land. This was the derivation of the “bishop” and “college” leases once so common in Ireland.<sup>87</sup> Similar statutory powers of leasing were conferred on private landowners who held a limited freehold interest only in the land (eg a fee tail or life estate), usually under some family settlement. A plethora of statutes conferred such leasing powers for particular purposes such as building churches, schools, corn mills, prisons and hospitals, and for activities, such as bog reclamation, mining and growing timber.<sup>88</sup> Later, more general powers, including leasing powers, were conferred by legislation such as the *Settled Land Acts 1882-1890*. Many of the older statutes remain in force, as do the *1882-1890 Acts*.

### **C Family Settlements**

1.22 Down through the centuries, when land remained the main source of wealth and security, there was a natural desire amongst those fortunate enough to own land to hold on to it. This was a particular aim of families who had acquired substantial estates,<sup>89</sup> to whom “keeping it in the family” was the guiding principle. This aim

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<sup>85</sup> See paragraph 1.25 below.

<sup>86</sup> For detailed list of such statutes see paragraph 4.04 below.

<sup>87</sup> Cf the “Shelbourne” lease, which derived from the penal laws debarring Catholics from purchasing land, but permitting them to take a lease up to 31 years. See Wylie *op cit* fn 72 paragraph 1.36.

<sup>88</sup> See again, paragraph 4.04 below.

<sup>89</sup> In this context the word “estate” is used in the sense of a physical entity comprising a large area of land, rather than in the technical sense of the legal concept of what a landowner really owns, *ie*, some freehold or leasehold estate, like a fee simple or tenancy for a term of years: see paragraph 1.03 above.

was adhered to by the English and Scottish settlers granted land by the Crown following the confiscations of Irish land during the 17<sup>th</sup> and 18<sup>th</sup> centuries.<sup>90</sup> It was originally facilitated in the very early days of the introduction of the feudal system. The *Statute of Westminster II 1285 (De Donis Conditionalibus)* created the fee tail estate, the primary characteristic of which was that the land was tied to being inherited by the grantee's "heirs", a system of inheritance which could not be altered by the grantee's will.<sup>91</sup> Use of this estate and the other limited freehold estate recognised by our law, the life estate, became the key to the creation by conveyancers of settlements designed to ensure that the land passed through successive generations of the same family. In due course large tracts of land became tied up in such settlements, with the successive generations unable to deal with it commercially because at any one time the current owner had only a limited estate with which to deal.<sup>92</sup> Eventually the legislature had to intervene and, as mentioned earlier, this was done initially by granting leasing powers to such limited owners.<sup>93</sup> Later legislation granted more extensive powers, such as the power to sell and to mortgage the land. The result was a wide range of very complex legislation culminating in the *Settled Land Acts 1882-1890*, which remain in force.<sup>94</sup>

## **D Conveyancing**

1.23 Over the centuries, conveyancing law developed in tandem with land law. Although there is much overlap between the two laws, the most convenient distinction to draw is that land law is concerned primarily with defining the various estates and interests which can be owned under the legal system, whereas conveyancing law is concerned primarily with determining how these estates and interests

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<sup>90</sup> See paragraphs 1.07 and 1.09 above.

<sup>91</sup> When wills of land became possible after enactment of the *Statute of Wills (Ireland) 1634*.

<sup>92</sup> This is a good illustration of the fundamental principle that what is owned by a landowner is not the physical entity (the "land"), but rather the legal concept of an estate or interest in the land: see paragraph 1.03 above.

<sup>93</sup> See paragraph 1.21 above.

<sup>94</sup> See further paragraph 4.09 below.

can be dealt with (“conveyed”), eg, bought and sold, leased and mortgaged.<sup>95</sup> Various archaic methods of conveying land were developed under the feudal system, such as feoffment with livery of seisin,<sup>96</sup> and although the modern form of a deed (a document “under seal”) was confirmed as an alternative by the *Real Property Act 1845*, those old forms<sup>97</sup> have not, in fact, been abolished.

1.24 Many conveyancing transactions are carried out in several stages and, in particular, usually involve execution of two documents.<sup>98</sup> The first involves entering into a contract for the sale and purchase of the land.<sup>99</sup> Contracts relating to land transactions have long been the subject of statutory control, imposed initially by the *Statute of Frauds (Ireland) 1695*.<sup>100</sup> That Act remains in force. The terms, or conditions, of such contracts tend to be very complicated and again much legislation on this subject has been enacted which also remains in force.<sup>101</sup> In addition this legislation contains provisions relating to the other document that is usually executed. This is the deed intended to complete the transaction agreed by the parties to the initial contract.

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<sup>95</sup> In this respect it is concerned primarily with “*inter vivos*” dispositions, ie, made while the landowner is still alive, in contrast to succession law, which is concerned with dispositions taking effect on death of the landowner, ie, under a will or in accordance with the law of “intestate” succession (where there is no valid will). The law of succession was the subject of relatively modern consolidating legislation in the *Succession Act 1965*.

<sup>96</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 67 and 278; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 3.023-3.024.

<sup>97</sup> And later conveyances “to uses” operating under the *Statute of Uses (Ireland) 1634*.

<sup>98</sup> See generally Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996).

<sup>99</sup> To be strictly correct, the sale and purchase of the “estate” or “interest” which the vendor is selling and the purchaser is buying: see paragraphs 1.03 and 1.22 above.

<sup>100</sup> See paragraph 8.03 below.

<sup>101</sup> Eg the *Vendor and Purchaser Act 1874* and various parts of the *Conveyancing Acts 1881-1911*.



## **E Registration**

1.25 Two systems of registration became key features of our land law and, in particular, of our conveyancing system.<sup>102</sup> One was introduced at the beginning of the 18<sup>th</sup> century, the Registry of Deeds system.<sup>103</sup> During the 19<sup>th</sup> century a quite different system of registration was introduced, a system of registration of title operated by the Land Registry.<sup>104</sup> The two systems are mutually exclusive in the sense that in a particular transaction relating to land,<sup>105</sup> the land will be either “unregistered” land (*ie* its title is not yet registered and so the Registry of Deeds system applies) or “registered” land (*ie* the title is already registered in the Land Registry and so the Registry of Deeds system is irrelevant).<sup>106</sup>

### **(1) Registration of deeds**

1.26 The primary function of the registration of deeds system is to govern the priorities as between different transactions relating to the same estate in the same parcel of land.<sup>107</sup> It provides a public register for recording the basic details<sup>108</sup> of each document<sup>109</sup> dealing with the land. A failure to register may result in that document losing

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<sup>102</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapters 5 and 24; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapters 21 and 22.

<sup>103</sup> Initially by the *Registration of Deeds Act (Ireland) 1707*.

<sup>104</sup> Initially the concept was introduced by the *Record of Title (Ireland) Act 1865*, but it only became fully established with the setting up of the Land Registry by the *Local Registration of Title (Ireland) Act 1891*.

<sup>105</sup> In strict theory, what is said here relates to the particular “estate” in the land which is the subject of the transaction: see paragraph 1.03 above.

<sup>106</sup> See now section 116 of the *Registration of Title Act 1964*.

<sup>107</sup> See generally *Madden Registration of Deeds, Conveyances and Judgment Mortgages* (2<sup>nd</sup> ed McGee 1901).

<sup>108</sup> By way of what is known as a “memorial” of the deed or other document: see paragraph 11.03 below.

<sup>109</sup> Although from the beginning known as the Registry of “Deeds”, this is something of a misnomer because the system has always applied to any document dealing with land, *ie*, included unsealed documents such as a written contract for the sale of land: see *O'Connor v McCarthy* [1982] IR 161 at 171 (*per* Costello J).

priority to a subsequent document which is registered, *ie*, the person claiming rights to the land under the unregistered document may find that they cannot be enforced against the land because the person claiming rights under the subsequent, but registered, document has priority.

1.27 There is no doubt that the Registry of Deeds system has been a considerable success over the centuries, even though it should be regarded as a very limited “stop-gap” measure pending complete registration in the Land Registry of the titles of all land in the State. Arguably that ultimate aim has been in contemplation at least since the Land Registry was established by the *Local Registration of Title (Ireland) Act 1891*. Not only did it provide for compulsory registration of the titles to land purchased under the land purchase scheme,<sup>110</sup> it also facilitated voluntary registration of the title to other land. The 1891 Act was replaced by the *Registration of Title Act 1964*, and this enshrined the ultimate aim by including specific provisions for extension of the system of compulsory registration, by designating any county or county boroughs as a “compulsory registration area”.<sup>111</sup> Unfortunately progress in realising the aim has been very slow, with only three counties<sup>112</sup> so far designated as compulsory registration areas and that was done over 30 years ago.<sup>113</sup> Until the ultimate aim of the complete registration of all titles is achieved, there will remain parcels of unregistered land to be governed by the Registry of Deeds system.

1.28 Notwithstanding the considerable progress which has been made in recent years in computerising the Registry of Deeds records, the fact remains that the system remains governed by the original 1707 Act and later amending Acts.<sup>114</sup> The Acts are couched in

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<sup>110</sup> And the titles to other land, *eg*, houses bought or built under the *Small Dwellings Acquisition Act 1899* and land acquired by local authorities for labourers’ plots under the *Labourers (Ireland) Act 1906*.

<sup>111</sup> See sections 23-25. See also McAllister *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland 1973) Chapter II; Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995) Chapter 22.

<sup>112</sup> Carlow, Laois and Meath.

<sup>113</sup> As from 1 January 1970: see Compulsory Registration of Ownership (Carlow, Laois and Meath) Order 1969 (SI No 87 of 1969).

<sup>114</sup> Major amending Acts were the *Registry of Deeds (Ireland) Act 1832* and

archaic language and are full of technical complexities and requirements which are no longer appropriate. The case for updating replacement is unanswerable.<sup>115</sup>

**(2) Registration of title**

1.29 This system largely falls outside the scope of this Consultation Paper because it was the subject of comparatively recent, post-1922, legislation, *ie*, the *Registration of Title Act 1964*.<sup>116</sup> What is needed primarily is completion of the computerisation programme instituted in recent years and rapid progress on extension of compulsory registration of title, so as to achieve the ultimate aim of having all titles throughout the State in the system.<sup>117</sup> When that is achieved the Registry of Deeds will become redundant. However, the Paper does point out later that there are some flaws in the 1964 Act which ought to be dealt with as a tidying-up measure.<sup>118</sup>

**F Mortgages**

1.30 One of the most common of transactions relating to land is the securing of a debt by mortgaging the land. Two forms have gained particular significance over the centuries. One is a loan mortgage, where the owner of the land<sup>119</sup> (the borrower) secures a loan by mortgaging the land in favour of the lender. Frequently the borrower is a purchaser and mortgages the land at the same time as it

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*Land Transfer (Ireland) Act 1848*. For detailed annotations to these and the other Acts still in force see Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) Part II.

<sup>115</sup> See paragraph 11.01 below.

<sup>116</sup> See generally the treatises on this by McAllister and Fitzgerald, fn 111 above.

<sup>117</sup> Progress has not been helped by the uncertainty created by the hiatus in implementing the governmental proposal, announced as long ago as September 1990, to convert the Land Registry and Registry of Deeds into a commercial semi-State body. This has yet to be implemented.

<sup>118</sup> See paragraph 13.02 below.

<sup>119</sup> Again in strict theory what is mortgaged is not the physical entity, the land, but the estate or interest in the land owned by the mortgagor: see paragraph 1.03 above.

is purchased.<sup>120</sup> The other form of mortgage, which is frequently used in Ireland, is the special statutory form created as a means of enforcing a judgment debt,<sup>121</sup> a judgment mortgage.

**(1)      *Loan Mortgages***

1.31      The law governing the creation of mortgages on land to secure loan debts and the rights and remedies of the mortgagor (the borrower) and, more particularly, of the mortgagee (the lender), has had a very long history.<sup>122</sup> Although there has been some statutory intervention, much of it occurred over a century ago,<sup>123</sup> and the traditional methods of creating mortgages, and rules based on these methods, have remained unchanged. Arguably these create unnecessary complications, and frequently militate against the true nature of a loan mortgage transaction – the securing of the lender’s loan.<sup>124</sup> The need for simplification and rationalisation seems clear.<sup>125</sup>

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<sup>120</sup>      See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 23; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapters 12 and 13.

<sup>121</sup>      *Ie* a debt in respect of which the creditor has obtained a court order for its enforcement.

<sup>122</sup>      See Johnston *Banking and Security Law in Ireland* (Butterworths 1998).

<sup>123</sup>      *Eg* in the *Conveyancing Acts 1881-1911*. Note, however, the introduction of some consumer protection in respect of housing loans by the *Consumer Credit Act 1995*: see paragraph 9.11 below.

<sup>124</sup>      Professor F W Maitland, the doyen of English authorities on the law of equity wrote: “that is the worst of our mortgage deed – owing to the action of equity, it is one long *suppressio veri* [suppression of the truth] and *suggestio falsi* [suggestion of falsehood]”. *Equity* (revised ed by Brunyate Cambridge University Press 1936) at 182.

<sup>125</sup>      Notwithstanding considerable changes introduced in England by the *Law of Property Act 1925*, the Law Commission considered that much more reform is still needed: see *Transfer of Land: Land Mortgages* (Law Com No 204, 1991). See also Jackson, “The Need to Reform the English Law of Mortgages” (1978) 94 LQR 571.

## **(2) Judgment Mortgages**

1.32 The system of enabling a judgment creditor to register<sup>126</sup> a judgment mortgage against the debtor's land was introduced by the *Judgment Mortgage (Ireland) Act 1850*<sup>127</sup> and has been much availed of over the years. However, here again the original legislation still in force is marred by considerable technical complexity and provisions which are no longer appropriate. The Commission recently published a Consultation Paper on this subject, recommending various reforms.<sup>128</sup>

## **G Other Jurisdictions**

1.33 Finally, it is worth drawing attention to reforms which have taken place, or been proposed, in the two other jurisdictions which share much of the historical development outlined above. This is particularly relevant in the context of pre-1922 statutes, because many of these were shared by those other jurisdictions, which are, of course, England (and Wales) and Northern Ireland. England and Wales replaced most of the pre-1922 statutes initially with the property legislation enacted in 1925,<sup>129</sup> which has since been modified substantially.<sup>130</sup> The law of Northern Ireland has been the

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<sup>126</sup> In either the Registry of Deeds or Land Registry, depending on whether the debtor's land is unregistered or registered land: see paragraph 1.25 above.

<sup>127</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 776-778; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 13.163 – 13.182. For detailed annotations on the 1850 Act and the amending *Judgment Mortgage (Ireland) Act 1858*, see Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes Series 1999) Part II.

<sup>128</sup> *Consultation Paper on Judgment Mortgages* (LRC CP 30 – 2004). See further Chapter 10 below.

<sup>129</sup> Settled Land Act, Trustee Act, Law of Property Act, Land Registration Act, Land Charges Act and Administration of Estates Act.

<sup>130</sup> By, eg, the *Law of Property Act 1969*, *Land Charges Act 1972*, *Local Land Charges Act 1975*, *Law of Property (Miscellaneous Provisions) Acts 1989 and 1994*, *Trusts of Land and Appointment of Trustees Act 1996* and *Land Registration Act 2002*.

subject to two major reviews,<sup>131</sup> resulting in recommendations for wholesale reforms, some of which have been implemented.<sup>132</sup> These matters have been taken into consideration in carrying out stage one of the Joint Project<sup>133</sup> and further references to them will be found throughout the Consultation Paper.

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<sup>131</sup> By the Land Law Working Party, which produced the *Survey of the Land Law of Northern Ireland* (HMSO 1971), and the Land Law Working Group: see its *Final Report* (HMSO 1990). Professor Wylie was a member of both the Working Party and Working Group.

<sup>132</sup> See, eg the Property (NI) Order 1978, Registration (Land and Deeds) (NI) Order 1992, Wills and Administration Proceedings (NI) Order 1994, Property (NI) Order 1997 and Ground Rents (NI) Order 2001.

<sup>133</sup> See page vi above.



## CHAPTER 2     TENURES AND ESTATES

2.01     This chapter deals with the fundamental concepts of tenure and estates which remain a feature of our law.<sup>1</sup> It seems clear that certain aspects of this subject are quite inappropriate to a 21<sup>st</sup> century system of land ownership. This is especially so in an independent state, which Ireland has been for nearly a century, and where the relationship between the State and its citizens is governed by a constitution such as the 1937 Constitution.

### A            Tenure

2.02     What was said in the previous paragraph is particularly applicable to the feudal concept of tenure. This was a concept imposed on Ireland by conquest, just as it had been on England by the Normans after 1066.<sup>2</sup> Amongst its key features were the principles that the Crown had acquired by conquest a sovereign or “radical” title to all land and that individual subjects would only be permitted to hold land from a superior “lord” and ultimately from the Crown.<sup>3</sup> Such subjects owed a duty of “fealty” or loyalty to the Crown and would forfeit their right to hold land if services or conditions upon which it was held were not performed. Various other events might cause the land to revert to the Crown, such as a subject dying without leaving any “heirs” or successors to take it. Although it would appear that this notion of tenure still applies in Ireland, with all land<sup>4</sup> now being held ultimately from the State and no other body or person

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<sup>1</sup>        See paragraph 1.03 above.

<sup>2</sup>        See paragraph 1.02 above.

<sup>3</sup>        See Milson *The Legal Framework of English Feudalism* (Cambridge University Press 1976).

<sup>4</sup>        Except, of course, any land already held directly by the State and not held by any other body or person.



being entitled to absolute ownership (*ie* “allodial” ownership),<sup>5</sup> it is no longer appropriate for several reasons.

**(1) The Constitution**

2.03 The underlying basis of the feudal system of landholding, stemming from the relationship of Crown and subjects bound by fealty, cannot be reconciled with the relationship between the State and its citizens under the Constitution. The courts have emphasised in a number of cases<sup>6</sup> that Crown prerogatives are inconsistent with the democratic and republican character of the State, as enshrined in both the 1922 and 1937 Constitutions.<sup>7</sup>

2.04 It is interesting to note that this inconsistency with the principles of a democratic state governed by a written constitution was recognised in the United States of America. The British had imposed also on that former colony the principles of feudal tenure,<sup>8</sup> but following the American Revolution and Declaration of Independence in 1776 it was quickly recognised that the notion of feudal tenure could not survive. Several State legislatures<sup>9</sup> enacted

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<sup>5</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 3; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 2.

<sup>6</sup> *Eg Byrne v Ireland* [1972] IR 24; *Webb v Ireland* [1988] IR 353; *Howard v Commissioners of Public Works* [1994] 1 IR 101. See the discussion in Kelly “Hidden Treasure and the Constitution” (1998) 10 DULJ 5; Morgan “Constitutional Interpretation” (1998) 10 DULJ 24; Lenihan “Royal Prerogatives and the Constitution” (1989) 24 Ir Jur (NS) 1; Costello “The Expulsion of the Royal Prerogatives from Irish Law: Quantifying and Remedying the Loss of the Royal Prerogative” (1997) 32 Ir Jur (NS) 145.

<sup>7</sup> See Kelly *The Irish Constitution* (4<sup>th</sup> ed by Hogan and Whyte Lexis Nexis Butterworths 2003) at 2110 *ff*.

<sup>8</sup> See the discussion by the Supreme Court of Pennsylvania in *Wallace v Harmstad* 44 Pa 492 (1863) and the US Supreme Court in *Stuart v City of Easton* 170 US 383 (1898).

<sup>9</sup> *Eg* New York, Pennsylvania, Connecticut, Michigan, Minnesota, New Jersey, Arkansas, Ohio, Wisconsin and Nevada. See Alexander “Time and Property in the American Republican Legal Culture” (1991) 66 NYUL Rev 273; Chesnut (1942) 82 U Penn L Rev; Kaufman (1949) 5 Maryland L Rev 1; Vance “The Quest for Tenure in the United States” (1923-24) 33 Yale L J 248.

statutes declaring that feudal tenure no longer existed and that all land in the particular state was “allodial”,<sup>10</sup> *ie* held by citizens as absolute owners and not from the State by way of tenure. The judiciary also recognised that feudal tenure had no place in the post-independence era.<sup>11</sup> In the robust words of Woodward J, giving the opinion of the Supreme Court of Pennsylvania in *Wallace v Harmstad*<sup>12</sup>: “All our lands are held mediately or immediately of the State, but by titles purged of all the rubbish of the dark ages, excepting only the feudal names of things not any longer feudal.”<sup>13</sup>

## **(2) Radical Title**

2.05 The apparent “radical” title<sup>14</sup> of the State derived from the concept of tenure has little or no practical significance. For example, it has long been an established principle of our law that when the State, or any other public body, wishes to acquire land, it must invoke some statutory power of compulsory purchase.<sup>15</sup> There is no question of the State being able to seize land on the basis that it is the ultimate owner under the system of tenure. This would again be inconsistent with the Constitution, in particular the guarantee of the right to private ownership enshrined in Article 43.<sup>16</sup> A further illustration of

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<sup>10</sup> See paragraph 1.03 above.

<sup>11</sup> *Matthews v Ward’s Lease* 10 Gill & J 443 (Maryland 1839); *Van Rensselaar v Hays* 19 NY 68 (1859) *Waltz v Security Trust & Savings Bank* 197 Cal 263 (1925). The US Supreme Court took the same view: see *Stuart v City of Easton* 170 US 383 (1898).

<sup>12</sup> 44 Pa 492 (1863). Charles II, by letters patent, granted the province of Pennsylvania to William Penn and his heirs to be held in “free and common socage” (see paragraph 1.05 above).

<sup>13</sup> By such “feudal names” Woodward J was referring to concepts like escheat (whereby the land went to the State if the owner died without any successors), but he pointed out that in the post-independence era escheat derived from “positive statute” and not feudal tenure. *Cf* the State’s position under our *Succession Act 1965*: see paragraph 2.06 below.

<sup>14</sup> See paragraph 2.02 above.

<sup>15</sup> See McDermott and Woulfe *Compulsory Purchase and Compensation in Ireland: Law and Practice* (Butterworths 1992).

<sup>16</sup> See Kelly *op cit* fn 7 at 1969 *ff*.

the loss of practical significance of tenure is the abolition of the concept of escheat.

**(3) Abolition of Escheat**

2.06 Escheat of land to the State or to a mesne lord<sup>17</sup> upon the death of a landowner, who made no valid will disposing of the land and who had no intestate successors,<sup>18</sup> was abolished by section 11(3) of the *Succession Act 1965*. Instead section 73 of that Act provides that, in the event of no person being available to take a deceased person's estate as intestate successor, the State is to take it "as ultimate intestate successor."<sup>19</sup> It is further provided by section 28 of the *State Property Act 1954* that, where a body corporate is dissolved, its land thereupon becomes the property of the State.<sup>20</sup>

**(4) Recommendation**

2.07 The time has surely come to recognise that the feudal concept of tenure has no place in the Irish legal system in the 21<sup>st</sup> century. A statutory provision similar to those enacted in various States in the United States should provide for its abolition and declare that all land in the State is allodial.<sup>21</sup> For the avoidance of doubt, this should be declared to be without prejudice to the position of the State under the *State Property Acts 1954* and *1998*. Furthermore, it should also be made clear that the abolition of tenure does not affect the estates and interests which can be owned in respect of land. This is a subject which is dealt with later.<sup>22</sup>

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<sup>17</sup> *I.e.* an intermediate lord where sub-grants had been made by way of subinfeudation: see paragraphs 1.06 – 1.07 above.

<sup>18</sup> Members of the family so designated by statute, now by Part VI of the *Succession Act 1965*.

<sup>19</sup> See, in relation to the previous law, *In the Goods of Doherty* [1961] IR 219.

<sup>20</sup> Section 28 (2) (a). See *Re Kavanagh and Cantwell*, High Court, 23 November 1984.

<sup>21</sup> See paragraphs 1.03, 2.02 and 2.04 above.

<sup>22</sup> See paragraph 2.10 below.

## B Pre-1922 Statutes

2.08 It follows from the recommendation that the concept of tenure should be abolished that old statutes relating to tenure can be repealed, for the most part without replacement.

### (a) *Repeal without replacement*

***Forfeiture Act (Ireland) 1639:*** This Act of the old Irish Parliament (15 Chas 1 sess 2 c 3) provided for relief against forfeiture for grantees of Crown land who had not paid the feudal rent or performed other feudal services. Most such services were abolished by the *Tenures Abolition Act (Ireland) 1662*<sup>23</sup> and such few that remained owing to the Crown, such as quit rents,<sup>24</sup> were of such little value that the State has ceased to have any interest in them.<sup>25</sup>

***Tenures Abolition Act (Ireland) 1662:*** This Act of the old Irish Parliament (14 & 15 Chas 2 sess 4 c 19) has long since served its purpose of abolishing most of the old forms of feudal tenure and converting them into what was then referred to as “free and common socage”.<sup>26</sup> The Act serves no purpose in the 21<sup>st</sup> century.

***Copyhold Acts 1843-1887:*** It was pointed out in the previous chapter that it seems clear that the type of “unfree” tenure which came to be known as copyhold did exist at one time in Ireland.<sup>27</sup> Furthermore the statutes enacted at Westminster, during the 19<sup>th</sup> century, providing for commutation of manorial rights and enfranchisement of

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<sup>23</sup> The Court of Wards and Liveries referred to in the 1639 Act (the mechanism whereby feudal dues were enforced) was abolished by section 1 of the 1662 Act.

<sup>24</sup> See further on these paragraphs 2.25 fn 80 and 7.08 below.

<sup>25</sup> In recent times the State has divested itself of numerous relics from the history of our land law system. Hence, *eg*, the dissolution of the Church Temporalities Fund under section 7 of the *Land Law Act 1984*: see paragraph 7.05 below. As regards quit rents see paragraphs 2.25 fn 80 and 7.08 below.

<sup>26</sup> See paragraph 1.05 above.

<sup>27</sup> See paragraph 1.08 above.

copyhold tenants, did apply expressly to Ireland.<sup>28</sup> However, as was explained earlier, by the time the British legislation was consolidated in the *Copyhold Act 1894*, any vestiges of copyhold had disappeared in Ireland.<sup>29</sup> This is, no doubt, why the 1894 Act did not apply to Ireland.<sup>30</sup> The result was that the earlier Acts remain applicable to Ireland and should now be repealed as obsolete.<sup>31</sup> The Acts in question are:-

*Copyhold Act 1843 (6 & 7 Vic c 23)*

*Copyhold Lands Act 1844 (7 & 8 Vic c 55)*

*Copyhold Act 1852 (15 & 16 Vic c 51)*

*Copyhold Act 1858 (21 & 22 Vic c 94)*

*Copyhold Act 1887 (50 & 51 Vic c 73).*

***Crown Lands Acts 1819-1913:*** It was also explained in the previous chapter that the British Crown acquired much land in Ireland.<sup>32</sup> Originally the process began with the 12<sup>th</sup> century invasion instigated by Henry II, which led to the imposition of the feudal tenure system. However the process was a long-drawn-out affair and was only completed during the 17<sup>th</sup> and 18<sup>th</sup> century confiscations arising from various rebellions by the Irish.<sup>33</sup> Much of this land was regranted to English and Scottish settlers, but some was retained in the hands of the Crown. In due course numerous statutes were passed at Westminster relating to the administration and management of such Crown land. An examination of these statutes reveals that many of them must have applied to land in Ireland.<sup>34</sup> A substantial

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<sup>28</sup> Eg *Copyhold Act 1841 (4 & 5 Vic c 35)* (see section 100). What remained unrepealed of this Act was repealed by the *Statute Law Revision Act 1983*.

<sup>29</sup> See again paragraph 1.08 above.

<sup>30</sup> See section 99.

<sup>31</sup> This was done in the North by the *Statute Law Revision Act (NI) 1954*.

<sup>32</sup> See paragraph 1.09 above.

<sup>33</sup> See paragraph 1.07 above.

<sup>34</sup> Several of the statutes refer specifically to lands in Ireland and others are

number of these statutes remain unrepealed, but they can have no relevance now. The reason for this is that any former Crown land which became vested in the State is now governed by the Constitution, in particular Article 10.<sup>35</sup> In accordance with Article 10.3 provision for the “management” and “control of the alienation” of State land has been made by statute, the *State Property Acts 1954* and *1998*. The old British *Crown Lands Acts* should, therefore, be repealed, so far as they are not already repealed. The Acts in question are:-

*Crown Private Estate Act 1800 (39 & 40 Geo 3 c 88)*<sup>36</sup>

*Crown Lands Act 1819 (59 Geo 3 c 94)*

*Crown Lands (Ireland) Act 1822 (3 Geo 4 c 63)*<sup>37</sup>

*Crown Lands Act 1825 (6 Geo 4 c 17)*

*Crown Lands Act 1841 (5 Vic c 1)*

*Crown Lands Act 1845 (8 & 9 Vic c 99)*

*Crown Lands Act 1848 (11 & 12 Vic c 102)*

*Crown Lands Act 1851 (14 & 15 Vic c 42)*

*Crown Lands Act 1852 (15 & 16 Vic c 62)*

*Crown Lands Act 1853 (16 & 17 Vic c 56)*

*Crown Lands Revenues (Ireland) Act 1854 (17 & 18 Vic c 68)*

*Crown Private Estates Act 1862 (25 & 26 Vic c 37)*

*Crown Lands Act 1866 (29 & 30 Vic c 62)*

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couched in such general terms that they must to be taken to have applied to all Crown land (including, therefore, any such land in Ireland).

<sup>35</sup> Replacing Article 11 of the 1922 Constitution. See Kelly *The Irish Constitution* (4<sup>th</sup> ed by Hogan and Whyte Butterworths 2003) at 179 *ff*.

<sup>36</sup> Sections 2, 4 and 5 of this Act were extended to Ireland by sections 3, 5 and 7 of the *Crown Private Estates Act 1862*.

<sup>37</sup> This Act related primarily to the sale of Irish “quit rents”: see paragraphs 2.25 *fn* 80 and 7.08 below.

*Crown Lands Act 1873 (36 & 37 Vic c 36)*

*Crown Private Estates Act 1873 (36 & 37 Vic c 61)*

*Crown Lands Act 1885 (48 & 49 Vic c 79)*

*Crown Lands Act 1894 (57 & 58 Vic c 43)*

*Crown Lands Act 1906 (6 Edw 7 c 28)*

*Crown Lands Act 1913 (3 & 4 Geo 5 c 8)*

(b) *Replace with substantial amendment*

***Quia Emptores 1290***: The *Statute of Westminster III 1290* (18 Edw 1 cc 1-3) (*Quia Emptores*) established a number of fundamental principles, only one of which remains of relevance in the 21<sup>st</sup> century. Those which concern feudal tenure, such as the prohibition on subinfeudation<sup>38</sup> and apportionment of feudal services,<sup>39</sup> are obsolete and clearly can no longer have any significance with the abolition of the concept of tenure (the new legislation should make it clear that it will not be possible to create tenure in future). There is, therefore, no need to retain such provisions in the new legislation.<sup>40</sup> What should be preserved in the new legislation is the fundamental principle applicable to freehold land which was also enshrined in the Statute.<sup>41</sup> This is the rule against inalienability, *ie*, that a freeholder,<sup>42</sup> unlike a leaseholder, should not be subject to undue

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<sup>38</sup> C1. See paragraph 1.06 above. See also the 1293 statute 21 Edw 1 c2 requiring Irish tenants in chief to comply with English rules.

<sup>39</sup> C2.

<sup>40</sup> C3 prohibited alienation of land in “mortmain” (*ie* into the “dead hand” of corporations or religious bodies like monasteries, which did not die, thereby depriving the superior lord or Crown of incidents arising on death, such as wardship, marriage and most important of all, escheat if the deceased left no heirs). Mortmain restrictions were removed by the *Mortmain (Repeal of Enactments) Act 1954*.

<sup>41</sup> C1. See paragraph 1.05 above.

<sup>42</sup> Strictly the holder of the largest freehold estate recognised under our land law system, the fee simple.

restrictions on the right to dispose of the freehold interest.<sup>43</sup> This is a principle which the courts have continued to recognise in recent times<sup>44</sup> and should be preserved in the new legislation.

2.09 *The Commission provisionally recommends that the concept of tenure should be abolished, and that old statutes relating to tenure should be repealed, for the most part without replacement.*

## **C Estates**

2.10 It does not follow from the proposed abolition of the concept of tenure<sup>45</sup> that the other fundamental concept which was part of the feudal system, the concept of “estates”,<sup>46</sup> should also be abolished. Tenure was essentially concerned with the relationship between the tenant (owner)<sup>47</sup> and the superior lord (ultimately the Crown) from whom the tenant’s grant of the land was derived. That sort of relationship has never been appropriate in the Irish State,<sup>48</sup> which is why it is recommended that the concept of tenure should be abolished. On the other hand, the concept of “estates” is concerned with the relationship between the owner and the land owned. It is essential that the legal system defines clearly the parameters of that relationship – it is this which determines exactly what “ownership” of land comprises. As was pointed out earlier,<sup>49</sup> what a landowner owns

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<sup>43</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 340-341; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paras 2.46 and 4.054.

<sup>44</sup> *Re Dunne’s Estate* [1998] IR 155. See also *Re Fitzsimons* [1992] 1 IR 295.

<sup>45</sup> See paragraph 2.07 above.

<sup>46</sup> See paragraph 1.03 above.

<sup>47</sup> In this context the word “tenant” is used in its original tenurial sense (derived from the Latin “teneo”, meaning “I hold”), *ie*, referring to a person who holds land under some form of tenure. It should not be confused with its more modern meaning, referring to a person who has a (leasehold) tenancy in land. Leaseholds were not recognised by the feudal system: see paragraph 1.10 above.

<sup>48</sup> See paragraphs 2.02 – 2.07 above.

<sup>49</sup> Paragraph 1.03 above.



under our legal system is not the physical entity (“the land”) as such, but rather some “estate” in that land.<sup>50</sup> On this basis it is important to retain a concept such as that relating to estates.

2.11 The question arises as to whether the existing concept of estates, which is feudal in origin, should be replaced by something else. On balance the conclusion has been reached that at this stage replacement of a well-established and understood concept is not justified and might do more harm than good. Most urban land in the State, and, therefore, the subject of the majority of transactions, remains unregistered land and subject to traditional conveyancing procedures. This involves the perusal of deeds and other documents referring to the well-recognised estates. Furthermore, Article 10.1 of the Constitution refers to “estates and interests” in land. The more appropriate time to consider replacement of the concept is probably when most, if not all, land in the State has become registered land.<sup>51</sup>

2.12 Retention of the concept of estates does not, of course, rule out modernisation and modification. The remainder of this Chapter deals with this subject. Also, in accordance with one of the primary aims of the Joint Project, it considers how far pre-1922 statutes relating to the various estates recognised by our legal system should be repealed or replaced.

2.13 *The Commission provisionally recommends that the concept of an estate in land should be retained.*

**(1) Fee Simple**

2.14 This is the largest estate recognised by our legal system and is the closest to absolute ownership. It would become even closer under the proposed new system whereby the concept of tenure would be repealed with “allodial” ownership.<sup>52</sup> There are, however, some aspects of the fee simple estate which merit consideration.

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<sup>50</sup> Or some “interest” falling short of an “estate”: *ibid* fn 8.

<sup>51</sup> It is not without significance that those jurisdictions which have developed an e-conveyancing system have done so only in respect of registered land. See, *eg*, as regards England and Wales, Part 8 of the *Land Registration Act 2002*, which implements the joint report by the Law Commission and Land Registry *Land Registration for the Twenty-First Century* (Cm 4027 1998).

<sup>52</sup> See paragraphs 1.03, 2.04 and 2.07 above.

2.15 Over the centuries it has been not uncommon to create what are usually referred to as “modified” fees simple, such as a determinable fee<sup>53</sup> and a fee simple subject to a condition subsequent.<sup>54</sup> There seems to be no reason to interfere with the law relating to such estates,<sup>55</sup> save in one respect. One controversial point has been how far such a modified fee standing on its own<sup>56</sup> should be regarded as creating a sufficient “succession of interests” to attract the provisions of the *Settled Land Acts 1882-90*. The conclusion has been reached that it is inappropriate to impose on the owner of such a modified fee (which may never end because the event intended to trigger that ending never occurs) the complications of such legislation.<sup>57</sup> This should be made clear in the new legislation.

2.16 *The Commission provisionally recommends that it should be made clear in the new legislation that a modified fee standing on its own does not attract settlements legislation.*

2.17 The other aspect of the fee simple estate concerns a particular development of Irish land law which was mentioned in the previous chapter. This is the confusion of the concepts of freehold and leasehold ownership.<sup>58</sup> Perhaps the most striking manifestation of this was the creation of various categories of fee farm grant.<sup>59</sup> This

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<sup>53</sup> *Ie* a fee simple which is liable to determine upon the happening of an event (which may or may not occur). If the event does occur the fee simple ends *automatically* and the land reverts to the grantor (or successors in title) who originally created it. Until the event does occur, the grantor has what is known as a “possibility of reverter”.

<sup>54</sup> *Ie* a fee simple which may be determined by the grant or exercising a right of re-entry upon a condition being satisfied.

<sup>55</sup> See on this Lyall *op cit* fn 43 at 175-203; Wylie *op cit* fn 43 paragraphs 4.046-4.056. One of the controversial points to arise was how far the rule against perpetuities applied to such estates, but that would no longer arise with the proposed abolition of that rule: see paragraph 3.01 below.

<sup>56</sup> *Ie* where it is granted to a person without a limitation over in favour of another person: see Wylie *op cit* fn 43 paragraphs 8.022-8.023.

<sup>57</sup> Note the proposed radical reform of the legislation discussed in Chapter 4 below. And see, in particular, paragraph 4.15.

<sup>58</sup> See paragraphs 1.12-1.16 above.

<sup>59</sup> See paragraphs 1.13-1.15 above.

involves the grantee holding a fee simple estate, but being liable for the payment of rent and, usually, for performance of various other obligations, such as compliance with covenants relating to user of the land and maintenance and repairs.<sup>60</sup> The question is whether such confusion of concepts should be allowed to continue.

2.18 There is much strength in the argument that a modern system of land ownership should be as simple as possible and readily understood by the general public.<sup>61</sup> Most members of the public understand that a leasehold tenant usually has to pay rent to a landlord and perform various other obligations. It is further understood that a failure to pay the rent or to perform other obligations may have serious consequences, including the loss of the tenancy. Very few would expect someone who owns the freehold to have to pay rent and would find it very difficult to understand that a failure to do so, or to perform other obligations, might result in loss of the property. Yet, because most fee farm grants in Ireland create the relationship of landlord and tenant between the grantor and grantee,<sup>62</sup> that is precisely the position of a fee farm grantee.<sup>63</sup> Quite apart from the obvious confusion of the position of a freehold owner and a leasehold tenant, arguably this situation is out of keeping with the drive to get rid of ground rents in recent decades.<sup>64</sup> The creation of new ground

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<sup>60</sup> See Lyall *op cit* fn 43 Chapter 5; Wylie *op cit* fn 43 paragraphs 4.057-4.111.

<sup>61</sup> Note the aims for the Joint Project announced by the Minister for Justice in June 2004 (see p vii above) and the guiding principles adopted by the Commission's Substantive Law Working Group (see page 2 above).

<sup>62</sup> Most modern grants will have been created under *Deasy's Act 1860*: see paragraph 1.15 above.

<sup>63</sup> It is by no means clear that the prohibition in section 27 of the *Landlord and Tenant (Ground Rents) (No. 2) Act 1978* on exercising a right of re-entry or bringing ejectment proceedings for non-payment of rent in respect of dwellinghouses applies to fee farm rents: see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 2.22.

<sup>64</sup> Initiated by the *Landlord and Tenant (Ground Rents) Act 1967*. See also the *Landlord and Tenant (Ground Rents) (No. 2) Act 1978*. See Wylie *op cit* Chapter 31.

rents in respect of dwellings was prohibited by the *Landlord and Tenant (Ground Rents) Act 1978*.<sup>65</sup>

2.19 It is not entirely clear whether the 1978 Act prohibited the creation of fee farm grants in respect of dwellings. A problem of interpretation exists because the Act renders void only leases under which the lessee of residential property would otherwise have the right “to enlarge his interest into a fee simple”<sup>66</sup> under the other ground rents legislation. The point about a fee farm grantee is, of course, that the fee farm grant has already vested the fee simple in the grantee, so there is no need to “enlarge the interest” into a fee simple.<sup>67</sup> Nevertheless, it would certainly be more consistent with the policy of ridding residential property of the ground rent system if the prohibition in the 1978 Act did apply to fee farm grants. This should be made clear.

2.20 *The Commission provisionally recommends that it should be made clear that the Landlord and Tenant (Ground Rents) Act 1978 prohibits the creation of a ground rent by way of fee farm grant.*

2.21 That raises the issue of whether the prohibition should be extended to non-residential property. In the interests of simplification of the law there is much to be said for such a provision. The reason fee farm grants are created nowadays in respect of non-residential property is that it is the only effective way to ensure that extensive covenants, in particular, positive covenants such as those relating to repairs and maintenance, will bind successors in title. This is because grants made under *Deasy’s Act* create the relationship of landlord and tenant between the parties, so that leasehold law applies<sup>68</sup> rather than

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<sup>65</sup> Section 2.

<sup>66</sup> Section 2 (1).

<sup>67</sup> This interpretation point is exacerbated by the wording of section 8 of the 1978 (No 2) Act, which refers to a person having the “right as incident to his *existing* interest in land to enlarge that interest into a fee simple and for that purpose *to acquire* by purchase the fee simple in the land. (Emphasis added). On the other hand, section 3 of the 1978 (No 2) Act defines “lease” as including a fee farm grant and section 1(2) provides that that Act is to be construed together with the “(No 1)” 1978 Act.

<sup>68</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 21.

freehold law.<sup>69</sup> However the Commission recently recommended substantial changes to the law of freehold covenants<sup>70</sup> which would, in effect, render such covenants as fully enforceable as leasehold covenants. On the basis that these recommendations are implemented in the new legislation, it is recommended that the creation of new fee farm grants should be prohibited. In future where it is desired to create an arrangement whereby rent is payable, a lease should be used.

2.22 *The Commission provisionally recommends that the creation of new fee farm grants should be prohibited. In future where it is desired to create an arrangement whereby rent is payable, a lease should be used.*

2.23 That leaves the issue of what to do with existing fee farm grants, whether arising from statutory conversion provisions<sup>71</sup> or express grant. Again in the interests of simplification, and, in particular, avoidance of the confusion of freehold and leasehold ownership, it is recommended that the ground rents legislation should be extended to enable all existing fee farm grantees to redeem the rent. Such redemption should not affect the enforceability of covenants (other than those relating to the rent) and these should remain fully enforceable, but subject to provisions for discharge and modification recently recommended by the Commission.<sup>72</sup> It should also be noted that the Commission's Landlord and Tenant Working Group has been reviewing the ground rents legislation and will issue a separate Consultation Paper on the subject in the near future. Any recommendations in that should be taken into account in dealing with existing fee farm grants.

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<sup>69</sup> Which is subject to the limitations of the rule in *Tulk v Moxhay*, whereby the burden of a negative covenant only will pass to successors in title and then only in equity: see Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 21; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 19.

<sup>70</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals (LRC 70-2003)*. See further paragraph 7.29 below.

<sup>71</sup> See paragraphs 1.14 above and 2.34 below.

<sup>72</sup> Fn 70 above.

2.24 *The Commission provisionally recommends that the ground rents legislation should be extended to enable all existing fee farm grantees to redeem the rent.*

2.25 Turning to the subject of pre-1922 statutes, some do relate to fee farm grants. Those relating to conversion grants are discussed later.<sup>73</sup> The *Fee Farm Rents (Ireland) Act 1851*<sup>74</sup> was a short statute which provided for certain remedies<sup>75</sup> for recovery of fee farm rents and seems to have applied to any kind of grant.<sup>76</sup> The Act must have had very limited impact and has little or no significance in modern times. Almost all grants in existence today are leasehold conversion grants or *Deasy's Act* grants, under which the grantor has a landlord's full remedies to recover the rent.<sup>77</sup> Even prior to the 1851 Act provision had been made for the relatively rare fee farm grant creating a rentcharge. Thus the *Distress for Rent (Ireland) Act 1712*<sup>78</sup> conferred a statutory right of distress for rent.<sup>79</sup> On the basis that it is now redundant<sup>80</sup> it is recommended that the 1851 Act be repealed without replacement.

2.26 *The Commission provisionally recommends that the Fee Farm Rents (Ireland) Act 1851 should be repealed without replacement.*

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<sup>73</sup> Paragraph 2.34 below.

<sup>74</sup> 14 & 15 Vic c 20.

<sup>75</sup> In essence an action for debt and distress for rent but not ejectment for non-payment of rent. The Act was held to be retrospective: see *Major v Barton* (1851) 2 ICLR 28.

<sup>76</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 4.064 and 4.097.

<sup>77</sup> *Ibid* paragraphs 4.083 and 4.097.

<sup>78</sup> 9 Anne c 2.

<sup>79</sup> See Wylie *op cit* fn 76 paragraph 4.107.

<sup>80</sup> Rents payable under feudal grants that may have survived to modern times were most likely to have been "quit rents" payable to the State, but these were written off by the Minister for Finance in 1975, in exercise of the powers conferred by section 12 of the *State Property Act 1954*: see paragraph 7.08 below.

## **(2) Fee Tail**

2.27 This estate was the creature of statute, the *Statute of Westminster II 1285*<sup>81</sup> (*De Donis Conditionalibus*), and was designed to enable feudal landowners to ensure that their land passed down through successive generations of the family. It became the key device used by conveyancers in later centuries in creating family settlements again designed to keep the land in the family.<sup>82</sup> These were the times when land was the main source of wealth and other forms of investment did not exist. The effectiveness of the estate was, however, greatly reduced by subsequent legislative developments. The ability of a tenant in tail to “bar the entail”, so as to create a fee simple, was considerably simplified by the *Fines and Recoveries (Ireland) Act 1834*.<sup>83</sup> Furthermore, a fee tail creates a limited interest only in the land, whereby a succession of interests arises because a fee simple reversion will also exist, so that it came within the scope of the *Settled Land Acts 1882-90*.<sup>84</sup> This meant that the tenant in tail acquired the extensive powers of disposal conferred by those Acts.

2.28 Such an estate is an anachronism in the 21<sup>st</sup> century. It belongs to a different era and the creation of one has been unheard of in modern times.<sup>85</sup> Any met by practitioners nowadays will have been created decades ago in respect of some large estate which has been in the hands of the same family for generations. The time has come to consign the estate to history, by prohibiting its future creation.<sup>86</sup> As regards existing fees tail, given the extensive powers to

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<sup>81</sup> 13 Edw 1 c 1.

<sup>82</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 14; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 8.

<sup>83</sup> 4 & 5 Will 4 c92. See Lyall *op cit* fn 82 at 233-236; Wylie *op cit* fn 82 paragraphs 4.123-4.125.

<sup>84</sup> See Chapter 4 below.

<sup>85</sup> One very practical reason for this is that any arrangement which provides for successive interests in land may give rise to an additional charge to Capital Gains Tax.

<sup>86</sup> It was not done in England by the 1925 property legislation, but has been effected now by the *Trusts of Land and Appointment of Trustees Act 1996*, Schedule 1, paragraph 5.

bar the entail contained in the *Fines and Recoveries (Ireland) Act 1834*, it is recommended that the new legislation should bring about an automatic barring of the entail, with the same result as the tenant in tail could produce by executing a fully effective disentailing deed under that Act.<sup>87</sup>

2.29 *The Commission provisionally recommends the abolition of the fee tail estate and that the new legislation should bring about an automatic barring of entails, with the same result as the tenant in tail could produce by executing a fully effective disentailing deed under the Fines and Recoveries (Ireland) Act 1834.*

2.30 *The consequence of the above recommendations is that pre-1922 statutes relating to the fee tail estate can be repealed without replacement. These are:-*

*Statute of Westminster II 1285 (De Donis Conditionalibus) (13 Edw 1 c 1)*<sup>88</sup>

*Fines and Recoveries (Ireland) Act 1834 (4 & 5 Will 4 c 92).*

### **(3) Life Estate**

2.31 So far as the orthodox life estate<sup>89</sup> is concerned, there seems no reason why this should not remain with its well-recognised characteristics,<sup>90</sup> subject to one major change. Ever since the *Settled Land Acts 1882-90* conferred substantial powers of disposition on

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<sup>87</sup> This was what was recommended for the North in the Land Law Working Group's *Final Report* (HMSO 1990) Volume 1 paragraph 2.1.2.8 and Volume 3 (Property Order) at 407-409.

<sup>88</sup> C 1 was the only part of this Statute to remain unrepealed after the *Statute Law Revision Act 1983*, apart from c 15 which relates to an action on behalf of a minor being brought by a "next friend". Arguably c 15 can also be repealed as such actions are now catered for by the *Rules of the Superior Courts*, O 15 rr 16 and 30: see *Dunne v National Maternity Hospital* [1989] IR 91; *Best v Wellcome Foundation Ltd* [1993] 3 IR 421. This issue is not concerned directly with land law and conveyancing.

<sup>89</sup> *Ie* apart from the Irish combined freehold/leasehold versions considered in paragraphs 2.34 and 2.35 below.

<sup>90</sup> See Lyall *op cit* fn 82 Chapter 9; Wylie *op cit* fn 82 paragraphs 4.143-4.166



tenants<sup>91</sup> for life, in particular, the power to sell the fee simple, with the result that the proceeds of sale (capital money) are held by trustees, the legal title derived from the life estate lost its significance. In England this was recognised by the provision in section 1 of the *Law of Property Act 1925* decreeing that in future a life estate would operate in equity only.<sup>92</sup> This would become all the more so here if the recommendations relating to settlements made later are implemented.<sup>93</sup> Under these recommendations, all settlements of land and the creation of a life estate necessarily involves a succession of interests<sup>94</sup> creating a settlement, would take effect under a trust of the land, with the legal (fee simple) title being held on trust for the persons entitled in succession (such as a tenant for life). On this basis it is recommended that in future a life estate should create an equitable interest in land only.

2.32 *The Commission provisionally recommends that, in future, a life estate should create an equitable interest in land only.*

2.33 The issue remains as to what to do about the combined freehold/leasehold interests which were once so common in Ireland – the lease for lives renewable for ever and leases for lives combined with a concurrent or reversionary term of years.<sup>95</sup>

2.34 So far as leases for lives renewable forever are concerned, none can have been created since 1849 because section 37 of the *Renewable Leasehold Conversion Act 1849* provided that any such leases would operate automatically as a fee farm grant.<sup>96</sup> The 1849 Act enabled pre-1849 lessees holding such leases to convert them into

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<sup>91</sup> Again the word “tenant” is used here in the sense of the holder of the freehold life estate and not in the leasehold sense: see paragraph 2.10 fn 47 above.

<sup>92</sup> See Megarry & Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum Sweet & Maxwell 2000) paragraphs 4.029-4.055.

<sup>93</sup> See Chapter 4 below.

<sup>94</sup> Because there must be a reversionary or remainder interest (eg a fee simple) to fall into possession on the determination of the life interest.

<sup>95</sup> See paragraphs 1.14 and 1.16 above. For more detail see Lyall *op cit* fn 82 at 251-272 ; Wylie *op cit* fn 82 paragraphs 4.167-4.178.

<sup>96</sup> See paragraph 1.14 above.

a fee farm grant, but not all such lessees took advantage of this. However, section 74 of the *Landlord and Tenant (Amendment) Act 1980* in such cases automatically vested the fee simple in the existing lessee, subject to the same obligations<sup>97</sup> arising from this being deemed a “graft” on the old lease. Unlike section 37 of the 1849 Act, section 74 does not use the expression “fee farm grant”, so that, although the substantive effect is probably the same, what is vested in lessees of pre-1849 leases should not be referred to as a fee farm grant.<sup>98</sup> The result of these provisions is that leases for lives renewable for ever have disappeared<sup>99</sup> from the Irish land law system and so the pre-1922 statutes relating to them have served their purpose and can now be repealed without replacement.<sup>100</sup>

2.35 So far as leases for lives combined with a term of years are concerned, the reasons for their creation have also long since gone.<sup>101</sup> Again in the interests of simplification the future creation of such leases, including a simple lease for lives without any term of years attached, should be prohibited. So far as existing ones are concerned, it is arguable that they are so rare nowadays that they can be left to “wither on the vine”. It does not seem worth the effort to include in

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<sup>97</sup> Presumably in respect of rent and other obligations arising under covenants and conditions in the old lease.

<sup>98</sup> Note that section 1(2) of the 1980 Act incorporates the definition of “fee simple” contained in section 2(1) of the *Landlord and Tenant (Ground Rents) Act 1967* and section 3 (1) of the *Landlord and Tenant (Ground Rents) (No. 2) Act 1978*, both of which define “fee simple” as *not* including the interest of a person holding land under a fee farm grant. The proposals *re* redemption of fee farm rents made earlier should apply also to section 74 fees simple: see paragraph 2.23 above.

<sup>99</sup> It was pointed out earlier that the 1849 Act applied also to leases for *years* renewable for ever (so that section 37 also converted post-1849 grants of these into fee farm grants), but, probably by an oversight, section 74 of the 1980 Act applies only to pre-1849 leases for *lives* renewable for ever: see paragraph 1.14 fn 53 above. This oversight should be corrected in the new legislation.

<sup>100</sup> See paragraph 2.37 below.

<sup>101</sup> To do with conferring the right to vote which used to apply to freeholders only and the old law of inheritance: see FitzGibbon L J in *Duckett v Keane* [1903] 1 IR 409 at 413-41. See also Wylie *op cit* paragraph 4.177.

the new legislation complicated conversion provisions to turn them into fixed terms of years determinable on the dropping of the lives.<sup>102</sup>

2.36 *The Commission provisionally recommends that, in the interests of simplification, the future creation of certain leases, including a simple lease for lives with or without any term of years attached, should be prohibited.*

2.37 *The consequence of the above considerations and recommendations is that a number of pre-1922 statutes relating to combined freehold/leasehold interests can be repealed without replacement. These are:-*

*Life Estates Act (Ireland) 1695*<sup>103</sup>

*Timber Act (Ireland) 1767,*<sup>104</sup> *section 11*<sup>105</sup>

*Leases for Lives Act (Ireland) 1777,*<sup>106</sup> *section 11*<sup>107</sup>

*Tenantry Act (Ireland) 1779*<sup>108</sup>

*Renewal of Leases (Ireland) Act 1838*<sup>109</sup>

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<sup>102</sup> Such as was recommended for the North in the Land Law Working Group's *Final Report* (HMSO 1990) and implemented in Article 37 of the Property (NI) Order 1997.

<sup>103</sup> 7 Will 3 c 8 This Act facilitated proof of the "dropping" of lives: see Wylie *op cit* paragraph 4.170.

<sup>104</sup> 7 Geo 3 c 20 (Ireland).

<sup>105</sup> Section 11 extended protection from the law of waste conferred on lessees for lives renewable for ever by the *Timber Act 1765* (5 Geo 3 c 17) to fee farm grantees.

<sup>106</sup> 17 & 18 Geo 3 c 49. This Act was part of the legislation enacted by the Irish Parliament to promote Catholic Emancipation. Most of it (sections 1-10) was repealed by the *Statute Law Revision (Ireland) Act 1879* (42 & 43 Vic c 24).

<sup>107</sup> This section extended an express power in a settlement to grant leases for lives to a power to grant a lease for a term of years determinable on lives.

<sup>108</sup> 19 & 20 Geo 3 c 30. This Act was passed to confirm the "old equity of the country" developed by the Irish courts, whereby a lessee could obtain in equity a renewal of lives long after the old ones had dropped. Doubts on this jurisdiction had been expressed in Irish appeals to the House of Lords: *Kane v Hamilton* 1 Ridgw P C 180; *Bateman v Murray* 1 Ridgw P C 187. See Wylie *op cit* paragraphs 4.170-4.173.

<sup>109</sup> 1 & 2 Vic c 62. This Act enabled the Masters of the old Court of Chancery

*Renewable Leasehold Conversion Act 1849*<sup>110</sup>

*Renewable Leaseholds Conversion (Ireland) Act 1868*<sup>111</sup>

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to order or appoint renewals of leases for lives or years dependent on lives where the persons supposed to make the appointment were out of the jurisdiction.

<sup>110</sup> 12 & 13 Vic c 105.

<sup>111</sup> 31 & 32 Vic c 62. This Act simply extended the 1849 Act to cover perpetually renewable leases granted by governors of educational institutions.



## CHAPTER 3 FUTURE INTERESTS

3.01 The law relating to future interests is an extremely complex one,<sup>1</sup> but it was the subject of a major review recently carried out by the Law Reform Commission. The results of this were set out in the *Report on the Rule Against Perpetuities and Cognate Rules*.<sup>2</sup> This contains recommendations which would radically alter the law and introduce considerable simplification. In particular they would involve abolition of the rule against perpetuities and cognate rules, such as the Rule in *Whitby v Mitchell*, the rules relating to accumulations and the Rule in *Purefoy v Rogers*.<sup>3</sup> Clearly the new legislation should implement the recommendations contained in that Report, subject to one qualification.

3.02 The Report recommended that the common law contingent remainder rules, notwithstanding its acknowledgment that they are “shot through with anomalous exceptions and, in skilled hands, are easily avoided”, should be retained.<sup>4</sup> The Report pointed out that these rules were bound up with the feudal concept of “seisin”, a key element in the collection of feudal dues.<sup>5</sup> They were designed to ensure that, for example, no gaps in the seisin would occur when these dues could not be collected. Clearly this original function of the rules has long since gone and the abolition of tenure recommended earlier would be the final nail in the coffin.<sup>6</sup> However, the reason the

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<sup>1</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapters 10 and 11; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 5.

<sup>2</sup> LRC 62-2000.

<sup>3</sup> See the draft Bill set out in Appendix A to the Report.

<sup>4</sup> Paragraph 5.33.

<sup>5</sup> Such dues were payable only by a person who was “seised” of the land: see Lyall *op cit* fn 1 at 9; Wylie *op cit* fn 1 paragraph 4.018.

<sup>6</sup> See paragraph 2.07 above.

Report did not recommend abolition of the rules is that they do have a modern function.

3.03 The modern “valuable” function identified by the Report<sup>7</sup> is that, in preventing an “abeyance of seisin”, the rules ensure that there is always someone who holds the legal title<sup>8</sup> to land. However, this view was taken in the narrow context of a review of the law of future interests, rather than in the context of general reform of land law and conveyancing law which is the subject of this Consultation Paper. Again in the interests of simplifying the law for the 21<sup>st</sup> century, there is a very strong case for getting rid also of the complexities of the common law contingent remainder rules. The simplest way of doing this is to provide that all future interests, contingent or otherwise,<sup>9</sup> should operate in equity only and that only a fee simple in possession should be a legal estate. The result would be that in future all future interests would be held under a trust, with the legal title vested always in trustees.<sup>10</sup> This would accord with the proposed new scheme for settlements of land.<sup>11</sup> On this basis the recommendation is now made that the common law contingent remainder rules should also be abolished.

3.04 *The Commission provisionally recommends that the Law Reform Commission Report on the Rule Against Perpetuities and Cognate Rules should be implemented subject to the qualification that the common law contingent remainder rules should be abolished.*

3.05 *The consequence of the recommendations outlined above is that several pre-1922 statutes can be repealed without replacement. These are:-*

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<sup>7</sup> Paragraph 5.33.

<sup>8</sup> The standard method of avoiding the common law rules was to use a conveyance to uses (or a modern trust). They also do not apply to dispositions made by will, under which initially the legal title is vested in the deceased’s personal representatives and the beneficiaries have an equitable interest only.

<sup>9</sup> An exception to this would be a possibility of reverter or right of re-entry attached to a stand alone determinable fee or fee simple subject to a condition: see paragraph 2.15 above.

<sup>10</sup> This accords with the scheme of the English *Law of Property Act 1925*.

<sup>11</sup> See Chapter 4 below.

*Real Property Act 1845,*<sup>12</sup> *section 8*<sup>13</sup>

*Law of Property Amendment Act 1860,*<sup>14</sup> *section 7*<sup>15</sup>

*Contingent Remainders Act 1877*<sup>16</sup>

*Accumulations Act 1892*<sup>17</sup>

*Conveyancing Act 1911,*<sup>18</sup> *section 6*<sup>19</sup>

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<sup>12</sup> 8 & 9 Vic c 106.

<sup>13</sup> This section related to the various ways in which a subsequent contingent remainder might be saved from destruction, where the actions of holders of prior interests might cause an “abeyance” of seisin: see Wylie *op cit* fn 1 paragraphs 5.023-5.028.

<sup>14</sup> 23 & 24 Vic c 38.

<sup>15</sup> This section relates to a particularly arcane point concerning the effect of certain dispositions on seisin: see Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 114.

<sup>16</sup> 40 & 41 Vic c 33. The Commission’s Report (LRC 62 – 2000) recommended repeal of this statute: see paragraph 5.35.

<sup>17</sup> 55 & 56 Vic c 58. The Report also recommended repeal of this statute: see paragraph 5.46.

<sup>18</sup> 1 & 2 Geo 5 c 37.

<sup>19</sup> This section resolved a doubt as to the applicability of the rule against perpetuities to remedies for enforcing rentcharges conferred by section 44 of the *Conveyancing Act 1881*. See paragraph 7.15 below.





## CHAPTER 4     SETTLEMENTS AND TRUSTS OF LAND

4.01     The development of the law relating to settlements and trusts of land has been a somewhat complicated one.<sup>1</sup> To some extent it belongs to an earlier era when much land in the country was tied up in family settlements<sup>2</sup> - and the families were usually English and Scottish settlers granted land following confiscation from the Irish.<sup>3</sup> A key aspect of the conveyancing arrangements governing these settlements was that at any particular time the current “owner” of the land would hold a limited freehold estate only – the fee tail<sup>4</sup> or a life estate.<sup>5</sup> The essential problem about holding an estate less than the fee simple was that the holder had limited powers of dealing with the land. This was particularly the case with a life estate, which might end at any time with the death of the life owner. Such an estate was practically worthless – effectively it could not be sold, leased or mortgaged as security for loans. This resulted in much land being withheld from the marketplace and allowed to deteriorate because the holders had no way of getting themselves out of financial difficulties. In due course the Irish Parliament and then the Westminster Parliament intervened, as it had in England and Wales,<sup>6</sup> through legislation, particularly in the 18<sup>th</sup> and 19<sup>th</sup> centuries. This legislation took several forms.

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<sup>1</sup>     See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 14 ; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapters 8-10.

<sup>2</sup>     See paragraph 1.22 above.

<sup>3</sup>     See paragraphs 1.07, 1.09 and 1.11 above.

<sup>4</sup>     See paragraphs 1.03 and 2.27 above.

<sup>5</sup>     See paragraphs 1.03 and 2.31 above.

<sup>6</sup>     See Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum Sweet & Maxwell 2000) Chapter 8.

## A Leasing Powers

4.02 An initial legislative response was to confer on limited owners of land various powers of leasing the land for specific purposes. This had the dual purpose of enabling the limited owners to raise much needed income and of furthering various public purposes. Such purposes usually involved either the promotion of activities like mining, growing timber and land drainage and improvement or the building of things like hospitals, schools and churches. Special statutory leasing powers were also conferred on various educational and religious bodies.

4.03 Most of the legislation referred to in the previous paragraph remains in force, but is now obsolete for a number of reasons. One is that, in so far as it was designed to empower limited owners to lease land, it was superseded by the more general leasing powers conferred by later legislation, in particular, the *Settled Land Acts 1882-90*.<sup>7</sup> This would become even more the case under the new legislative regime recommended later to replace those Acts.<sup>8</sup> Another reason is that, in so far as the legislation was designed to promote specific public purposes, it must have long since served its purpose. To the extent that such purposes should still be promoted, much more modern and comprehensive legislation provides for this. For example, mining activities are now governed by the *Minerals Development Acts 1940 and 1979*<sup>9</sup> and forestry is governed by the *Forestry Act 1946*.

4.04 *The following pre-1922 statutes, which conferred limited powers of leasing and which have been suspended by later general statutes, can now be repealed without replacement:-*

*Ecclesiastical Lands Act (Ireland) 1634*<sup>10</sup>

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<sup>7</sup> See paragraph 4.09 below.

<sup>8</sup> *Ie* whereby all settlements would operate under a trust with the trustees having full, plenary powers to deal with the land: see paragraph 4.13 below.

<sup>9</sup> See Donelan *Energy and Mineral Resources Law in Ireland* (Round Hall Press 1985).

<sup>10</sup> 10 & 11 Chas 1 c 3. This Act was the source of what came to be known as “bishops’ lease” and “college leases”: see Wylie *op cit* fn 1 paragraphs

*Mining Leases Act (Ireland) 1723*<sup>11</sup>  
*Timber Act (Ireland) 1735*<sup>12</sup>  
*Mining Leases Act (Ireland) 1741*<sup>13</sup>  
*Mining Leases Act (Ireland) 1749*<sup>14</sup>  
*Hospitals Act (Ireland) 1761*<sup>15</sup>  
*Timber Act (Ireland) 1765*<sup>16</sup>  
*County Hospitals Act (Ireland) 1765*<sup>17</sup>  
*County Hospitals Act (Ireland) 1767*<sup>18</sup>  
*Timber Act (Ireland) 1767*<sup>19</sup>  
*Timber Act (Ireland) 1775*<sup>20</sup>  
*County Hospitals Act (Ireland) 1777*<sup>21</sup>  
*Timber Act (Ireland) 1777*<sup>22</sup>  
*Leases for Lives Act (Ireland) 1777*<sup>23</sup>  
*Leases by Schools Act (Ireland) 1781*<sup>24</sup>

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1.36 and 4.080.

- 11 10 Geo 1 c 5.
- 12 9 Geo 2 c 7.
- 13 15 Geo 2 c 10.
- 14 23 Geo 2 c 9.
- 15 1 Geo 3 c 8.
- 16 5 Geo 3 c 17.
- 17 5 Geo 3 c 20.
- 18 7 Geo 3 c 8.
- 19 7 Geo 3 c 20. See paragraph 2.37 fn 105 above.
- 20 15 & 16 Geo 3 c 26.
- 21 17 & 18 Geo 3 c 15.
- 22 17 & 18 Geo 3 c 35.
- 23 17 & 18 Geo 3 c 49. See paragraph 2.37 fn 107 above.
- 24 21 & 22 Geo 3 c 27.

*Timber Act (Ireland) 1783*<sup>25</sup>  
*Leases by Schools Act (Ireland) 1785*<sup>26</sup>  
*Leases for Corn Mills Act (Ireland) 1785*<sup>27</sup>  
*Timber Act (Ireland) 1791*<sup>28</sup>  
*Ecclesiastical Lands Act (Ireland) 1795*<sup>29</sup>  
*Leases for Cotton Manufacture Act (Ireland) 1800*<sup>30</sup>  
*Mines (Ireland) Act 1806*<sup>31</sup>  
*School Sites (Ireland) Act 1810*<sup>32</sup>  
*Mining Leases (Ireland) Act 1848*<sup>33</sup>  
*Leases for Mills (Ireland) Act 1851*<sup>34</sup>  
*Trinity College, Dublin, Leasing and Perpetuity Act 1851*<sup>35</sup>  
*Leasing Powers Act for Religious Worship in Ireland Act 1855*<sup>36</sup>  
*Limited Owners Residences Act 1870*<sup>37</sup>

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<sup>25</sup> 23 & 24 Geo 3 c 39.

<sup>26</sup> 25 Geo 3 c 55.

<sup>27</sup> 25 Geo 3 c 62.

<sup>28</sup> 31 Geo 3 c 40.

<sup>29</sup> 35 Geo 3 c 23.

<sup>30</sup> 40 Geo 3 c 90.

<sup>31</sup> 46 Geo 3 c 71.

<sup>32</sup> 50 Geo 3 c 33.

<sup>33</sup> 11 & 12 Vic c 13.

<sup>34</sup> 14 & 15 Vic c 7.

<sup>35</sup> 14 & 15 Vic cxxvii (local and personal Act). See Wylie *op cit* fn 1 paragraphs 1.36 and 4.080. Trinity, like other Irish universities, now has full powers of dealing with its land under the *Universities Act 1997*.

<sup>36</sup> 18 & 19 Vic c 39.

<sup>37</sup> 33 & 34 Vic c 56.

*Limited Owners Residences Act (1870) Amendment Act 1871*<sup>38</sup>

*Leasing Powers Amendment Act for Religious Purposes in Ireland Act 1875*<sup>39</sup>

*Limited Owners Reservoirs and Water Supply Further Facilities Act 1877*<sup>40</sup>

*Leases for Schools (Ireland) Act 1881*<sup>41</sup>

## **B Landed Estates Court**

4.05 During the early part of the 19<sup>th</sup> century many owners of large estates were in dire straits, often occupying properties which were severely run down, heavily mortgaged and threatened by creditors.<sup>42</sup> In order to give these owners a way out of their difficulties, by authorising sales of the estates in order to pay off debts, the Westminster Parliament established in 1849 the Court of Commissioners for the Sale of Incumbered Estates in Ireland.<sup>43</sup> This, however, was replaced by the Landed Estates Court established by the *Landed Estates Court (Ireland) 1858*.<sup>44</sup> This Court supervised the sale and break-up of many of the large estates in Ireland during the latter half of the 19<sup>th</sup> century.<sup>45</sup> However, this operation was

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<sup>38</sup> 34 & 35 Vic c 84.

<sup>39</sup> 38 & 39 Vic c 11.

<sup>40</sup> 40 & 41 Vic c 31.

<sup>41</sup> 44 & 45 Vic c 65.

<sup>42</sup> See *Black Economic Thought and the Irish Question* (Cambridge University Press 1960); Goldstrom and Clarkson (eds) *Irish Population, Economy and Society* (Clarendon 1981); O'Brien *Economic History of Ireland in the Nineteenth Century* (Maunsel 1919).

<sup>43</sup> Under the *Incumbered Estates (Ireland) Act 1849* (12 & 13 Vic c 77). See also the *Incumbered Estates (Ireland) Acts 1852* (15 & 16 Vic c 67), *1853* (16 & 17 Vic c 64), *1855* (18 & 19 Vic c 73) and *1856* (19 & 20 Vic c 67). These Acts were all repealed by the *Statute Law Revision Acts 1875* and *1892*.

<sup>44</sup> 21 & 22 Vic c 72. See Wylie *op cit* fn 1 paragraph 1.42.

<sup>45</sup> Over 10,000 estates were sold by 1870: *ibid* fn 212.

superseded by two developments which occurred during the same period.

4.06 One development was, of course, the land purchase scheme introduced by the British Government to enable Irish tenants to buy out their landlords.<sup>46</sup> As indicated earlier, this proved in the long run to be a considerable success and resulted in most agricultural and pastoral land being owned in fee simple and as registered land.<sup>47</sup>

4.07 The other major development was the introduction, again by the Westminster Parliament, of legislation designed to give general powers of disposing of settled land to limited owners. This is considered below,<sup>48</sup> but first something must be said about the legislation relating to the Landed Estates Court.

4.08 *Since the operation of the Landed Estates Court has long been superseded, the time has come to repeal, without replacement, the legislation relating to it. The pre-1922 statutes in question are:-*

*Landed Estates Court (Ireland) Act 1858*<sup>49</sup>

*Landed Estates Court (Ireland) Act 1861*<sup>50</sup>

## **C Settlements Legislation**

4.09 The principle of conferring on limited owners general<sup>51</sup> powers of dealing<sup>52</sup> with settled land was introduced initially in the middle of the 19<sup>th</sup> century through a series of *Settled Estates Acts*.<sup>53</sup>

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<sup>46</sup> See paragraph 1.19 above.

<sup>47</sup> See paragraph 1.20 above.

<sup>48</sup> Paragraph 4.09.

<sup>49</sup> 21 & 22 Vic c 72.

<sup>50</sup> 24 & 25 Vic c 123.

<sup>51</sup> As opposed to powers (usually of leasing only) for specific purposes: see paragraph 4.02 above.

<sup>52</sup> Not just powers of leasing, but also, most significantly, powers to sell and mortgage the land.

<sup>53</sup> *Settled Estates Acts 1856* (19 & 20 Vic c 120), *1858* (21 & 22 Vic c 77), *1864* (27 & 28 Vic c 45), *1874* (37 & 38 Vic c 33) and *1876* (39 & 40 Vic c 30). These Acts were repealed and consolidated in the *Settled Estates Act 1877* (40 & 41 Vic c 18). They all applied to both England (and

These Acts<sup>54</sup> suffered from two major flaws. One was that settlors were free to contract out of the statutory provisions,<sup>55</sup> thereby defeating their purpose. The other was that it was necessary to apply to the Court for authorisation to exercise the statutory powers. Quite apart from the time and expense involved, the Court would usually insist upon the agreement of all persons interested in the land as a condition of giving consent.<sup>56</sup> These flaws were met by the *Settled Land Acts 1882-90*. However, although those Acts seemed to provide a comprehensive scheme, some of the earlier legislation was left in force. It is extremely doubtful whether it had any continuing significance, but it would certainly not have any purpose under the new scheme recommended below.<sup>57</sup>

4.10 *Two Acts dealing with settled land which have been superceded by later Acts should be repealed without replacement. They are:-*

*Settled Land (Ireland) Act 1847*<sup>58</sup>

*Settled Estates Act 1877*<sup>59</sup>

4.11 The *Settled Land Acts 1882-90* continue to govern settlements and trusts of land in Ireland today. Although they were a considerable improvement on the earlier *Settled Estates Acts*<sup>60</sup> they

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Wales) and Ireland.

<sup>54</sup> See also the *Settled Land (Ireland) Act 1847* (10 & 11 Vic c 46) which authorised trustees to improve settled land, provided the consent of the Court was obtained. This does not seem to have had an equivalent in England and Wales.

<sup>55</sup> See, eg, section 38 of the *Settled Estates Act 1877*.

<sup>56</sup> See *Ex parte Puxley* (1868) IR 2 Eq 237; *Re Boyd's Settled Estates* (1874) IR 8 Eq 76. The Court could, however, dispense with such agreement in certain cases (eg where the persons could not be found or trying to find them would involve disproportionate expense): see 1877 Act sections 27-28.

<sup>57</sup> Paragraph 4.13. This includes the obscure section 19 of the *Administration of Justice Act (Ireland) 1707* (6 Anne c 10), which relates to warranties given by tenants for life.

<sup>58</sup> 10 & 11 Vic c 46.

<sup>59</sup> 40 & 41 Vic c 18.

<sup>60</sup> See paragraph 4.09 above.



were themselves flawed in several respects. One flaw is the confusing treatment of different methods of settling land. At least three methods of creating settlements have been commonly used by conveyancers:<sup>61</sup> (1) settling the land in a succession of interests without the use of any trust;<sup>62</sup> what is usually referred to as a “strict settlement”; (2) settling the land on trustees who are required to hold the land for beneficiaries,<sup>63</sup> with at most a power (rather than an obligation) to sell the land: what might be referred to as a “holding” trust; (3) again settling the land on trustees, but in this instance putting an obligation upon them to sell it (but probably with a power to postpone sale exercisable at their discretion): this is the typical “trust for sale”.<sup>64</sup> Partly as a result of some parliamentary fumbling at Westminster<sup>65</sup> the way in which the Acts operate varies according to whether the particular arrangement falls within categories (1) and (2) or category (3). It has long been the view of practitioners that it would be much simpler to treat all forms of settlement and trusts of land in the same way, having a single statutory scheme applicable to all categories.<sup>66</sup>

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<sup>61</sup> See Lyall *op cit* fn 1 Chapter 14; Wylie *op cit* fn 1 Chapter 8.

<sup>62</sup> *I.e.*, the deed or will creating the settlement simply conveys or leaves the land directly to persons in succession, *eg* to A for life, then to B in fee tail, then to C in fee simple.

<sup>63</sup> Thus, taking the example in the previous footnote, the deed or will might convey or leave the land to X and Y in fee simple to hold on trust for A for life, then for B in fee tail, then for C in fee simple.

<sup>64</sup> The only difference from the example given in the previous footnote would be that the deed or will would make it clear that X and Y are trustees *for sale*. It is often a difficult question of construction whether or not the trust involves an *obligation* to sell, so as to constitute a trust for sale: see, *eg*, *Re Horne's Settled Estate* (1888) 39 Ch D 84; *Re Wagstaff's Settled Estates* [1900] 2 Ch 201; *Re Goodall's Settlement* [1909] 1 Ch 440; *Re Johnson* [1915] 1 Ch 435.

<sup>65</sup> The problem stems from the operation of section 63 of the *Settled Land Act 1882* and its subsequent amendment by sections 6 and 7 of the *Settled Land Act 1884* and section 10 of the *Conveyancing Act 1911*: see Lyall *op cit* fn 1 at 412-414; Wylie *op cit* fn 1 paragraphs 8.043-8.050.

<sup>66</sup> In England and Wales the *Settled Land Act 1925* largely followed the structure of the 1882-90 Acts and in their foreword to the sixth edition of their standard text, the original authors (Sir Robert Megarry and Sir William Wade) record that in the first (1957) and all later editions they had

4.12 Another fundamental flaw of the 1882-90 Acts is that they involve detailed provisions conferring various powers on limited owners. These powers are in some cases of restricted scope and are often hedged around by various conditions relating to their exercise.<sup>67</sup> Often it is found that they do not cover a transaction which may be important, if not vital, to a particular person interested under the trust or settlement; for example, purchasing a property as a home for a beneficiary rather than as an investment. Again it has long been the view that it would make for a much simpler scheme to reverse the approach of the 1882-90 Acts, by providing that all settlements of land should involve vesting the land in trustees and conferring on them full powers of dealing with the land. In essence the trustees should have the powers of an absolute owner, except, of course, that this would be subject to the vital qualification that they are trustees and, therefore, subject to the principles of the law of trusts.

4.13 A new statutory scheme such as that outlined in the previous paragraphs was, in fact, proposed for the North as long ago as 1971.<sup>68</sup> It was reiterated by the Land Law Working Group in its 1990 *Final Report*.<sup>69</sup> Although not yet implemented there a similar scheme, involving all forms of settlements operating as a trust of land, with the trustees having the powers of dealing with it of an absolute owner, was introduced to England and Wales by the *Trusts of Land and Appointment of Trustees Act 1996*.<sup>70</sup> It is recommended that a similar scheme be included in the new legislation.

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advocated abolition of the 1925 scheme in favour of simpler forms of trust: *The Law of Real Property* (6<sup>th</sup> ed by Harpum Sweet & Maxwell 2000) at v. They were noting that they had at least lived to see that abolition with the enactment of the *Trusts of Land and Appointment of Trustees Act 1996*: see paragraph 4.13 below.

<sup>67</sup> See the *Settled Land Act 1882* Parts III-VIII.

<sup>68</sup> Survey of the Land Law of Northern Ireland (HMSO 1971) Chapter 3.

<sup>69</sup> Volume 1, Chapters 2.3 and 2.4. See also the draft legislation set out in Volume 2 at 463-548.

<sup>70</sup> Part I. It was based on the recommendations in the Law Commission's Report *Transfer of Land: Trusts of Land* (Law Com No 181 1999). See Megarry and Wade *op cit* fn 66 Chapter 8.

4.14 *The Commission provisionally recommends that a new scheme involving all forms of settlements operating as a trust of land, with the trustees having the powers of dealing with it of an absolute owner, should be introduced.*

## **D New Statutory Scheme**

4.15 It may be helpful at this stage to outline in more detail what it is envisaged would be the salient features of the new statutory scheme. Although there are useful precedents in the North's proposals and in the English 1996 Act,<sup>71</sup> it does not follow that all the details of those should be followed.

### **(1) Trusts of Land**

4.16 Under the new scheme all forms of settlement and trusts of land should fall within the single "trust of land" scheme set out in the new legislation. It would, therefore, encompass all the categories referred to earlier.<sup>72</sup> It would also cover, as do the 1882-90 Acts, cases where land is vested in a minor,<sup>73</sup> but not other cases of incapacity.<sup>74</sup> The definition of a settlement, involving a succession of interests in land, in the 1882-90 Acts should generally be followed, but the opportunity should be taken to clarify certain matters.

4.17 It was recommended earlier that there seems to be no good reason for imposing on parties the paraphernalia of the statutory scheme where a modified fee simple is vested, without any limitations over in favour of other successive parties.<sup>75</sup> The holder of such a

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<sup>71</sup> Paragraph 4.13 above.

<sup>72</sup> Paragraph 4.11 above.

<sup>73</sup> *Settled Land Act 1882* sections 59-60: see Wylie *op cit* fn 1 paragraphs 8.026 and 25.03.

<sup>74</sup> Cf 1882 Act section 62. Persons suffering from a mental incapacity should be dealt with under the courts' jurisdiction, arising under the *Lunacy Regulation (Ireland) Act 1871*, re wards of court: see *Courts (Supplemental Provisions) Act 1961* section 9 and *Rules of the Superior Courts 1986* 0 67 and *Rules of the Circuit Court 2001* 0 47; Costello "Wards of Court – A General Guideline of the Procedures Involved" (1993) 78 *Gaz ILSI* 143.

<sup>75</sup> See paragraph 2.15 above.

modified fee would continue, therefore, to hold the legal title to the land, rather than under trustees in whom that title would be vested.<sup>76</sup> It is recommended that the same rule should apply in other cases where a person holds the substantial (fee simple) interest in the land subject only to minor interests or charges, such as an annuity in favour of someone else. As regards the very common practice of vesting land subject to a right of residence,<sup>77</sup> it is recommended that the distinction drawn for registered land<sup>78</sup> should apply generally under the new statutory scheme. Thus the new scheme imposing a trust would apply only where the right of residence is exclusive<sup>79</sup> and relates to the whole<sup>80</sup> of the land in question.<sup>81</sup> Finally, the new statutory scheme should not apply to land held for charitable or other public purposes. This is currently the subject of a separate review by the Commission.

4.18 *The Commission provisionally recommends that the holder of a modified fee that is vested, without any limitations over in favour of other successive parties, should continue to hold the legal title to the land, rather than under trustees in whom that title would be vested. It is recommended that the same rule should apply in other cases where a person holds the substantial (fee simple) interest in the land subject only to minor interests or charges, such as an annuity in favour of someone else. The new scheme would also apply only where a right of residence is exclusive and relates to the whole of the land in question. The new statutory scheme should not apply to land held for charitable or other public purposes.*

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<sup>76</sup> The same principle should apply in the not uncommon case where the fee simple is vested subject to a power of revocation.

<sup>77</sup> Eg where a farmer leaves the farm to his son, but subject to the right of his widow to reside in the farmhouse for the rest of her days. See Lyall *op cit* fn 1 at 525-531; Wylie *op cit* fn 1 paragraphs 20.13-20.24.

<sup>78</sup> See *Registration of Title Act 1964* section 81; Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995) at 37, 208 and 247.

<sup>79</sup> Ie it is not shared with others.

<sup>80</sup> Ie as opposed to part only of the land in question.

<sup>81</sup> See *Kelaghan v Daly* [1913] 2 IR 328; *Re Shanahan* [1919] 1 IR 131; *National Bank v Keegan* [1931] IR 344; *Johnston v Horace* [1993] ILRM 594.

## **(2)      *The Trustees***

4.19 It is standard practice for deeds or wills creating settlements<sup>82</sup> and trusts of land to specify who are the trustees and this should continue under the new scheme. The new legislation should, however, provide a “fall-back” provision in case no such express nomination is made in a particular case. The general rule in the 1882-90 Acts that at least two trustees should act should probably be retained,<sup>83</sup> but the Commission wishes to reserve its position on this point. The Commission is currently reviewing the issue of trusteeship as part of its Trust Law Project.

4.20 *The Commission provisionally recommends that the new legislation should provide a “fall-back” provision in case no express nomination of trustees is made in a particular case.*

## **(3)      *Trustee Powers***

4.21 As indicated earlier, a key feature of the recommended new statutory scheme would be that the trustees would have the full power of dealing with the land that an absolute (as opposed to a limited) owner has.<sup>84</sup> This should, however, be regarded as essentially a “default” position, so that, in accordance with the general law of trusts, it should be open to a settlor to impose restrictions on those powers in a particular case.<sup>85</sup> The trustees should be obliged to consider the interests of the beneficiaries in exercising their powers, to consult particular beneficiaries where the exercise affects them

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<sup>82</sup> Even in the case of a strict settlement, where no trust is created initially (see paragraph 4.11 above), trustees “of the settlement” should still be specified, because once any of the statutory powers under the 1882-90 Acts are exercised so as to raise capital money (*eg* the power of sale), that must be paid to such trustees rather than the limited owner exercising the statutory power. This is the vital protection for the other persons interested under the settlement and for the person (*eg* the purchaser in the case of a sale) dealing with the limited owner. See Lyall *op cit* fn 1 at 405-409; Wylie *op cit* fn 1 paragraphs 8.031-8.040.

<sup>83</sup> See 1882 Act section 39 (1). There seems no particular reason to impose a *maximum* limit on the number of trustees.

<sup>84</sup> See paragraph 4.13 above.

<sup>85</sup> This is the position under the English *Trusts of Land and Appointment of Trustees Act 1996*: see section 8.

directly, but should not be required to obtain consent to particular actions unless the settlor required this.<sup>86</sup> To some extent this raises issues relating to the law of trusts generally and these should be left for further consideration in the context of the separate project on this subject being carried out by the Commission. This applies particularly to issues such as how far the trustees should have power to delegate functions to beneficiaries and their powers of investment.

4.22 *The Commission provisionally recommends that a key feature of the recommended new statutory scheme should be that the trustees would have the full power of dealing with the land that an absolute (as opposed to a limited) owner has. This should, however, be regarded as essentially a “default” position, so that, in accordance with the general law of trusts, it should be open to a settlor to impose restrictions on those powers in a particular case. The trustees should be obliged to consider the interests of the beneficiaries in exercising their powers.*

**(4) Protection of Third Parties**

4.23 The new statutory scheme should contain very clear provisions concerning the position of third parties dealing with the trustees in the exercise of their powers. Generally in the absence of fraud or other improper conduct, such as participating in a breach of trust or having actual knowledge of such a breach, a purchaser from the trustees should be protected.<sup>87</sup> In particular it should be made clear that a purchaser is not expected to enquire into the actions of the trustees and should be entitled to assume that they are acting properly, similar to the provision governing personal representatives in section 61 of the *Succession Act 1965*.

4.24 *The Commission provisionally recommends that the new statutory scheme should contain very clear provisions concerning the position of third parties dealing with the trustees in exercise of their powers. Generally, in the absence of fraud or other improper conduct, a purchaser from the trustees should be protected.*

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<sup>86</sup> Cf sections 10 and 11 of the English 1996 Act.

<sup>87</sup> Cf section 16 of the English 1996 Act.

**(5) Disputes**

4.25 The new statutory scheme should contain an effective mechanism for resolution of disputes between the beneficiaries and trustees. The most appropriate method would seem to be to permit any person interested in the trust and the trust land, including both the trustees and the beneficiaries, to apply to the court for an appropriate order to resolve the dispute. The legislation should give the court general guidance as to the factors to be taken into consideration, such as the purpose of the trust, the interests of the respective beneficiaries (both present and future) and of creditors of beneficiaries.<sup>88</sup> Subject to this, the court should be given the broadest discretion to make what it thinks is the most appropriate order in all the circumstances of the case.<sup>89</sup>

4.26 *The Commission provisionally recommends that the new statutory scheme should contain an effective mechanism for resolution of disputes between the beneficiaries and trustees. The most appropriate method would be to permit any person interested in the trust and the trust land, including both the trustees and the beneficiaries, to apply to the court for an appropriate order to resolve the dispute.*

**(6) Pre-1922 Statutes**

4.27 *A consequence of enactment of the proposed new statutory scheme would be that the following pre-1922 statutes would be replaced with substantial amendment:-*

*Settled Land Act 1882*<sup>90</sup>

*Settled Land Act 1884*<sup>91</sup>

*Settled Land Acts (Amendment) Act 1887*<sup>92</sup>

*Settled Land Act 1889*<sup>93</sup>

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<sup>88</sup> Cf sections 14 and 15 of the English 1996 Act.

<sup>89</sup> See further, the Law Reform Commission *Report on the Variation of Trusts* (LRC 63-2000) (December 2000).

<sup>90</sup> 45 and 46 Vic c 38.

<sup>91</sup> 47 & 48 Vic c 18.

<sup>92</sup> 50 & 51 Vic c 30.

*Settled Land Act 1890*<sup>94</sup>

*Conveyancing Act 1911, section 10.*<sup>95</sup>

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<sup>93</sup> 52 & 53 Vic c 36.

<sup>94</sup> 53 & 54 Vic c 69.

<sup>95</sup> This section related to trusts for sale: see Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 328-329.





## CHAPTER 5      POWERS OF APPOINTMENT

5.01      Powers of appointment are commonly inserted in deeds and wills creating settlements and trusts.<sup>1</sup> Essentially, instead of the settlor allocating property directly to specified beneficiaries, a power is conferred on a person (the donee<sup>2</sup> of the power or appointor) to “appoint” (*ie* select) from a group of persons (the objects of the power) those who should be allocated the property (the appointees) and in what shares.<sup>3</sup> This subject,<sup>4</sup> which is fairly technical, is relatively uncontroversial, but it requires consideration because there are several pre-1922 statutes which bear on the subject.

### **A      *Illusory Appointments Act 1830***<sup>5</sup>

5.02      This Act was enacted to deal with confusion which had arisen from the courts’ attempt to regulate the exercise of powers of appointment.<sup>6</sup> In the case of a “non-exclusive” power (*ie* where the settlor had made it clear that each object of the power should be

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<sup>1</sup>      See Chapter 4 above.

<sup>2</sup>      Who may be a trustee in the case of a trust.

<sup>3</sup>      See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 13; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 11.

<sup>4</sup>      The other type of power commonly used in practice is a power of attorney, but the law relating to this was recently overhauled in the *Powers of Attorney Act 1996*. This Act was partly based on the recommendations contained in the Commission’s *Report on Land Law and Conveyancing Law : (2) Enduring Powers of Attorney* (LRC 31 – 1989). See Wylie *op cit* fn 3 paragraphs 11.29-11.51. See also Chapter 3 of the Law Reform Commission’s Consultation Paper on *Law and the Elderly* (LRC CP 23-2003).

<sup>5</sup>      11 Geo 4 & 1 Will 4 c 46.

<sup>6</sup>      See Lyall *op cit* at 373-374; Wylie *op cit* paragraph 11.20.

allocated at least some property by the donee), the courts were concerned that the donee might attempt to thwart the settlor's wishes by cutting off a particular object "with a shilling",<sup>7</sup> hence the expression "illusory appointment".<sup>8</sup> What the Act does is to clarify matters by providing that the appointment of a nominal sum is not to invalidate the exercise of a power of appointment.

5.03 Arguably the 1830 Act was rendered redundant by a later Act, the *Powers of Appointment Act 1874* and that what is needed in the new legislation is a consolidating provision which encapsulates the substance of both Acts. This is what was included in the English *Law of Property Act, 1925*.<sup>9</sup>

## **B        *Powers of Appointment Act 1874*<sup>10</sup>**

5.04 This Act provided that every power of appointment should be presumed to be an exclusive power<sup>11</sup> with the result that the donee has a complete discretion whether to make any appointment at all in favour of any particular object, never mind making an illusory appointment. As the leading English authority on the subject put it: "The Act of 1830 enabled an appointor to cut off any object of the power with a shilling; the Act of 1874 enables him to cut off the shilling also."<sup>12</sup> As indicated earlier, what is needed is a provision to consolidate the effect of the 1830 and 1874 Acts. A precedent for this can be found in section 158 of the *Law of Property Act 1925*. This reads:

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<sup>7</sup> See the judgment of Lord Nottingham L C in *Gibson v Kinven* (1682) 1 Vern 66; also *Vanderzee v Aclom* (1799) 4 Ves 771 at 784-785 (*per Arden MR*).

<sup>8</sup> See Howe "Exclusive and Nonexclusive Powers and the Illusory Appointment" (1944) 42 Mich L Rev 649.

<sup>9</sup> Section 158. See paragraph 5.04 below.

<sup>10</sup> 37 & 38 Vic c 37.

<sup>11</sup> See paragraph 5.02 above. Note that this creates a presumption only, so that it is open to a settlor to rebut the presumption.

<sup>12</sup> Farwell *Powers* (3<sup>rd</sup> ed 1916) at 427.

“(1) No appointment made in exercise of any power to appoint among two or more objects is invalid on the grounds that:-

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

But every such appointment is valid, notwithstanding that any one or more of the objects is thereby, or in default of appointment, to take any share in the property.

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

The result of these recommendations would be that the *Illusory Appointments Act 1830* and the *Powers of Appointment Act 1874* would be replaced without substantial amendment.

5.05 *The Commission provisionally recommends that the Illusory Appointments Act 1830 and the Powers of Appointment Act 1874 should be replaced without substantial amendment.*

## **C      *Law of Property Amendment Act 1859,*<sup>13</sup> Section 12**

5.06 Section 12 of this Act deals with how the donee of a non-testamentary power of appointment (*ie* one which must be exercised by the donee while still alive and not by will coming into force on the donee’s death) should execute the power.<sup>14</sup> The section is concerned with the mechanics of execution of the instrument and has an odd feature. Testamentary powers are governed by section 79 of the *Succession Act 1965*, which simply provides that the donee need comply only with the usual requirements for execution of a valid will.

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<sup>13</sup> 22 & 23 Vic c 35.

<sup>14</sup> See Lyall *op cit* at 373; Wylie *op cit* paragraph 11.14.

On the other hand, section 12 requires that the donee of a non-testamentary power must meet requirements which are not strictly necessary for execution of a deed, for example attestation by two or more witnesses. It is difficult to justify this distinction and so it is recommended that section 12 should be replaced with an equivalent of section 29 of the 1965 Act *ie* a donee of a non-testamentary power should only have to meet the requirements for valid execution of a deed.<sup>15</sup> The result would be that section 12 of the 1859 Act would be replaced with substantial amendment.

5.07 *The Commission provisionally recommends that a donee of a non-testamentary power should only have to meet the requirements for valid execution of a deed.*

#### **D        *Conveyancing Act 1881*,<sup>16</sup> Section 52**

5.08 This section was designed to overrule the common law principle that a power “simply collateral” (*ie* where the donee has no interest in the property to which the power of appointment relates) could not be released (*ie* given up).<sup>17</sup> It confers a general right of release for any power, whether collateral or general. However, notwithstanding its wide wording, it is very doubtful whether it applies to a power “in the nature of a trust”, because this would cause a divesting of the interests which objects of such powers are deemed to have, until an appointment is made which results in such divesting.<sup>18</sup> Furthermore it may be doubted whether it applies to “fiduciary” powers, because a release would be inconsistent with the fiduciary duty owed by the donee in such cases.<sup>19</sup> The replacement of section 52 in the new legislation should include an express exception of powers in the nature of a trust and fiduciary powers. The result would be that section 52 of the 1881 Act would be replaced without substantial amendment.

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<sup>15</sup> The subject of those requirements is dealt with later. See paragraph 8.32 below.

<sup>16</sup> 44 & 45 Vic c 41.

<sup>17</sup> See Lyall *op cit* fn 3 at 369; Wylie *op cit* fn 3 paragraph 11.03 and 11.26.

<sup>18</sup> See Wylie *op cit* fn 3 paragraphs 11.11 and 11.26.

<sup>19</sup> *Ibid* paragraphs 11.09 and 11.26.

5.09 *The Commission provisionally recommends that section 52 of the Conveyancing Act 1881 should be replaced without substantial amendment, subject to the inclusion of an express exception of powers in the nature of a trust and fiduciary powers.*

**E            *Conveyancing Act 1882*<sup>20</sup> Section 6**

5.10        This section confers a general right on donees of powers of appointment to disclaim the power, *ie* refuse to accept it in the first place. Such a disclaimer does not necessarily destroy the power, for there may be other donees who do not disclaim.<sup>21</sup> This is an uncontroversial provision<sup>22</sup> which should be replaced without substantial amendment.

5.11        The Commission provisionally recommends that the general right of donees of powers of appointment to disclaim the power under section 6 of the Conveyancing Act 1882 should be replaced without substantial amendment.

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<sup>20</sup>        45 & 46 Vic c 39.

<sup>21</sup>        See section 6 (2).

<sup>22</sup>        See Wylie *op cit* fn 3 paragraph 11.27.



## CHAPTER 6 CO-OWNERSHIP

6.01 This chapter deals with the law of co-ownership, *ie* where several persons or bodies own estates or interests in land concurrently.<sup>1</sup> Such arrangements are very common, but the law relating to them is somewhat complex. Several matters require consideration, including a number of pre-1922 statutes.

### A Fragmentation of the Legal Title

6.02 One of the major changes to the law introduced in England and Wales was the prohibition by the *Law of Property Act 1925* on creation of legal tenancies in common.<sup>2</sup> The point about a tenancy in common, as opposed to a joint tenancy,<sup>3</sup> is that there is no “right of survivorship” whereby, on the death of one co-owner, the deceased’s interest in the land passes automatically to the surviving co-owner or co-owners. In the case of a tenancy in common each owner is regarded as have a distinct, albeit undivided, share in the land, which can be left by will to whomever the owner wishes. The result is that over time the legal ownership of the property may become more and more fragmented, as tenants in common die and leave their shares to a large group of people (*eg* children), who then, in turn, do the same. The result may be that over a couple of generations the legal ownership of the property becomes split between dozens, perhaps

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<sup>1</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 10; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 7. See also Conway *Co-ownership of Land: Partition Actions and Remedies* (Butterworths 2000).

<sup>2</sup> Section 34-36. See Megarry & Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum, Sweet & Maxwell 2000) Chapter 9.

<sup>3</sup> Other traditional forms of co-ownership, such as co-parcenary and a tenancy by the entirety, have ceased to have any significance in modern times: see Lyall *op cit* fn 1 at 443-445; Wylie *op cit* fn 1 paragraphs 7.40-7.52.



even, in the extreme cases, hundreds of people. This renders the carrying out of transactions with the land extremely complex, as all these people have to be traced in order that they can sign the necessary documents, such as the contract for sale and deed of conveyance. The English *Law of Property Act 1925* aimed to resolve this by providing that in future the legal title to co-owned land should always be vested in trustees as joint tenants and that any tenancy in common would exist only in respect of the equitable or beneficial interest.

6.03 The Commission recently considered this matter and resolved not to recommend similar provisions here.<sup>4</sup> One reason was that the evidence of practitioners indicated that the sort of conveyancing problems mentioned in the previous paragraph do not arise in practice. Another reason is that it would involve a considerable interference with the freedom of parties to devise their method of holding land. This is a point of some substance nowadays as it is very common for large groups of investors to acquire commercial property and to hold it as co-owners, invariably as tenants in common. The view of practitioners experienced in such transactions is that it would not be acceptable to many such investors to have the legal title to the property vested in a limited number of them only.

6.04 Apart from such considerations, the English provisions have proved to be one of the most controversial aspects of the 1925 legislation. Particular problems were created by the form of trust imposed by the *Law of Property Act 1925*, which was a trust for sale.<sup>5</sup> Such a trust, which involves an obligation to sell the land at the earliest opportunity, was inconsistent with some of the most common examples of co-ownership, for example, where a married couple purchase their matrimonial home, which they naturally intend to keep for some time. This aspect of the 1925 Act was not altered until the enactment of the *Trusts of Land and Appointment of Trustees Act 1996*.<sup>6</sup>

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<sup>4</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70 2003) paragraph 5.05.

<sup>5</sup> See paragraph 4.13 above.

<sup>6</sup> See section 5 and Schedule 2. See also Megarry & Wade *op cit* fn 2

6.05 *The Commission provisionally recommends that there should be no prohibition on the creation of legal tenancies in common.*

## **B Severance**

6.06 One of the most important aspects of the law of co-ownership is the concept of severance of a joint tenancy.<sup>7</sup> This is the process whereby a joint tenancy is converted into a tenancy in common. If this occurs, it has considerable significance for the joint tenants, because it means that the right of survivorship<sup>8</sup> no longer exists. They, therefore, lose the expectation that one of them will end up as sole owner of the entire land, being the last surviving joint tenant.

6.07 The Commission has again considered this subject in recent times and made recommendations which should be implemented in the new legislation. One is that the methods of bringing about the severance should be simplified.<sup>9</sup> Another is a more radical proposal, which is that it should no longer be open to a joint tenant to sever the joint tenancy unilaterally, *ie* without the consent of the other joint tenants.<sup>10</sup> In its *Consultation Paper on Judgment Mortgages*<sup>11</sup> it was recommended that registration of a judgment mortgage against the interest of a joint tenant should no longer effect a severance.<sup>12</sup>

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paragraphs 9.051-9.054.

<sup>7</sup> See Lyall *op cit* fn 1 at 435-443; Wylie *op cit* fn 1 paragraphs 7.22-7.32.

<sup>8</sup> See paragraph 6.02 above.

<sup>9</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) at 11-12. This pointed out the current need to employ a “conveyance to uses” and such relics from the past should be removed generally: see paragraph 8.13 below. The earlier recommendation was reiterated in the *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003) paragraph 5.02.

<sup>10</sup> LRC 70-2003, Chapter 5.

<sup>11</sup> LRC CP 30-2004.

<sup>12</sup> Paragraph 6.16. It was also recommended that the effect of a judgment mortgage on a joint tenancy should be the same whether the land is registered or not: paragraph 6.12.

6.08 The Commission also considered recently a related matter, commorientes, *ie* where joint tenants suffer “simultaneous” deaths in some disaster like a car accident or aircraft crash.<sup>13</sup> Often it is impossible to tell in such cases which of them died first, so as to determine which was the survivor taking the entire land. It was considered that the current rule enshrined in section 5 of the *Succession Act 1965*, based on the common law,<sup>14</sup> that in such cases they should be deemed to have died simultaneously, often produced unsatisfactory results. It was recommended that, where the circumstances surrounding the death of joint tenants renders it uncertain which was the survivor, this should effect a severance and the land should be deemed at that point to be held on a tenancy in common and to pass to their respective successors at such.<sup>15</sup> This should be implemented in the new legislation.

6.09 *The Commission provisionally recommends that its previous recommendations relating to the severance of joint tenancies and commorientes should be implemented.*

## **C Partition**

6.10 Partition is a process whereby co-owners<sup>16</sup> can put an end to the co-ownership, *ie*, the land is partitioned (divided up) amongst the co-owners so that they thereafter each own a part of the land as sole owner. Problems often arise either because the parties cannot agree to partition or, if they agree in principle, cannot agree as to how it should be done, or because it is not feasible or practicable to partition the land physically, for example, a single house amongst four co-owners. It was to resolve these sorts of problems that legislation was introduced, essentially to enable any co-owner to obtain a court order for partition.<sup>17</sup> The current law is largely contained in the *Partition*

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<sup>13</sup> See *Re Kennedy Estates* High Court (Kearns J) 31 January 2000.

<sup>14</sup> *Re Phene's Trusts* (1870) 5 Ch App 139.

<sup>15</sup> LRC 70-2003, Chapter 3.

<sup>16</sup> Both joint tenants and tenants in common.

<sup>17</sup> Originally by the old Irish Parliament – the *Joint Tenants Act (Ireland) 1542* (33 Hen 8 c 10), subsequently amended by the *Partition Act (Ireland) 1697* (9 Will 3 c 12). The 1542 Act was repealed by the *Statute Law Revision (Pre-Union Irish Statutes) Act 1962* and caused doubts as to

*Acts 1868*<sup>18</sup> and *1876*,<sup>19</sup> the most important feature of which is the court's power to order a sale of the land, with division of the proceeds of sale amongst the co-owners, instead of a physical division of the land.

6.11 The *Partition Acts* are widely used, but their provisions are somewhat complex and hedged with dubious conditions.<sup>20</sup> There is considerable scope for their simplification in the new legislation and precedents exist in the North's proposals<sup>21</sup> and English legislation.<sup>22</sup> The Commission has also recommended that the Acts should no longer apply to judgment mortgages<sup>23</sup> and judgment creditors should be covered by new legislation dealing with judgment mortgages generally.<sup>24</sup> The result would be that the *Partition Acts 1868* and *1876* would be replaced with substantial amendment.

6.12 *The Commission provisionally recommends that the Partition Acts 1868 and 1876 should be replaced with substantial amendment with a view to their simplification, and that the Acts should no longer apply to judgment mortgages.*

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whether the courts' jurisdiction survived – it probably did, at least under the courts' inherent equitable jurisdiction: see *O'D v O'D* High Court (Murphy J) 18 November 1983; *F v V* [1987] ILRM 1. The Commission recommended that this doubt be resolved by statute: see *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 16-17.

<sup>18</sup> 31 & 32 Vic c 40.

<sup>19</sup> 39 & 40 Vic c 17.

<sup>20</sup> For a detailed discussion of the operation of the Acts see Conway *op cit* fn 1.

<sup>21</sup> *Final Report of the Land Law Working Group* (HMSO 1990) Volume 2 (Property Order) at 454-455.

<sup>22</sup> *Law of Property Act 1925* section 28.

<sup>23</sup> See *Consultation Paper on Judgment Mortgages* (LRC CP 30-2004) paragraph 6.19.

<sup>24</sup> See Chapter 10 below.

## **D       Accounts**

6.13       It is not uncommon for one co-owner to enjoy more out of the land than another co-owner, for example, sole occupation of a house which is co-owned. At common law it was not possible for one co-owner to bring an action of account against another, to seek an adjustment to take account of such situations.<sup>25</sup> Such a right was conferred by section 23 of the *Administration of Justice Act (Ireland) 1707*.<sup>26</sup> This is an important provision, so that section 23 of the 1707 Act should be replaced without substantial amendment in the new legislation.

6.14       *The Commission provisionally recommends that section 23 of the Administration of Justice Act (Ireland) 1707 should be replaced without substantial amendment in the new legislation.*

## **E       Bodies Corporate**

6.15       The *Bodies Corporate (Joint Tenancy) Act, 1899*<sup>27</sup> was enacted to enable corporate bodies, like banks and other financial institutions, to hold property in a joint tenancy with others, for example, as trustees.<sup>28</sup> This has had considerable practical significance and so the 1899 Act should be replaced without substantial amendment in the new legislation.

6.16       *The Commission provisionally recommends that the Bodies Corporate (Joint Tenancy) Act 1899 should be replaced without substantial amendment.*

## **F       Equitable Co-owners**

6.17       One of the most controversial areas of land law and conveyancing law in recent decades has been the courts' willingness to hold that a person has acquired informally an equitable interest in land, the legal title to which is vested in someone else.<sup>29</sup> The

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<sup>25</sup>       For detailed discussion of this subject see Conway *op cit* fn 1 Chapter 11.

<sup>26</sup>       6 Anne c 10.

<sup>27</sup>       62 & 63 Vic c 20.

<sup>28</sup>       See Wylie *op cit* fn 1 paragraph 7.05.

<sup>29</sup>       See Lyall *op cit* fn 1 Chapter 17; Wylie *op cit* paragraphs 25.15-25.16.

development of the judicial basis for this has been a somewhat tortuous one throughout the common law world.<sup>30</sup> Particular problems are created in the conveyancing context where the holder of the equitable interest is also in occupation of the property. In such instances it may be held that a purchaser<sup>31</sup> of the land, who deals with the legal owner only, may nevertheless be held bound by the “hidden” equitable interest.<sup>32</sup>

6.18 This difficult area was the subject of a recent review by the Commission relating to the rights and duties of co-habitees.<sup>33</sup> The Commission concluded that it was not appropriate to recommend legislation making provisions for (1) a reformed version of the purchase money resulting trust<sup>34</sup> (2) a community property regime<sup>35</sup> or (3) extension of the *Family Home Protection Act 1976* to qualified co-habitees.<sup>36</sup> Instead, it recommended that qualified co-habitees should be able to apply to the court for property adjustment orders in exceptional circumstances, within one year of the relationship breaking down.<sup>37</sup> It would not be appropriate to revisit such matters in this Consultation Paper.

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<sup>30</sup> See the comparative study (including Ireland) in Mee *The Property Rights of Cohabitees* (Hart Publishing 1999). Note also the English Court of Appeal’s recent attempt at rationalisation in *Oxley v Hiscock* [2004] 3 All ER 703.

<sup>31</sup> Or other body dealing with the legal owner, *eg*, a lending institution taking a mortgage of the land as security for a loan.

<sup>32</sup> Under, *eg*, the doctrine of constructive notice. See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed 1996) paragraph 16.23. Note also section 72 (1)(j) of the *Registration of Title Act 1964* which classifies “the rights of every person in actual occupation of the land” as a burden affecting registered land *without* registration. See Conlon “Beneficial Interests – Conveyances and the Occupational Hazard” *Law Society Gazette*, March 1985; Pearce “Joint Occupation and the Doctrine of Notice” (1980) 15 *Ir Jur* (ns) 211.

<sup>33</sup> Consultation Paper on Rights and Duties of Co-habitees (LRC CP 32-2004), especially Chapter 3.

<sup>34</sup> *Ibid* paragraph 3.51.

<sup>35</sup> *Ibid* paragraph 3.57.

<sup>36</sup> *Ibid* paragraph 3.62.

<sup>37</sup> *Ibid* paragraph 3.88.

6.19 There is, however, one aspect of this subject which is of particular significance to the subject of this Consultation Paper. That is the conveyancing problem raised earlier.<sup>38</sup> The problem for conveyancers is that the beneficial interests, however they arise, are often “hidden”, and it is often unrealistic to expect purchasers, still less lending institutions, to discover all those claimants of such interests who might be in occupation of land. It is recommended, therefore, that in future any such claim should be unenforceable against a purchaser or mortgagee of the land<sup>39</sup> unless it has been protected by prior registration in the Land Registry or Registry of Deeds, as appropriate. Such a recommendation has already been made in Northern Ireland.<sup>40</sup>

6.20 *The Commission provisionally recommends that in future any claim to an equitable interest in land should be unenforceable against a purchaser or mortgagee of the land unless it has been protected by prior registration in the Land Registry or Registry of Deeds, as appropriate.*

## **G Common Rights**

6.21 It is a frequent occurrence in rural areas, particularly in the Western counties, to have remote bog and grazing land on hills and mountains held by numerous co-owners. The Land Commission was given power to authorise partition of such “commonages” by section 39 of the *Land Act 1939*,<sup>41</sup> but many still exist. The *Commons Acts (Ireland) 1789*<sup>42</sup> and *1791*<sup>43</sup> prohibited the commission of waste on common land and it is recommended that these Acts be replaced without substantial amendment in the new legislation.

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<sup>38</sup> Paragraph 6.17 above.

<sup>39</sup> This would not, of course, stop the claimant enforcing the equitable interest against the proceeds of sale or loan money in the hands of the vendor or mortgagor, under the usual equitable doctrine of tracing.

<sup>40</sup> *Final Report of the Land Law Working Group* (HMSO 1990) Volume 1 paragraphs 2.2.14-2.2.34 and Volume 2 (Property Order) at 447-450.

<sup>41</sup> See *Re Commonage at Glennamaddoo* [1992] 1 IR 297.

<sup>42</sup> 29 Geo 3 c 30.

<sup>43</sup> 31 Geo 3 c 38.

6.22 *The Commission provisionally recommends that the Commons Acts (Ireland) 1789 and 1791 should be replaced without substantial amendment in the new legislation.*

## **H Party Structures and Boundaries**

6.23 Although not necessarily strictly involving forms of co-ownership of land,<sup>44</sup> there are two related matters which merit consideration. One is the regulation of neighbouring parties' rights in respect of a party wall or other structure dividing their respective properties. This can be a source of much dispute and an attempt at statutory regulation was contained in the, rarely noticed *Boundaries Act (Ireland) 1721*.<sup>45</sup> The new legislation should contain a modern version of this and a recent precedent exists in England.<sup>46</sup> The 1721 Act would then be replaced with substantial amendment.

6.24 *The Commission provisionally recommends that the new legislation should contain a modern version of the Boundaries Act (Ireland) 1721 dealing with neighbouring parties' rights in respect of party walls or other structures dividing their respective properties.*

6.25 Another frequent source of dispute between neighbouring owners arises where buildings are built so close to the boundary line between their properties that the only means of access (which may be necessary in order, for example, to carry out repairs and maintenance) is from the neighbour's property. Legislation to resolve such disputes, enabling a landowner to obtain a court "access" order, is recommended. Again a precedent exists in England.<sup>47</sup>

6.26 *The Commission provisionally recommends that legislation should be enacted to resolve disputes between neighbouring owners by enabling an owner to obtain a court "access" order where appropriate.*

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<sup>44</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 7.53-7.62.

<sup>45</sup> 8 Geo 1 c 5. Cf the private and local *Dublin Corporation Act 1890* (53 & 54 Vict c 246). See Wylie *op cit* fn 44 paragraphs 7.57-7.62.

<sup>46</sup> *Party Wall etc Act 1996*. See *Roadrunner Properties Ltd v Dean* [2004] 11 EG 140.

<sup>47</sup> *Access to Neighbouring Land Act 1992*.





## CHAPTER 7 APPURTENANT RIGHTS

7.01 This Chapter is concerned with “appurtenant” rights, *ie*, rights which do not confer substantial ownership in the sense of an estate in the land,<sup>1</sup> but rather some minor right usually<sup>2</sup> exercisable over a neighbour’s land. Indeed, it is common for neighbouring landowners to have such rights over each other’s land. The rights recognised by our legal system fall into two broad categories.

7.02 One very broad category is that known as “incorporeal hereditaments”.<sup>3</sup> This comprises some very common rights, such as easements (*eg* a right of way) and *profits à prendre* (*eg* a right to fish or to cut turf).<sup>4</sup> It also comprises some less common rights, such as rentcharges,<sup>5</sup> and some which have become obsolete, such as tithe rentcharges<sup>6</sup> and advowsons.<sup>7</sup> These are discussed below.

7.03 The other category, which is also very common, is freehold covenants relating to land. Whenever a landowner sells off part of the land,<sup>8</sup> or sub-divides the land,<sup>9</sup> it is usual to impose various covenants

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<sup>1</sup> See paragraphs 1.03 and 2.10 above.

<sup>2</sup> The qualification is made here because one form of incorporeal hereditament, a *profit à prendre* (see paragraph 7.02 below), can exist *in gross*, *ie* it is not necessarily appurtenant to land and can be owned by someone who owns no estate or other interest in land. Thus such a person may hold fishing rights in a river or stream owned by someone else.

<sup>3</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 22; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 6.

<sup>4</sup> See Bland *The Law of Easements and Profits à Prendre* (Round Hall Sweet & Maxwell 1997).

<sup>5</sup> See paragraph 7.11 below.

<sup>6</sup> See paragraph 7.05 below.

<sup>7</sup> See paragraph 7.07 below.

<sup>8</sup> *Eg* where a house owner has a very large garden and sells off part of it as a

on the purchasers of the parts sold off. These may be restrictive or negative in nature (*eg* restricting the future use of the parts sold off to private residential purposes) or positive (*eg* requiring maintenance and repair of boundary walls and fences). Since these covenants are being imposed on freehold as opposed to leasehold<sup>10</sup> owners, the intention usually is that they will bind successors in title indefinitely. However, the law relating to freehold covenants has never developed properly and is subject to serious flaws.<sup>11</sup> The most serious of these are that, first, the burden of a positive covenant does not “run with the land” (*ie* bind a successor in title to the original covenantor) and, secondly, the burden of negative covenants runs in equity only,<sup>12</sup> so that the person entitled to enforce the covenant (the original covenantee or a successor in title) does not have a legal right. This has important practical significance, because, generally speaking,<sup>13</sup> equitable rights are more vulnerable than legal ones,<sup>14</sup> and may turn out to be unenforceable against a successor in title.<sup>15</sup> This is an area of the law which has long needed major reform.<sup>16</sup>

7.04 It may be convenient to begin with incorporeal hereditaments and to dispose, first of all, of those which are obsolete

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building plot.

<sup>9</sup> *Eg* where a developer divides a large building site into plots, upon each of which a new house will be built, *ie* the typical housing estate.

<sup>10</sup> The law relating to leasehold covenants is relatively straightforward and effective: see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1996) Chapter 21.

<sup>11</sup> See Lyall *op cit* fn 3 Chapter 21; Wylie *Irish Land Law op cit* fn 3 (3<sup>rd</sup> ed Butterworths 1997) Chapter 19.

<sup>12</sup> Under the rule in *Tulk v Moxhay*: see authorities in fn 11 above.

<sup>13</sup> To some extent it depends on the impact of registration systems: see paragraphs 1.25-1.29 above.

<sup>14</sup> The latter, as it is often put, “bind the world”.

<sup>15</sup> *Eg* a *bona fide* purchaser of a legal estate without notice of the equitable right to enforce a freehold restrictive covenant. On the operation of this doctrine see Lyall *op cit* fn 3 at 122-130; Wylie *op cit* fn 3 paragraphs 3.069-3.090.

<sup>16</sup> See paragraph 7.29 below.

or no longer of practical significance. This is relevant in the context of pre-1922 statutes.

## **A Tithe Rentcharges**

7.05 The history of these, which stem from the “tithe”, which was the right of the “established” church to one tenth of the produce of land in each parish, has been a long and complicated one.<sup>17</sup> Tithes in kind were later substituted by money compositions charged on land, which in turn were replaced by tithe rentcharges payable into the Church Temporalities Fund created after disestablishment of the Church of Ireland by the *Irish Church Act 1869*. An apportioned part of that fund became vested in the State, but section 7 of the *Land Act 1984* extinguished all remaining tithe rentcharges payable into the Fund and dissolved the Fund, which was to be paid into, or disposed of, for the benefit of the Exchequer.

7.06 The Commission provisionally recommends that the pre-1922 statutes relating to tithe rentcharges still in force<sup>18</sup> can now be repealed without replacement. These are:-

*Tithes Act 1835*<sup>19</sup>

*Tithe Rentcharge (Ireland) Act 1838*<sup>20</sup>

*Tithe Arrears (Ireland) Act 1839*<sup>21</sup>

*Tithe Rentcharge (Ireland) Act 1848*<sup>22</sup>

7.07 In passing it may be noted that the *Irish Church Act 1869*<sup>23</sup> abolished another incorporeal hereditament connected with the established church. This was an advowson, which was the right of a

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<sup>17</sup> See Lyall *op cit* fn 1 at 765-766; Wylie *op cit* fn 1 paragraphs 6.120-6.128.

<sup>18</sup> The Repeals Schedule to the *Land Act 1984* listed the *Tithe Rentcharge (Ireland) Act 1900*, but not the earlier Acts listed below.

<sup>19</sup> 5 & 6 Will 4 c 74.

<sup>20</sup> 1 & 2 Vic c 109.

<sup>21</sup> 2 & 3 Vic c 3.

<sup>22</sup> 11 & 12 Vic c 80.

<sup>23</sup> Section 10.

landowner to nominate a clergyman to an ecclesiastical “living”, *ie* as the rector or vicar of the local church.<sup>24</sup>

## **B        Former Crown Rents and Similar Rights**

7.08        On its establishment the State inherited the right to receive various rents issuing out of land in Ireland and previously payable to the British Crown. Most of these rents were redeemed under the land purchase scheme,<sup>25</sup> but some did survive and, although comprising miniscule amounts, were collected on behalf of the State by the Land Commission and accounted for to the Department of Finance.<sup>26</sup> There were various categories, such as: (1) Crown rents reserved in feudal grants of land;<sup>27</sup> (2) “quit” rents reserved in 17<sup>th</sup> century grants made to English and Scottish settlers following confiscation of Irish land;<sup>28</sup> (3) composition rents reserved in the compositions entered into by the Lords and Chieftains of Connaught and Thomond during the reign of Elizabeth I. However, in exercise of power conferred by section 12 of the *State Property Act 1954*, the Minister for Finance waived the payment of these rents and released the lands from them, as from 29 September 1975.<sup>29</sup> As a result the *Plus Lands Act (Ireland) 1703*<sup>30</sup> can be repealed without replacement.<sup>31</sup>

7.09        *The Commission provisionally recommends that the Plus Lands Act (Ireland) 1703 should be repealed without replacement.*

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<sup>24</sup>        See Lyall *op cit* fn 3 at 766; Wylie *op cit* fn 3 paragraphs 6.018-6.019.

<sup>25</sup>        See paragraphs 1.19-1.20 above.

<sup>26</sup>        See *State Property Act 1954* sections 13-15.

<sup>27</sup>        See Wylie *op cit* fn 3 paragraph 6.008.

<sup>28</sup>        See paragraph 1.07 above and Wylie *op cit* fn 3 paragraphs 6.009-6.012.

<sup>29</sup>        By then just over 100 rents yielding the princely annual sum of £129 were still being collected!

<sup>30</sup>        2 Anne c 8, which related to quit rents. See Wylie *op cit* fn 3 paragraph 6.010.

<sup>31</sup>        Most other legislation relating to these rents has either been repealed already (eg, the *Plantation Statutes* of 1662 and 1665) by the *Statute Law Revision (Pre-Union Irish Statutes) Act 1962* or has been recommended for repeal earlier (eg the *Crown Lands Act 1906*: see paragraph 2.08 above).

7.10 In passing it may be noted that other former Crown rights may survive, such as the right to grant “franchises”,<sup>32</sup> but in so far as these were part of the Crown prerogatives it must be doubted now whether the State can invoke the right to grant such.<sup>33</sup> This is even more clearly so with respect to the former Crown right to confer titles of honour and special offices.<sup>34</sup>

## C Rentcharges

7.11 Rentcharges, to be distinguished from leasehold rents,<sup>35</sup> are relatively rare nowadays.<sup>36</sup> In the past they have taken various forms, such as under a fee farm grant not creating the relationship of landlord and tenant<sup>37</sup> or as part of a settlement of land where they are used to provide income or an annuity for members of the family who are not given a substantial estate or interest in the land.<sup>38</sup> The continued creation of such non-statutory rentcharges is of questionable value nowadays, particularly in the light of the confusion with leasehold arrangements. Apparently such rentcharges are rarely, if ever, used as part of modern settlement and trust arrangements.<sup>39</sup> It is, therefore, recommended that the future creation

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<sup>32</sup> See Lyall *op cit* fn 3 at 764-765; Wylie *op cit* fn 3 paragraph 6.020.

<sup>33</sup> As a result of the Supreme Court’s ruling that such prerogatives are inconsistent with the Constitution: see *Byrne v Ireland* [1972] IR 241; *Webb v Ireland* [1988] IR 353. See paragraph 2.03 above.

<sup>34</sup> See Lyall *op cit* at 767-768; Wylie *op cit* paragraph 6.021. Article 40.2.1 of the Constitution prohibits the conferring of “titles of nobility”: see Kelly *The Irish Constitution* (4<sup>th</sup> ed by Hogan & Whyte Lexis Nexis Butterworths 2003) at 1387-8.

<sup>35</sup> See paragraph 2.25 above.

<sup>36</sup> See Lyall *op cit* at 757-764; Wylie *op cit* paragraphs 6.131-6.145.

<sup>37</sup> See paragraphs 1.13-1.15 above.

<sup>38</sup> *Eg* a fee tail or life estate: see paragraph 4.01 above.

<sup>39</sup> Future creation of rentcharges was prohibited in England by the *Rentcharges Act 1977*, but excluded were settlement rentcharges and so-called “estate” rentcharges (*ie* where they are used as an indirect means of securing enforcement of positive freehold covenants). See Megarry & Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum, Sweet & Maxwell, 2000) paragraphs 18.014-18.039. The recommendations made later remove the need for the latter device: see paragraph 7.29 below.

of such rentcharges be prohibited. This recommendation is not intended to affect statutory rentcharges, many of which have been created in the past, *eg*, in relation to land drainage and improvement schemes promoted under the *Landed Property Improvement (Ireland) Act 1847*.<sup>40</sup>

7.12 *The Commission provisionally recommends that the future creation of rentcharges should be prohibited, but without prejudice to statutory rentcharges.*

7.13 As regards existing rentcharges, various, somewhat unsatisfactory, pre-1922 statutory provisions exist for their redemption or discharge.<sup>41</sup> These are:-

***Chief Rents Redemption (Ireland) 1864:***<sup>42</sup> This Act is a somewhat odd statute. The short title refers to “chief rents”, the preamble refers to land subject to “any rent” and section 1 (the explanation of terms used in the Act) refers to land held in fee farm, for lives renewable for ever or for any term whereof more than 200 years remain unexpired! Apart from doubts as to its scope,<sup>43</sup> the function of the Act seems pointless, since apparently it applies only if the parties agree on redemption.<sup>44</sup> There appears to be no provision whereby the landowner paying the rent can force the rent owner to submit to redemption. The Act has long been a dead letter<sup>45</sup> and a more effective statutory scheme for redemption of rents should be created. It was recommended earlier in the context of fee farm grants that consideration should be given to extending the post-1922 grounds rents scheme.<sup>46</sup>

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<sup>40</sup> See paragraph 13.12 below.

<sup>41</sup> Other legislation in the 19<sup>th</sup> century which could be used would have been the *Landed Estates Court (Ireland) Act 1858*, but that involved applications to court: see paragraphs 4.05-4.08 above.

<sup>42</sup> 27 & 28 Vic c 38.

<sup>43</sup> Which might include whether it applies to rentcharges as opposed to feudal rent services and leasehold rents.

<sup>44</sup> Section 2. If they agree, what is the need for legislation?

<sup>45</sup> See Lyall *op cit* fn 3 at 764; Wylie *op cit* fn 3 paragraph 4.074.

<sup>46</sup> Paragraph 2.23 above.

Meanwhile the 1864 Act can be repealed without replacement.

***Conveyancing Acts 1881<sup>47</sup> and 1911:<sup>48</sup>*** Section 5 of the 1881 Act, as amended by section 1 of the 1911 Act, is a somewhat obscure provision, which seems to have been used in the past to secure a discharge of rentcharges.<sup>49</sup> It relates to “an annual sum charged on land”, which presumably would cover a rentcharge.<sup>50</sup> It does not seem to have been used in modern times and also suffers from the flaw of requiring an application to the court. It should be repealed without replacement.

7.14 *The Commission provisionally recommends that the Chief Rents Redemption Act (Ireland) 1864 and section 5 of the Conveyancing Act 1881 as amended by section 1 of the Conveyancing Act 1911 should be repealed without replacement.*

7.15 There are several other pre-1922 statutory provisions relating to rentcharges which merit consideration. These are:-

***Law of Property Amendment Act 1859<sup>51</sup>:*** Section 10 of this Act reversed the common law rule<sup>52</sup> that a *partial* release of a rentcharge operated to release the entire land and thereby extinguished the rentcharge. This seems uncontroversial, except that it should be made more explicit that when there is a partial release, the amount of the

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<sup>47</sup> 44 & 45 Vic c 41.

<sup>48</sup> 1 & 2 Geo 5 c 37.

<sup>49</sup> *Re McGuinness's Contract* 1901) 1 NIJR 49; *Re Ryan's Trusts* (1901) 1 NIJR 138; *Re McSwiney and Harnett's Contract* [1921] 1 IR 178, *Re Malone* (1937) 71 ILTR 26. See Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1992) at 162.

<sup>50</sup> Note that section 45 of the 1881 Act dealt specifically with redemption of rentcharges, but this section did *not*, unlike the rest of the Act, apply to Ireland: see subsection (7). Presumably this was because of the existence here of the 1864 Act (paragraph 7.13 above) and the Landed Estates Court (fn 41 above).

<sup>51</sup> 22 & 23 Vic c 35. See Wylie *op cit* fn 49 at 99-111.

<sup>52</sup> *Coke upon Littleton* (19<sup>th</sup> ed 1832) 147b and 147c.



rentcharge not released remains charged on the entire land, unless the parties agree to apportion it to part only of that land.<sup>53</sup> Subject to that section 10 should be replaced without substantial amendment. Section 28 of the 1859 Act relates to chief rents and rentcharges and is designed to protect personal representatives from personal liability when they dispose of or distribute the deceased's land subject to payment of such a rent. This is similar to section 27 of the Act which covers land subject to leasehold rents.<sup>54</sup> A more general provision providing protection for personal representatives in distribution of the deceased's *personal* estate was contained in section 29 of the 1859 Act, but section 29 was repealed by the *Succession Act 1965*. There is now a replacement provision in section 49 of the 1965 Act.<sup>55</sup> It would have been more appropriate if sections 27 and 28 of the 1859 had also been replaced and subsumed in the 1965 Act. It is recommended that this should be done now, so that the sections can be replaced without substantial amendment.

***Conveyancing Acts 1881<sup>56</sup> and 1911<sup>57</sup>***: Section 44 of the 1881 Act contains various statutory remedies for enforcing rentcharges. One of them, the right of distress,<sup>58</sup> has ceased to be of practical significance in modern times.<sup>59</sup> It was

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<sup>53</sup> See *Booth v Smith* (1884) 14 QBD 318; *Price v John* [1905] 1 Ch 744 Wylie *op cit* at 103. The same applies to section 11 of the 1859 Act which applies to partial release of judgments.

<sup>54</sup> Strictly leasehold rents are outside the scope of this Consultation Paper: see paragraph 7 of the Introduction, page 4 above.

<sup>55</sup> See Brady *Succession Law in Ireland* (2<sup>nd</sup> ed Butterworths 1995) at 322; Keating *Keating on Probate* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2002).

<sup>56</sup> 44 & 45 Vic c 41.

<sup>57</sup> 1 & 2 Geo 5 c 37.

<sup>58</sup> Which did not apply to a rentcharge, as opposed to a feudal or leasehold rent (known as a rent "service": see paragraphs 2.25 and 7.11 above), at common law. The remedy was, however, originally extended to rentcharges by the *Distress for Rent Act (Ireland) 1712* (9 Anne c 2).

<sup>59</sup> There are doubts about the constitutionality of some aspects of the remedy: see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1996)

abolished in respect of rents relating to any premises let solely as a dwelling by section 19 of *Housing (Miscellaneous Provisions) Act 1992* and the Commission's Landlord and Tenant Group is considering whether it should be abolished altogether.<sup>60</sup> Subject to that, section 44 should be replaced without substantial amendment. On the other hand, section 6 of the 1911 Act, which provided that the remedies in section 44 were not subject to the rule against perpetuities, would become redundant with the recommendation, noted earlier,<sup>61</sup> that this rule should be abolished.

7.16 *The Commission provisionally recommends that:*

*(i) section 10 of the Law of Property Amendment Act 1859 should be replaced without substantial amendment subject to the recommendation that it should be made explicit that where a rentcharge is partially released, the amount not released remains charged on the entire land, unless it is apportioned to part of the land only by the parties;*

*(ii) sections 27 and 28 of the Law of Property Amendment Act 1859 should be replaced without substantial amendment so as to allow personal representatives to be protected in the distribution of a deceased's land subject to the payment of a rent;*

*(iii) the provisions of section 44 of the Conveyancing Act 1881 should be replaced without substantial amendment subject to deletion of references to the right of distress. The Commission also recommends the repeal of section 6 of the Conveyancing Act 1911 without replacement.*

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paragraph 12.15.

<sup>60</sup> There is very little evidence of it being used in modern times in respect of commercial or mixed used premises.

<sup>61</sup> Paragraph 3.01 above.

## **D Easements and Profits**

7.17 Easements and profits *à prendre* are extremely common rights over land,<sup>62</sup> but the law relating to them, especially their methods of acquisition,<sup>63</sup> is extremely complex and in need of reform.<sup>64</sup>

### **(1) Prescription**

7.18 The law relating to acquisition of easements and profits by prescription (*ie* long user) is extremely confusing and complicated. This whole area was reviewed recently by the Law Reform Commission and its Report contains recommendations for a radical overhaul designed to simplify the law greatly.<sup>65</sup> The new legislation should implement those recommendations.<sup>66</sup> A result of this is that the *Prescription Act 1832*<sup>67</sup> and the *Prescription (Ireland) Act 1858*<sup>68</sup> would be replaced with substantial amendment

7.19 *The Commission provisionally recommends that the Report on the Acquisition of Easements and Profits à Prendre by Prescription (LRC 66-2002) should be implemented and that the Prescription Act 1832 and the Prescription (Ireland) Act 1858 should be replaced with substantial amendment.*

### **(2) Express Grants and Reservations**

7.20 An earlier Report of the Commission recommended that an anomaly relating to the express creation or transfer of easements

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<sup>62</sup> See paragraph 7.02 above.

<sup>63</sup> The issue of what rights can constitute an easement in particular would seem to be one best left to be developed judicially: see, *eg*, the judgment of Shanley J in *Redfont Ltd v Custom House Dock Management Ltd* High Court, (Shanley J) 31 March 1998 (concerning an easement of “parking” vehicles).

<sup>64</sup> See Bland *The Law of Easements and Profits à Prendre* (Round Hall Sweet & Maxwell 1997).

<sup>65</sup> Report on the Acquisition of Easements and Profits à Prendre by Prescription (LRC 66-2002).

<sup>66</sup> Note the draft Bill in Appendix A to the 2002 Report.

<sup>67</sup> 2 & 3 Will 4 c 71.

<sup>68</sup> 21 & 22 Vic c 42. This Act simply extended the 1832 Act to Ireland.

appurtenant to registered land, where, contrary to the general rule relating to registered land,<sup>69</sup> it would appear that “words of limitation” must still be used in the deed,<sup>70</sup> should be removed.<sup>71</sup> This recommendation should be incorporated in the general recommendation made later for total abolition of the need for words of limitation in deeds of land.<sup>72</sup> The special provision in section 62 of the *Conveyancing Act 1881* designed to enable the *Statute of Uses (Ireland) 1634* to be used for reservations of easements and profits in favour of land retained by a grantor who disposes of part of land will no longer be needed. Chapter 8 deals with conveyances generally and the recommendations there include removal of the need for conveyances “to uses” altogether and repeal of the 1634 Statute.<sup>73</sup> This would also remove the need for a provision such as that contained in section 62 of the 1881 Act.<sup>74</sup>

7.21 *The Commission provisionally recommends that the requirement that words of limitation be used upon the express creation or express transfer of easements appurtenant to registered land should be removed as part of the general removal of the need for words of limitation in deeds generally.*

### **(3) Implied Grants and Reservations**

7.22 This is another very complicated area of the law, especially that relating to implied grant, *ie*, where a grantee of land claims that, despite the absence of any reference in the deed conveying or transferring the land to an easement or profit passing with the land,<sup>75</sup> such an easement or profit should be taken to have passed by

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<sup>69</sup> *Registration of Title Act 1964* section 125. See Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995) at 35-36.

<sup>70</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 6.054.

<sup>71</sup> Report on Land Law and Conveyancing Law: (6) Further General Proposals (LRC 56-1999) Chapter 1(4).

<sup>72</sup> Paragraph 8.43 (*re* section 51 of the 1881 Act) below.

<sup>73</sup> See paragraph 8.20 below.

<sup>74</sup> See paragraph 8.43 below.

<sup>75</sup> And usually to be enjoyed in respect of land retained by the grantor. A typical claim would be for a right of way over the retained land to provide access to the land conveyed or transferred to the grantee.

implication.<sup>76</sup> The law governing this subject is largely based upon the Rule in *Wheeldon v Burrows*,<sup>77</sup> but the principles laid down in that case are confusing and have given rise to much controversy.<sup>78</sup> There is much to be said for abandoning this rule and basing the law, instead, on the wider principle which is often said to be the basis of the rule,<sup>79</sup> the doctrine of non-derogation from grant, *ie*, that once a grantor has conveyed or transferred land to someone else (the grantee), the grantor must not seek to frustrate the grantee in the reasonable enjoyment of the land anticipated when the conveyance or transfer was agreed. The Supreme Court has very recently approved of the non-derogation doctrine in the context of a claim to an easement in the case of *William Bennett Construction Ltd v Greene*.<sup>80</sup> On this basis it is recommended that the Rule in *Wheeldon v Burrows* be abolished and that, in future, a claim to an easement or profit by way of implied grant should be based solely on the doctrine of non-derogation from grant.<sup>81</sup> Following the various judicial formulations given over the years,<sup>82</sup> it is recommended that the legislation should

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<sup>76</sup> See Bland *op cit* fn 64 Chapter 12.

<sup>77</sup> (1879) 12 Ch D 31.

<sup>78</sup> See Bland *op cit* fn 64 paragraphs 12.05 – 12.11.

<sup>79</sup> *Head v Meara* [1912] 1 IR 262 at 265 (*per* Ross J).

<sup>80</sup> 25 February 2004. Keane C J, giving the judgment of the Court (the other members were Murray and Geoghegan JJ) approved of earlier views given by Barron J in *Connell v O'Malley* High Court, 28 July 1983.

<sup>81</sup> It is important to note that the non-derogation doctrine is not confined to rights which comprise easements or profits and the new legislation should make it clear that, in applying it to acquisition of easements and profits, it is not restricting the doctrine's scope in other respects. For recent use of the doctrine in the context of landlord and tenant law see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1996) paragraphs 14.12, 15.13 and 17.08.

<sup>82</sup> *Eg*: "the presumed intention of the parties" (*per* Barron J in *Connell v O'Malley*, approved by the Supreme Court in the *William Bennett Construction* case, fn 80 above); "A grantor having given a thing with one hand is not to take away the means of enjoying it with the other" (*per* Bowen LJ in *Birmingham Dudley & District Banking Co v Ross* (1888) 38 Ch D 295 at 313); "If A lets a plot to B, he may not act so as to frustrate the purpose for which in the contemplation of both parties the land was hired" (*per* Lord Loreburn LC in *Lyttleton Times Co Ltd v Warners Ltd* [1907] AC 476 at 481. See also the discussion by Nicholls LJ in *Johnston*

give a statutory formulation of the doctrine along the following lines: “there should be implied in favour of a grantee of land any easement or profit à prendre which it is reasonable to assume, in all the circumstances of the case, would have been within the contemplation of the parties as being included in the grant, had they adverted to the matter.”

7.23 *The Commission provisionally recommends that the rule in Wheeldon v Burrows should be abolished and that, in future, a claim to an easement or profit by way of implied grant should be based solely on the doctrine of non-derogation from grant. The legislation should provide that there should be implied, in favour of a grantee of land, any easement or profit à prendre which it is reasonable to assume, in all the circumstances of the case, would have been within the contemplation of the parties as being included in the grant, had they adverted to the matter.*

7.24 Connected with the subject of implied grant of easements is section 6 of the *Conveyancing Act 1881*. This is a section of broad scope,<sup>83</sup> which is often invoked by a grantee who is claiming that an easement or profit has passed by implication.<sup>84</sup> There are, however, two troublesome aspects as to how the section’s operation in the context of easements and profits has been interpreted by the courts.

7.25 One controversial matter is whether the section applies only to pass existing easements and profits (which arguably is what its wording suggests) or whether it can convert or enlarge rights or quasi-rights into full easements or profits. This point arises in the typical *Wheeldon v Burrows* situation,<sup>85</sup> where the owner of a large parcel of land (who clearly, so long as the land remains in that owner’s sole ownership, cannot have rights like easements or profits against the owner’s self) sells part of the land to someone else, who then claims by implication an easement or profit over the land retained. As it is sometimes put, the issue is whether there must have been diversity of

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*& Sons Ltd v Holland* [1988] 1 EGLR 264 at 267.

<sup>83</sup> Sometimes referred to as a statutory “word-saving” provision, it is also dealt with later: see paragraph 8.43 below.

<sup>84</sup> See *Bland op cit* fn 64 paragraphs 12.12-12.16.

<sup>85</sup> See paragraph 7.22 above.

ownership or occupation prior to the conveyance to which it is sought to apply section 6.<sup>86</sup> Until recently there was no Irish authority on the point and conflicting views had been given by the English courts,<sup>87</sup> but the predominant view now seems to be that prior diversity of ownership or occupation is a prerequisite to application of the section. This was certainly the view of some of the law lords in *Sovmots Investments Ltd v Secretary of State for the Environment*.<sup>88</sup> The Supreme Court agreed with this view in the recent *William Bennett Construction Ltd* case<sup>89</sup> and it is recommended that this qualification on the operation of section 6 in the context of easements and profits should be made explicit in the replacement legislation.<sup>90</sup>

7.26 Another equally controversial construction put on the operation of section 6<sup>91</sup> is that it has been held in a series of cases in England,<sup>92</sup> and in a Circuit Court case in Ireland,<sup>93</sup> that it may enlarge what was previously a purely informal arrangement, such as a revocable licence personal to the licensee, into a full legal easement. A typical example would be where an owner lets part of property and, as an act of kindness or good neighbourliness, permits the tenant to take a short cut through the part of the property retained and still

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<sup>86</sup> Section 6 was replaced in England and Wales by section 62 of the *Law of Property Act 1925*.

<sup>87</sup> *Cf Broomfield v Williams* [1897] 1 Ch 602; *Long v Gowlett* [1923] 2 Ch 177; *Ward v Kirkland* [1967] Ch 194.

<sup>88</sup> [1977] 2 All ER 385 at 391 (*per* Lord Wilberforce) and 397-398 (*per* Lord Edmund-Davies). See also *Squarey v Harris-Smith* (1987) 42 P & CR 118; *Payne v Inwood* (1996) 74 P & CR 42. See Harpum "Easements and Centre Point: Old Problems Resolved in a Novel Setting" (1977) 41 Conv 415; Smith "Centre Point : Faulty Towers with Shaky Foundations" [1978] Conv 449; Harpum "Long v Gowlett : A Strong Fortress" [1979] Conv 113.

<sup>89</sup> See paragraph 7.22 above.

<sup>90</sup> See paragraph 8.43 below.

<sup>91</sup> And its English replacement (section 62 of the *Law of Property Act 1925*).

<sup>92</sup> None of which, however, involves the highest court (the House of Lords): see *International Tea Stores Ltd v Hobbs* [1903] 2 Ch 165; *White v Williams* [1922] 1 KB 727; *Wright v Macadam* [1949] 2 DB 744; *Goldberg v Edwards* [1950] Ch 247; *Graham v Philcox* [1984] QB 747.

<sup>93</sup> *Jeffers v Odeon (Ireland) Ltd* (1953) 87 ILTR 187.

occupied by the landlord. Such permission would normally be revocable at any time.<sup>94</sup> If later the landlord conveys the freehold reversion in the let part to the tenant, the effect of that will apparently be that the tenant then acquires a legal right of way, attached to the freehold in the former let part of the property and exercisable indefinitely over the landlord's retained land. This may have disastrous consequences for the landlord and constitutes a trap for the unwary conveyancer who should remember in such situations to protect the landlord by including an express exclusion of section 6.<sup>95</sup> This seems to be a flawed interpretation of the section and contrary to what must have been intended.<sup>96</sup> When the section refers to various rights passing with a conveyance of "land", as appertaining to or enjoyed with the "land", this must surely be taken to mean not only existing rights,<sup>97</sup> but also only such rights already attaching to the estate or interest in the land being conveyed. In other words, it is crucial to abide by the fundamental principles of our land law system, one of which is that what is owned or conveyed is an estate or interest in land rather than the physical entity.<sup>98</sup> If one then reverts to the example given above, the issue is what existing rights attached to the freehold reversion subsequently conveyed to the tenant of the part of the property. The answer must surely be none. The only "right" existing prior to the conveyance of the freehold reversion was the bare licence attaching to the lease. There was certainly no legal right of way attaching to the freehold reversion held by the landlord in the part let to the tenant and exercisable over the land the landlord retained.<sup>99</sup> The Supreme Court in the *William Bennett Construction*

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<sup>94</sup> As a bare or revocable licence: see Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 510; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 20.03.

<sup>95</sup> As the section permits: see subsection (4).

<sup>96</sup> See Tee "Metamorphoses and Section 62 of the Law of Property Act 1925" [1998] Conv 115.

<sup>97</sup> Which refer back to the point about prior diversity and non-application to *quasi*-rights made in the previous paragraph.

<sup>98</sup> See paragraph 1.03 above.

<sup>99</sup> Again this would also offend the rule that one cannot have rights against oneself: see paragraph 7.25 above.



*Ltd* case<sup>100</sup> also took the view that section 6 of the 1881 Act could not “enlarge” a purchaser’s rights. It is recommended that the replacement of section 6 should also make this point explicit.<sup>101</sup> In the light of the above discussion section 6 should be replaced with substantial amendment.

7.27 *The Commission provisionally recommends that section 6 of the Conveyancing Act 1881 should be replaced with substantial amendment so as to make it explicit that section 6 cannot be used to enlarge what was previously a purely informal arrangement, such as a revocable licence personal to the licensee, into a full legal easement.*

#### **(4) Other Pre-1922 Statutes**

7.28 It may be convenient finally, to draw attention to other legislation which relates to easements and profits. Attention was drawn in an earlier chapter to the *Commons Acts (Ireland) 1789 and 1791*, which relate to commonages of remote land in rural areas, involving rights like grazing rights shared amongst numerous people.<sup>102</sup> The *Turbary (Ireland) Act 1891*<sup>103</sup> was part of the land purchase scheme<sup>104</sup> and provided for regulation of rights of turbary (the right to cut turf) following purchase of land by tenants under that scheme. This will be considered by the Commission’s Landlord and Tenant Group as part of its review of pre-1922 statutes relating to landlord and tenant matters.<sup>105</sup>

### **E Freehold Covenants**

7.29 The law relating to enforcement of freehold covenants, which is seriously flawed,<sup>106</sup> was the subject of a major review by the

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<sup>100</sup> Paragraph 7.22 above.

<sup>101</sup> See paragraph 8.43 below.

<sup>102</sup> See paragraph 6.21 above.

<sup>103</sup> 54 & 55 Vic c 45.

<sup>104</sup> See paragraphs 1.19-1.20.

<sup>105</sup> See Introduction paragraph 7, page 4 above.

<sup>106</sup> See paragraph 7.03 above.

Law Reform Commission recently. The resultant Report<sup>107</sup> contains recommendations for substantial reform and these should be implemented in the new legislation.<sup>108</sup>

7.30 *The Commission provisionally recommends that Chapter 1 of the Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals (LRC 70-2003) relating to freehold covenants should be implemented.*

7.31 Finally it should be noted that there is one pre-1922 statutory provision which relates partly to freehold covenants. Section 11 of the *Conveyancing Act 1911* entitles a purchaser of part of land held under a common title to require a memorandum giving notice of restrictive covenants, or other rights, attaching to other land held under that common title, endorsed on or annexed to the title deeds probably held by some other party.<sup>109</sup> However, the section makes it clear that a failure to invoke its provisions does not prejudice a purchaser's title<sup>110</sup> and, in practice, it is rarely, if ever, used. It is recommended that it be repealed without replacement.

7.32 *The Commission provisionally recommends that section 11 of the Conveyancing Act 1911, should be repealed without replacement.*

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<sup>107</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals (LRC 70-2003) Chapter 1.*

<sup>108</sup> Note the draft legislation in Appendix A to the Report. There is a statutory precedent for rendering freehold covenants enforceable against successors in title. Section 10 (4) (b) of the *State Property Act 1954* provides that covenants, creditors and agreements contained in grants made of State land "shall be equally binding on, and enforceable against, any person claiming through or under the original grantee as if the grant had been made to that person."

<sup>109</sup> In the common case where the owner of a large parcel of land sells off various parts of the parcel to different purchasers, but retains some of the land that owner will retain the deeds relating to the entire parcel and each purchaser will simply obtain the deed relating to the part sold to that purchaser.

<sup>110</sup> Subsection (2).



## CHAPTER 8     CONTRACTS AND CONVEYANCES

8.01     This Chapter deals with numerous matters which relate to the conveyancing process, including the two key documents at the heart of that process – the contract for sale and the deed of conveyance (or transfer in the case of registered land).<sup>1</sup> This is the area on which the Law Reform Commission has issued several previous Reports and Consultation Papers which are referred to in the following paragraphs. It is also an area covered by many pre-1922 statutes which require consideration. This is best done initially by considering them under the two broad headings of contracts and conveyancing. The Chapter then ends with a detailed consideration of the provisions of the key statutes, the *Conveyancing Acts 1881-1911*.

### A        **Contracts**

8.02     Several pre-1922 statutes deal with contracts for the sale or other disposition of land, including the formalities for the creation of a binding contract and the terms and conditions of that contract.

#### **(1)        *Statute of Frauds (Ireland) 1695***<sup>2</sup>

8.03     Section 2 of this Statute, which requires some written evidence of the making of the contract relating to land to render it enforceable in court, is one of the most litigated statutory provisions.<sup>3</sup> Its operation was reviewed by the Law Reform Commission in its *Report on Gazumping*,<sup>4</sup> and the conclusion reached was that a change

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<sup>1</sup>        See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) and *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999).

<sup>2</sup>        7 Will 3 c 12.

<sup>3</sup>        See Farrell *Irish Law of Specific Performance* (Butterworths 1994) Chapter 3; Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) Chapter 6.

<sup>4</sup>        LRC 59 – 1989.

in its basic provisions was not to be recommended.<sup>5</sup> Considerable guidance on the section's operation has been given by the Supreme Court in recent times<sup>6</sup> and, as the *Report on Gazumping* pointed out,<sup>7</sup> the new legislation in England and Wales has proved to be somewhat controversial.<sup>8</sup> Until an e-conveyancing system comes on stream,<sup>9</sup> it seems more appropriate to retain the existing provisions, however imperfect they have proved to be over the centuries. This is, however, subject to two recommendations.<sup>10</sup>

8.04 One recommendation is that the wording of section 2 of the 1695 Statute should be recast in modern language. A precedent for this was provided in the English 1925 property legislation.<sup>11</sup> The

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<sup>5</sup> Paragraphs 3.18-3.21. See also the *Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds* (LRC 56 – 1998) Chapter 3.

<sup>6</sup> *Boyle v Lee* [1992] ILRM 65; *Supermac's Ireland Ltd v Katesan (Naas) Ltd* [2000] 4 IR 273. See also Geoghegan J's judgment in *Shirley Engineering Ltd v Irish Telecommunications Investments PLC* High Court, 2 December 1999 and O'Sullivan J's judgment in *Higgins v Argent Developments Ltd* High Court, 1 February 2002, affirmed by the Supreme Court 13 May 2003.

<sup>7</sup> Paragraph 3.21.

<sup>8</sup> *Law of Property (Miscellaneous Provisions) Act 1989* section 2 (which requires the entire contract to be put in writing). See, eg *Spiro v Glencrown Properties Ltd* [1991] 1 All ER 600; *Record v Bell* (1991) P & CR 192; *Tootal (Clothing) Ltd v Guinea Properties Ltd* [1992] 64 P & CR 452. *Barnsley Conveyancing Law and Practice* (4<sup>th</sup> ed by Thompson Butterworths 1996) Chapter 5; *Megarry & Wade The Law of Real Property* (6<sup>th</sup> ed by Harpum 2000) paragraphs 12.018-12.044.

<sup>9</sup> Which will inevitably change dramatically how contracts are made and transfers of land are effected – essentially by instantaneous electronic transmission, as envisaged by the *Electronic Commerce Act 2000* (which currently exempts contracts for the sale of land: see section 10 (1)).

<sup>10</sup> It should be noted that the 1695 Statute deals with other matters outside the scope of this Consultation Paper. Section 2 also covers contracts relating to guarantees, agreements upon consideration of marriage and agreements not to be formed within a year. Section 4-6, which also remain in force, relate to the law of trusts and will be considered by the Commission's Working Group dealing with that area of the law.

<sup>11</sup> *Law of Property Act 1925* section 40, which was replaced by section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989*: see fn 8 above.

other recommendation is that the new legislation should confer statutory power to alter the requirements in future by statutory instrument. It is envisaged that this power might be exercised, not only with a view to facilitating introduction of e-conveyancing, but also with a view to responding to market developments and providing elements of consumer protection. It is suggested that the various recommendations in the *Report on Gazumping*, relating to matters such as providing a statutory form of receipt for booking deposits and regulating advertisements of the sale of houses in new developments, are best implemented in this way. Subject to this, section 2 of the *Statute of Frauds (Ireland) 1695* should be replaced without substantial amendment.

8.05 *The Commission provisionally recommends that the Statute of Frauds (Ireland) 1695 should be replaced without substantial amendment.*

8.06 Before turning to other pre-1922 statutes relating to contracts for the sale of land, it may be convenient to consider a number of related issues which have also been the subject of review by the Law Reform Commission:

- (i) ***Tempany v Hynes***<sup>12</sup>: This exceptionally controversial decision of the Supreme Court has caused all sorts of problems for practitioners.<sup>13</sup> In ruling that, upon the creation of a contract for the sale of land, the purchaser acquires a beneficial interest commensurate with, and to the extent only of, the amount of the purchase money which has been paid,<sup>14</sup> the Court overturned what had hitherto been accepted to be the position.<sup>15</sup> This was that the effect of a binding contract for

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<sup>12</sup> [1976] IR 101.

<sup>13</sup> See Farrell *op cit* fn 3 Chapter 11; Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) Chapter 12.

<sup>14</sup> Thus, taking the typical situation where the purchaser pays a 10% deposit on entering into the contract, a 10% beneficial interest only is acquired.

<sup>15</sup> This was held to be the position by the dissenting judge in *Tempany v Hynes*, Henchy J. He subsequently suggested that the Court might some day revisit the matter: see *Hamilton v Hamilton* [1982] IR 466 at 484. See also the similar comment by McCarthy J in *Doyle v Hearne* [1987] IR 601

the sale of land was to pass the entire beneficial interest to the purchaser. The Commission recommended that the decision should be reversed by legislation and that the “orthodox” position should be restored.<sup>16</sup> This recommendation should be implemented in the new legislation.

- (ii) ***Bain v Fothergill***<sup>17</sup>: This is another controversial case, a decision of the House of Lords in the 19<sup>th</sup> century, which restricted a purchaser’s right to claim damages for breach of contract, when it turned out subsequent to the contract for sale that the vendor could not show good title to the property contracted to be sold.<sup>18</sup> Although over the years the judiciary expressed dissatisfaction with the rule, it has continued to be applied. The Commission recommended that it be abolished by statute,<sup>19</sup> as has been done in England and Wales.<sup>20</sup> This recommendation should also be implemented in the new legislation.
- (iii) ***Land Act consents***: A legacy of the land purchase scheme<sup>21</sup> is the need in many transactions to obtain consents under the *Land Act 1965*.<sup>22</sup> This has become increasingly anomalous

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at 617.

<sup>16</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 24-27; *Report on Interests of Vendor and Purchaser in Land During the Period Between Contract and Completion* (LRC 49 – 1995) paragraph 4.18.

<sup>17</sup> (1874) LR 7 HL 158.

<sup>18</sup> See Wylie *op cit* fn 13 paragraphs 13.79-13.87.

<sup>19</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 30-32.

<sup>20</sup> *Law of Property (Miscellaneous Provisions) Act 1989* section 3.

<sup>21</sup> See paragraphs 1.19-1.20.

<sup>22</sup> Sections 12, 13 and 45. See Wylie *op cit* fn 13 paragraphs 16.29-16.53.

with the State's position under the EU and various adjustments have had to be made.<sup>23</sup> The Commission drew attention to these difficulties and called for further adjustments.<sup>24</sup> However, it is clear that in recent times the need for such consents has become largely a pure formality, which generates much needless paperwork and constitutes an irritant in the conveyancing process. The *Land Bill 2004*<sup>25</sup> proposes to abolish the need for such consents<sup>26</sup> and, if that Bill does not proceed to law for any reason, it is recommended that a similar provision be included in the legislation to implement the recommendations in this Consultation Paper.

- (iv) ***Registration of Title Act 1964, section 23***: This section in the 1964 Act, which deals with certain cases where compulsory registration arises, does give rise to some practical conveyancing problems, which are again a legacy of the land purchase scheme.<sup>27</sup> The Commission recommended legislation to deal with these<sup>28</sup> and it is understood that this would be implemented in the draft *Registration of Deeds and Titles Bill*, which was included in the Government Legislation Programme published on 28 September 2004. On the

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<sup>23</sup> See Laffoy "Section 45 of the *Land Act 1965* and the Right of Establishment in European Communities" (1982-83) 6 *Journal of Irish Society for European Lawyers* 26.

<sup>24</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 37-38.

<sup>25</sup> No 35 of 2004, presented to the Senate by Senator Mary O'Rourke on 13 July 2004.

<sup>26</sup> By repeal of sections 12 and 45 of the *Land Act 1965*: see section 12 (d).

<sup>27</sup> See Marshall "Compulsory Registration and the Irish Church Act 1869" *Gaz ILSI*, January/February 1983; Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995) at 380-383.

<sup>28</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 43-44.



assumption that the Bill will be introduced and duly enacted,<sup>29</sup> there would be no need for the legislation designed to implement the recommendations in this Consultation Paper to deal with the matter.<sup>30</sup>

- (v) **Conditions of Sale:** In 1991 the Commission issued two Reports, one dealing with the extent to which the risk of damage to the property should pass to the purchaser upon the entering into of the contract for sale<sup>31</sup> and the other dealing with service of completion notices.<sup>32</sup> The recommendations in both instances were for statutory provisions, but, in fact, they were both implemented by the Law Society in revisions of the *General Conditions of Sale*,<sup>33</sup> which are part of its standard contract for sale form which is invariably used by practitioners.<sup>34</sup> On this basis there seems to be no need for

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<sup>29</sup> See further Chapters 11 and 13 below.

<sup>30</sup> In passing it should be noted that some previous recommendations of the Commission have already been implemented or covered by legislation : (i) removal of restrictions on “convicts” disposing of land (see *Report on Land Law and Conveyancing Law : (1) General Proposals* (LRC 30 - 1989) paragraphs 33-34 : see *Criminal Law Act 1997* (repealing *Forfeiture Act 1870*); (ii) imposing a 5-year limit on seeking a planning injunction in respect of completed unauthorised developments or unauthorised use of land (*ibid* paragraphs 35-36): see *Planning and Development Act 2000* section 160 (6) (imposing a 7-year limit in respect of unauthorised developments); (iii) imposing a 6-year limit on challenging conveyances on the ground of failure to obtain consent under the *Family Home Protection Act 1976* (*ibid* paragraphs 39-42): see *Family Law Act* section 1995 54(1)(b)(ii).

<sup>31</sup> *Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser* (LRC 39 – 1991).

<sup>32</sup> *Report on Land Law and Conveyancing Law: (4) Service of Completion Notices* (LRC 40 – 1991).

<sup>33</sup> Conditions 40 and 43 of the *General Conditions of Sale* (1995 ed). See Wylie *op cit* fn 13 paragraphs 12.36- 12.43 and 13.20-13.24.

<sup>34</sup> The provisions are now to be found in conditions 40 and 43 of the *General Conditions of Sale* (2001 ed).

statutory provisions, but it should be made clear in the new legislation that the power to make regulations by statutory instrument recommended earlier<sup>35</sup> should cover conditions of sale.

8.07 *The Commission provisionally recommends that:*

*(i) the decision in Tempany v Hynes be reversed and that the “orthodox” position be restored, whereby a binding contract for the sale of land will transfer the entire beneficial interest to the purchaser;*

*(ii) the rule in Bain v Fothergill should be abolished;*

*(iii) legislation should be implemented to abolish the consents required for certain transactions under the Land Act 1965;*

*(iv) its proposals in relation to section 23 of the Registration of Title Act 1964 be implemented;*

*(v) a power to make regulations by statutory instrument concerning contracts for and conditions of sale should be included in the new legislation.*

**(2) *Sale of Land by Auction Act 1867***<sup>36</sup>

8.08 This Act regulates the terms upon which auction sales of land are conducted and is of considerable practical significance in Ireland, because it is more common here to sell houses by public auction rather than by private treaty, than it is in England and Wales.<sup>37</sup> The Act governs matters like fixing a reserve price and reserving the vendor’s right to bid at the auction. Its provisions have long been reflected in the Law Society’s *General Conditions of Sale*.<sup>38</sup> The new legislation should retain the substance of the Act, but the provisions should be recast in a much simpler form, such as that

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<sup>35</sup> Paragraph 8.04 above.

<sup>36</sup> 30 & 31 Vic c 48.

<sup>37</sup> See Wylie *op cit* fn 13 Chapters 2 and 3.

<sup>38</sup> See 2001 ed, Condition 4: Wylie *op cit* fn 13 paragraphs 2.14-2.25.

contained in the Law Society's General *Conditions*.<sup>39</sup> Furthermore it is recommended that the provisions relating to court sales<sup>40</sup> and re-opening of biddings<sup>41</sup> are best left to be dealt with by rules of court.<sup>42</sup> Subject to this the 1867 Act should be replaced without substantial amendment.

8.09 *The Commission provisionally recommends that the provisions of the Sale of Land by Auction Act 1867 should be recast in a simpler form. It is also recommended that the provisions relating to court sales and re-opening of biddings should be dealt with by rules of court. Subject to that the 1867 Act should be replaced without substantial amendment.*

**(3) *Vendor and Purchaser Act 1874***<sup>43</sup>

8.10 The provisions of this Act still in force are important in relation to conveyancing practice. Sections 1 and 2 concern the title to be shown by a vendor in conveyancing transactions, and operate as "default" provisions, *ie* they operate in the absence of express provisions to the contrary in the contract.<sup>44</sup> Nevertheless they have considerable significance because, as statutory provisions, they set the context in which express provisions are made and tend to create the norm for these.

8.11 Section 1 prescribes the period of title which should be shown, 40 years, and the Commission recommended some time ago that this should be reduced to 20 years.<sup>45</sup> It rejected the argument for

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<sup>39</sup> Cf the recasting proposed for the North in the Land Law Working Group's *Final Report* (HMSO 1990) Volume 2 at 551-552.

<sup>40</sup> See sections 7 and 8.

<sup>41</sup> See Wylie *op cit* fn 13 paragraphs 11.04-11.07.

<sup>42</sup> Rules of the Superior Courts 1986 Order 51; Circuit Court Rules 2001 Order 43.

<sup>43</sup> 37 & 38 Vic c 78.

<sup>44</sup> The so-called "open" contract situation, to be distinguished from a "closed" contract containing express provisions as to the title to be shown. See Wylie *op cit* fn 13 Chapter 14.

<sup>45</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 8-9.

reducing it further, to 15 years, as was done in England and Wales,<sup>46</sup> on the ground that this would be uncomfortably close to the 12-year limitation period for actions to recover land (which may be extended in cases of fraud or disability).<sup>47</sup> This recommendation that the period should be reduced to 20 years should be implemented in the new legislation, so that section 1 should be replaced with substantial amendment.

8.12 *The Commission provisionally recommends that the statutory period of title that needs to be shown on an open contract should be reduced from 40 to 20 years.*

8.13 Section 2 deals with the title to be shown in different transactions involving leases and leasehold property.<sup>48</sup> It should be read together with other provisions to be found in sections 3 and 13 of the *Conveyancing Act 1881*. Two aspects of the rules laid down in these provisions seem unsatisfactory. One is that they are very restrictive, in the sense that often they result, if applicable, in a purchaser of a lease or of leasehold property being entitled to see little or nothing about the vendor's title. The consequence of this is that they are out of line with what the Law Society recommends in many cases and practitioners will frequently insist upon the vendor providing the purchaser with much more title than the statutory provisions allow. In particular, where a purchaser is being granted a substantial leasehold interest, and is paying a substantial capital sum (premium) for it, it is only reasonable that the vendor should be required to produce evidence of title. It is recommended, therefore, that section 2 of the 1874 Act, and sections 3 and 13 of the 1881 Act, should be modified in accordance with the Law Society's recommendations.<sup>49</sup>

8.14 *The Commission provisionally recommends that section 2 of the Vendor and Purchaser Act 1874, and sections 3 and 13 of the Conveyancing Act 1881 be modified to allow the purchaser of a lease or of leasehold property to insist upon the vendor producing more*

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<sup>46</sup> *Law of Property (Miscellaneous Provisions) Act 1989* section 23.

<sup>47</sup> *Statute of Limitations 1957* sections 13, 48-49 and 71.

<sup>48</sup> See Wylie *op cit* fn 13 paragraphs 14.68-14.75.

<sup>49</sup> See Law Society *Conveyancing Handbook* Chapter 4.4 and 4.5.

*evidence of title than these sections provide for. On that basis, the Commission provisionally recommends that the sections should be replaced with substantial amendment.*

8.15 The other unsatisfactory aspect of the statutory provisions governing leases and leasehold property is the rule in *Patman v Harland*.<sup>50</sup> This rule seems to run counter to the spirit of the statutory provisions, because it results in a purchaser, who relies on those provisions, nevertheless being fixed with constructive notice of matters that would have been discovered if, instead of so relying, an express provision had been inserted in the contract allowing the purchaser to see more title than the statutory provisions allow. The rule was abolished in England<sup>51</sup> and it is recommended that it be abolished in the new legislation to implement this Consultation Paper.

8.16 *The Commission provisionally recommends that the rule in Patman v Harland should be abolished.*

8.17 Section 9 of the 1874 Act provides for a court procedure which is very commonly used in Ireland,<sup>52</sup> a vendor and purchaser summons. This is an application to the High Court which the parties to a contract for the sale of land can bring in order to determine issues arising from the contract,<sup>53</sup> such as whether objections or requisitions raised by a purchaser are proper or reasonable.<sup>54</sup> Given its continued regular use here, it is recommended that the Court Rules Committees should consider whether it could be made even more efficient for parties by ensuring that such applications are heard and dealt with as quickly as possible.<sup>55</sup> Subject to this, section 9 should be replaced without substantial amendment.

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<sup>50</sup> (1881) 17 Ch D 353. See Wylie *op cit* fn 13 paragraphs 14.71-14.73.

<sup>51</sup> *Law of Property Act 1925* section 44(5): see Wylie *op cit* fn 13 paragraph 14.72.

<sup>52</sup> Cf England and Wales: see Barnsley *Conveyancing Law and Practice* (4<sup>th</sup> ed by Thompson Butterworths 1996) at 611.

<sup>53</sup> But not the validity of the contract itself: see *Re Scott* (1879) 13 ICLR 139 at 140 (*per* Chatterton V C).

<sup>54</sup> See Farrell *Irish Law of Specific Performance* (Butterworths 1994) paragraph 8.53-8; Wylie *op cit* fn 13 paragraphs 13.26-13.29.

<sup>55</sup> The original version of section 9 of the 1874 Act as it applied in England

8.18 *The Commission provisionally recommends that section 9 of the Vendor and Purchaser Act 1874 should be examined by the Court Rules Committee to assess whether it can be made more efficient for parties.*

## **B Conveyances**

8.19 Apart from the *Conveyancing Acts 1881-1911* which are considered later,<sup>56</sup> there are several pre-1922 statutes dealing with conveyances of land which require consideration.

### **(1) Statute of Uses (Ireland) 1634<sup>57</sup>**

8.20 It is extraordinary that this ancient statute, which is a relic from the feudal ages,<sup>58</sup> continues to have significance in modern times, so that many deeds of conveyance still contain references to the vendor conveying the land “to uses”.<sup>59</sup> The old forms of conveyance linked to the Statute were abolished in England and Wales as long ago as 1925.<sup>60</sup> In the 21<sup>st</sup> century deeds of conveyance, and provisions within them, should operate in a straightforward and simple manner, as intended by the parties.<sup>61</sup> On this basis the 1634 statute should be repealed without replacement.

8.21 *The Commission provisionally recommends that the Statute of Uses (Ireland) 1634 should be repealed without replacement.*

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and Wales referred to applications being heard “in chambers”, but this has not applied in Ireland. See Farrell *op cit* paragraph 8.54; Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 141.

<sup>56</sup> Paragraph 8.43 below.

<sup>57</sup> 10 Chas 1 sess 2 c 1.

<sup>58</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 92-114 ; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 3.015-3.024.

<sup>59</sup> See the precedents in Laffoy’s *Irish Conveyancing Precedents* (Butterworths) especially Divisions E and J.

<sup>60</sup> *Law of Property Act 1925* sections 51, 60 and 65. The English *Statute of Uses 1535* had in fact been repealed by the *Law of Property Act 1922*.

<sup>61</sup> For provisions designed to ensure this, see paragraphs 8.34, 8.36, and 8.43 below.

**(2)      *Conveyancing Act (Ireland) 1634*<sup>62</sup>**

8.22      This somewhat obscure statute<sup>63</sup> deals with two types of transaction. One is where a voluntary (*ie* involving no consideration paid by the grantee) conveyance of land is regarded as being made to defraud the purchaser of a subsequent conveyance of the same land (*ie* someone who has paid consideration).<sup>64</sup> The provisions relating to this matter in the 1634 Act, as amended by the *Voluntary Conveyances Act 1893*,<sup>65</sup> are confusing and outdated.<sup>66</sup> They were replaced in much simpler and straightforward language in the English *Law of Property Act 1925*<sup>67</sup> and the same should be done here in the new legislation. Thus it is recommended that sections 1-5 of the 1634 Act should be replaced with substantial amendment.

8.23      *The Commission provisionally recommends that sections 1-5 of the Conveyancing Act (Ireland) 1634 as amended by the Voluntary Conveyances Act 1893 should be replaced with substantial amendment.*

8.24      The other type of transaction covered<sup>68</sup> relates to dispositions of any kind of property which are designed to defraud creditors. It is not at all clear how these provisions fit in with the provisions governing this subject in the *Bankruptcy Act 1988*.<sup>69</sup> The

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<sup>62</sup>      10 Chas 1 sess 2 c 3.

<sup>63</sup>      It is linked with the *Sales of Reversions Act 1867* (see paragraph 8.40 below) and the *Voluntary Conveyances Act 1893* (see paragraph 8.42 below).

<sup>64</sup>      Sections 1-5. See Wylie *op cit* fn 58 paragraph 3.087 and 9.078.

<sup>65</sup>      See paragraph 8.42 below.

<sup>66</sup>      Note the controversy over the use of the word “void” (which probably means “voidable”, *ie*, not void until a court order to this effect is obtained) and the onus of proof: see *National Bank Ltd v Behan* [1913] 1 IR 5 12; *Re Moore* [1918] 1 IR 169.

<sup>67</sup>      *Law of Property Act 1925* section 173.

<sup>68</sup>      See sections 10, 11 and 14.

<sup>69</sup>      Sections 57-59. See Sanfey and Holohan *Bankruptcy Law and Practice in Ireland* (Round Hall 1991) Chapter 8. Note that the provisions relating to fraudulent preferences in bankruptcy legislation were applied to companies by sections 284, 286, and 287 of the *Companies Act 1963*.

provisions in the 1988 Act seem to be comprehensive and so it is recommended that sections 10, 11 and 14 of the 1634 Act should be repealed without replacement.<sup>70</sup>

8.25 *The Commission provisionally recommends the repeal without replacement of sections 10, 11 and 14 of the Conveyancing Act (Ireland) 1634.*

**(3) *Maintenance and Embracery Act (Ireland) 1634***<sup>71</sup>

8.26 This Act did two things, only one of which is relevant to this Consultation Paper. The one which is not of relevance is the application to Ireland of the ancient law of “maintenance, embracery and champerty”, which prohibits a person with no interest in the matter from assisting, encouraging or promoting another person to bring an action in court, usually on the understanding that a share in any proceeds will be given if the action is successful. This law is designed to protect the integrity of the administration of justice and has been recognised and applied by the Irish courts in recent times, albeit on the grounds of “public policy” rather than by reference to the 1634 Act.<sup>72</sup>

8.27 The provisions<sup>73</sup> of the Act which are of relevance are those which prohibit the buying, selling or otherwise obtaining of any “pretenced title” to land, unless the vendor or grantor has been in possession at least one year before the sale or grant. These provisions clearly belong to another age, when title to property was often very insecure or subject to dispute, with the result that it was common for people to lay claim to land to which they had no valid title. On that view the Act is now obsolete<sup>74</sup> and should be removed from the

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<sup>70</sup> This has been done in both England and Wales (the equivalent in section 172 of the *Law of Property Act 1925* was replaced by section 253 of the *Insolvency Act 1985*) and the North (sections 10, 11 and 14 of the 1634 Act were replaced by Articles 367-369 of the *Insolvency (NI) Order 1989*).

<sup>71</sup> 10 Chas 1 sess 3 c 15.

<sup>72</sup> See *McElroy v Flynn* [1991] ILRM 294; *Fraser v Buckle* [1996] 1 IR 1; *O’Keeffe v Scales* [1998] 1 IR 290.

<sup>73</sup> Sections 2, 4 and 6.

<sup>74</sup> Another view is that the 1634 Act was largely declaratory of the common law: see Palles CB in *Robb v Dorian* (1877) IR 11 CL 292. In *Gillespie v Hogg* [1947] 13 Ir Jur Rep 15 Murnaghan J expressed the view that it does



statute book, as Kenny J suggested in *Brown v Fahy*.<sup>75</sup> It is recommended that sections 2, 4 and 6 of the 1634 Act be repealed without replacement.

8.28 *The Commission provisionally recommends that sections 2, 4 and 6 of the Maintenance and Embracery Act (Ireland) 1634 should be repealed without replacement.*

**(4) *Real Property Act 1845***<sup>76</sup>

8.29 This Act contains a number of important provisions. One, relating to future interests, has already been dealt with<sup>77</sup> and another relates to the law of landlord and tenant,<sup>78</sup> which is outside the scope of this Consultation Paper.<sup>79</sup>

8.30 Section 2 of the Act is a fundamental provision which introduced the modern deed as the main method of conveying land, but only as an alternative to the ancient feudal methods (such as “feoffment with livery of seisin”) and those linked to the *Statute of Uses (Ireland) 1634*<sup>80</sup> (such as a “bargain and sale” and “covenant to stand seised”).<sup>81</sup> Clearly these relics from the past should be removed and the simple deed should become the sole method of conveying land,<sup>82</sup> pending the introduction of electronic methods under an e-conveyancing system. It should remain the case that there are certain, long-established exceptions to the rule that a deed, as opposed to an

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not apply to registered land.

<sup>75</sup> High Court 24 October 1975.

<sup>76</sup> 8 & 9 Vict c 106.

<sup>77</sup> Section 8: see Chapter 3 above.

<sup>78</sup> Section 9.

<sup>79</sup> But it has been considered by the Commission’s Landlord and Tenant Project Group: see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 – 2003) paragraphs 2.26, 12.04, 12.06 and 13.08.

<sup>80</sup> See paragraph 8.20 above.

<sup>81</sup> See on this subject Lyall *op cit* fn 58 at 108-112; Wylie *op cit* fn 58 paragraphs 3.023-3.030.

<sup>82</sup> This was done in England by section 51 of the *Law of Property Act 1925*.

unsealed written document, must be used, eg some leases and leasehold transactions<sup>83</sup> and wills and assents.<sup>84</sup>

8.31 *The Commission provisionally recommends that the simple deed should become the only method of conveying transferring land pending the introduction of electronic methods under an e-conveyancing system.*

8.32 The other matter which should be implemented by the new legislation is an overhaul of the requirements for valid creation or execution of deeds previously recommended by the Commission.<sup>85</sup> This includes an extremely important provision to cover foreign corporate bodies dealing with land in the State. With the considerable increase in foreign investment which the State has experienced in recent times, there is now an urgent need to cater for overseas companies which do not have a corporate seal of the sort which Irish and British companies have. On the basis of the recommendations contained in this and the previous paragraph section 2 of the 1845 Act should be replaced with substantial amendment.

8.33 *The Commission provisionally recommends that section 2 of the Real Property Act 1845 should be replaced with substantial amendment so as to overhaul the requirements for valid creation or execution of deeds, including the requirements in relation to foreign corporate bodies dealing with land in the State.*

8.34 As regards the Act's other provisions of relevance, section 3, so far as it remains unrepealed,<sup>86</sup> deals with partitions, exchanges

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<sup>83</sup> See the Commission's *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 – 2003) Chapter 2.

<sup>84</sup> *Succession Act 1965* sections 52 and 78. Note also the provisions in sections 4-6 of the *Statute of Frauds (Ireland) 1695* relating to declarations of trusts and disposition of beneficial interests: see paragraph 8.03 fn 10 above.

<sup>85</sup> *Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds* (LRC 56 – 1998) Chapter 2. Note the draft legislation set out on at 36-37 of that Report.

<sup>86</sup> *Deasy's Act 1860* repealed the references to leases, assignments and surrenders: those matters are dealt with respectively by sections 4, 7, 8 and 9 of that Act: see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapters 5, 21 and 25.

and releases and can be replaced without substantial amendment.<sup>87</sup> The same applies to section 4, which relates to the effect of words commonly used in conveyances, such as “give” and “grant”.<sup>88</sup> Section 5 is a somewhat obscure provision and should be replaced with substantial amendment to resolve a number of doubts.<sup>89</sup> In particular it should be made clear that it does not affect generally the fundamental doctrine of privity of contract. Section 6 renders various future interests alienable<sup>90</sup> *inter vivos*<sup>91</sup> and, subject to it being made clear that it covers all such interests,<sup>92</sup> should be replaced without substantial amendment.

8.35 *The Commission provisionally recommends that section 3 of the Real Property Act 1845 should be replaced without substantial amendment. Similarly, the Commission provisionally recommends that section 4 of the same Act should be replaced without substantial amendment. Section 6 should also be replaced without substantial amendment. Section 5 should be replaced with substantial amendment to resolve a number of doubts.*

**(5) *Law of Property Amendment Act 1859***<sup>93</sup>

8.36 This Act contains a number of miscellaneous provisions still in force, some of which relate to landlord and tenant law and so are outside the scope of this Consultation Paper.<sup>94</sup> With respect to those

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<sup>87</sup> But the reference to “feoffments” should be dropped: see paragraph 8.30 above.

<sup>88</sup> But again the reference to a “feoffment” should be dropped.

<sup>89</sup> Along the lines proposed for the North in the Land Law Working Group’s *Final Report* (HMSO 1990) Volume 2 at 598-599. See Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 91-92.

<sup>90</sup> Section 10 of the *Conveyancing Act 1881*.

<sup>91</sup> Section 3 of the *Wills Act 1837*, replaced by section 76 of the *Succession Act 1965*, rendered them alienable by will.

<sup>92</sup> Including possibilities of reverter (see Wylie *op cit* fn 89 at 93), which were held recently to be covered by section 3 of the *Wills Act 1837*: see *Bath and Wells Diocesan Board v Jenkinson* [2002] 4 All ER 245.

<sup>93</sup> 22 & 23 Vic c 35.

<sup>94</sup> Sections 1-3 and 27, which have been considered by the Commission’s Landlord and Tenant Project Group: see eg *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28-2003) paragraph 3.20.

which are relevant,<sup>95</sup> section 21 is one of a number of provisions designed to enable a person to transfer property to himself and another.<sup>96</sup> The section and other provisions should be consolidated into a general provision governing such transactions,<sup>97</sup> so that it would be replaced without substantial amendment. Section 24<sup>98</sup> is a somewhat convoluted provision making it a crime to conceal title deeds fraudulently or to deduce title falsely.<sup>99</sup> It should be recast in much more simple form and language, but otherwise be replaced without substantial amendment.

8.37 *The Commission provisionally recommends that section 21 of the Law of Property Amendment Act 1859, as one of a number of provisions designed to enable a person to transfer property to himself and another should be consolidated into a general provision governing such transactions, so that it would be replaced without substantial amendment. The Commission also recommends that section 24 of the 1859 Act should be recast in much more simple form and language, but otherwise be replaced without substantial amendment.*

**(6) *Law of Property Amendment Act 1860***<sup>100</sup>

8.38 This Act also contained various miscellaneous provisions, not all of which applied to Ireland.<sup>101</sup> Section 6 concerned landlord

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As regards section 27 see paragraph 7.15 above.

<sup>95</sup> Section 23 relates to purchasers or mortgagees dealing with trusts and arguably was superseded by section 20 of the *Trustee Act 1893*. This will be dealt with by the Commission's Project Group on the Law of Trusts.

<sup>96</sup> *Eg* section 50 of the *Conveyancing Act 1881*: see paragraph 8.43 *re* section 50 of the *Conveyancing Act 1881* below.

<sup>97</sup> A precedent exists in section 72 of the English *Law of Property Act 1925*. Note also the provisions recommended for the North in the Land Law Working Group's *Final Report* (HMSO 1990) Volume 2 at 634-635.

<sup>98</sup> As extended by section 8 of the *Law of Property Amendment Act 1860*: see paragraph 8.38 below.

<sup>99</sup> See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraphs 9.31 and 14.61.

<sup>100</sup> 23 & 24 Vic c 38.

<sup>101</sup> Sections 1.5 related to registration of judgments, but this subject was already covered by the *Judgments (Ireland) Act 1844* and *Judgments*

and tenant law and is not relevant to this Consultation Paper. Section 7 concerned future interests and was dealt with earlier.<sup>102</sup> Section 8 simply amended section 24 of the 1859 Act.<sup>103</sup> Section 10 empowered the Lord Chancellor to make orders as to investment of cash under the control of the court. This would seem to have been superseded by Rules of Court<sup>104</sup> and should be repealed without replacement.

8.39 *The Commission provisionally recommends that Section 10 of the Law of Property Amendment Act 1860 should be repealed without replacement.*

**(7) *Sales of Reversions Act 1867***<sup>105</sup>

8.40 This Act was designed to counter a judicial inclination to view sales of “reversionary” interests with much suspicion, particularly if there was a suggestion of a sale at undervalue.<sup>106</sup> It is difficult to justify singling out such transactions nowadays and this matter should be left to be dealt with under the wide equitable jurisdiction to strike down “improvident” bargains<sup>107</sup> and transactions vitiated by improper conduct, such as fraud, duress, undue influence or other unconscionable behaviour.<sup>108</sup> It is recommended that the 1867 Act should be repealed without replacement.

8.41 *The Commission provisionally recommends that the Sale of Reversions Act 1867 should be repealed without replacement.*

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*Registry (Ireland) Act 1850.*

<sup>102</sup> See paragraph 3.04 above.

<sup>103</sup> See paragraph 8.36 above.

<sup>104</sup> See Rules of the Superior Courts 1986 Order 77.

<sup>105</sup> 31 & 32 Vic c 4.

<sup>106</sup> *Tyler v Yates* (1871) LR 6 Ch 665 ; *Earl of Aylesford v Morris* (1873) LR 8 Ch 484; *Rae v Jones* (1892) 29 LR Ir 500.

<sup>107</sup> See *Grealish v Murphy* [1946] IR 35 and discussion by Clark “The Unconscionability Doctrine Viewed from an Irish Perspective” (1980) 31 NILQ 114.

<sup>108</sup> See Keane *Equity and the Law of Trusts in the Republic of Ireland* (Butterworths 1988) Chapter 29; Delany *Equity and the Law of Trusts in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 1999) Chapters 15 and 16.

**(8) Voluntary Conveyances Act 1893<sup>109</sup>**

8.42 This Act amended sections 1 and 3 of the *Conveyancing Act (Ireland) 1634*, but in a somewhat ambiguous way.<sup>110</sup> It was recommended earlier that the 1634 and 1893 Acts should be replaced with substantial amendment.<sup>111</sup>

**C Conveyancing Acts 1881-1911**

8.43 It is appropriate now to consider the provisions in these key Acts relating to contracts and conveyances of land. As regards the main Act of 1881, some Parts relate to the law of landlord and tenant<sup>112</sup> and are outside the scope of this Consultation Paper.<sup>113</sup> Parts IV and V relate to the law of mortgages and are considered in a later chapter.<sup>114</sup> Part X relates to rentcharges and was considered in an earlier chapter.<sup>115</sup> The Parts still in force<sup>116</sup> which are of relevance are Parts I, II, IX, XII, XIV and XV-XVIII. It seems appropriate to deal with these on a section-by-section basis before turning to the provisions of the other Acts.

**(1) Conveyancing Act 1881<sup>117</sup>**

Section 2: This is an important definition section which is often invoked as an aid to interpretation of other legislation and conveyancing documents. In that respect it acts as a supplement to

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<sup>109</sup> 56 & 57 Vic c 21.

<sup>110</sup> See Wylie *Conveyancing Law* (Butterworths Annotated Statutes Series 1999) at 315.

<sup>111</sup> Paragraph 8.22 above.

<sup>112</sup> Parts III and XIII.

<sup>113</sup> They have been considered by the Commission's Landlord and Tenant Project Group: see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 – 2003) Chapters 3, 12 and 14.

<sup>114</sup> Chapter 9 below.

<sup>115</sup> See paragraph 7.13 above.

<sup>116</sup> Parts VI, VII, VIII, XI and XVII have been repealed. See Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 151-224.

<sup>117</sup> 44 & 45 Vic c 4.

definitions of key words relating to land law and conveyancing law contained in the Interpretation Act 1937,<sup>118</sup> which, of course, are applicable only to Acts of the Oireachtas. The Commission recommended that the definitions in the 1937 Act should be made applicable also to private documents relating to land<sup>119</sup> and this should be implemented in the new legislation. Apart from that, clearly an updated<sup>120</sup> and expanded version of section 2 of the 1881 Act will be needed in the new legislation, particularly because of its much wider scope. On that basis it is recommended that section 2 be *replaced with substantial amendment*.

**Section 3:** This section is linked with section 2 of the *Vendor and Purchaser Act 1874*.<sup>121</sup> It was recommended earlier that both provisions<sup>122</sup> should be replaced with substantial amendment to reflect the Law Society's recommendations in respect of transactions relating to leasehold property. Apart from that some updating and modifications should be made. Subsection (2) should be dropped as it relates to copyhold.<sup>123</sup> As regards subsections (4) and (5), which concern the effect of production of a receipt for rent, these should be rendered more effective by providing that an unqualified<sup>124</sup> receipt is *conclusive* evidence.<sup>125</sup> As regards subsection (11), it should be made clear that, where a court refuses to order specific performance against a purchaser, it has an unfettered discretion to order refund of some or

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<sup>118</sup> See Part III.

<sup>119</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 21-23.

<sup>120</sup> Thus references to feudal concepts like a “manor” should be dropped (see paragraph 2.08 above).

<sup>121</sup> See paragraph 8.10 above.

<sup>122</sup> And the related one in section 13 of the 1881 Act.

<sup>123</sup> See paragraph 2.08 above.

<sup>124</sup> It should remain open to a landlord to indicate expressly that breaches of covenant have occurred.

<sup>125</sup> This would accord with the Law Society's *General Conditions of Sale* (2001 ed) Condition 10(b)(iii).

all of any deposit paid.<sup>126</sup>

**Section 4:** This section confers statutory authority on personal representatives to complete a contract entered into by the deceased before death, but this appears to have been rendered redundant by the general powers conferred on personal representatives, now contained in the *Succession Act 1965*.<sup>127</sup> Section 4 should be *repealed without replacement*.

**Section 5:** It was recommended earlier that this provision no longer serves a useful purpose and should be *repealed without replacement*.<sup>128</sup>

**Section 6:** The operation of this section was considered at length earlier in the context of acquisition of easements and profits. It was recommended that it should be *replaced with substantial amendment*.<sup>129</sup>

**Section 7:** This section plays a vital role in conveyancing practice by providing detailed statutory covenants for title to be implied in conveyances and transfers of land. Although highly laudable in aim, the provisions are flawed in several respects.<sup>130</sup> They are couched in

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<sup>126</sup> The English courts doubted such jurisdiction (see *Re Scott and Alvarez's Contract* [1895] 2 Ch 603), but this was criticised by the Irish courts (see Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraphs 13.35-13.36), but doubts have remained: see *White v Spendlove* [1942] IR 224 at 252 (*per* Geoghegan J). The point was met in England by section 49(2) of the *Law of Property Act 1925*, which the courts eventually interpreted as giving an unfettered discretion: see *Universal Corporation v Five Ways Properties Ltd* [1979] 1 All ER 552; *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963.

<sup>127</sup> See Brady *Succession Law in Ireland* (2<sup>nd</sup> ed Butterworths 1995) Chapter 10; Wylie *op cit* fn 126 paragraphs 12.26 and 12.46.

<sup>128</sup> See paragraph 7.13 above.

<sup>129</sup> See paragraph 7.24-7.26 above.

<sup>130</sup> See Wylie *op cit* fn 126 paragraphs 21.05-21.33.



language of mind-boggling complexity, riddled with ambiguities and uncertainties and, largely as a consequence of a last minute amendment to the 1881 Bill, often rendered ineffective.<sup>131</sup> Clearly all these flaws should be addressed in the new legislation and a good precedent is to be found in the proposals for Northern Ireland.<sup>132</sup> On this basis section 7 should be *replaced with substantial amendment*.

**Section 8:** This section clarified the common law by disentitling a purchaser from requiring the vendor to execute the deed of conveyance or transfer in the purchaser's or the purchaser's solicitor's presence, but it does enable the purchaser to require his own witness to attest the execution, albeit at the purchaser's cost. Such requirements, including the latter, would be entirely out of keeping with modern practice. The section would seem to have been redundant for a long time and should be *repealed without replacement*.<sup>133</sup>

**Section 9:** This section is commonly relied upon where part only of land is disposed of and the title deeds are kept by the vendor (because they also relate to the part retained).<sup>134</sup> Its provisions should be retained but they should be amended to make it clear that both the acknowledgement of the right to production and the undertaking for safe custody of the title deeds pass automatically to subsequent

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<sup>131</sup> See Wylie *op cit* paragraph 21.08.

<sup>132</sup> See the Land Law Working Group's *Final Report* (HMSO 1990) Volume 2 at 638-643 and 991-996. This is to be preferred to the somewhat more obscure provisions adopted in the English *Law of Property (Miscellaneous Provisions) Act 1994*: see Barnsley *Conveyancing Law and Practice* (4<sup>th</sup> ed by Thompson Butterworths 1996) at 683-686; Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum Butterworths 2000) paragraphs 5.047-5.071.

<sup>133</sup> Such a repeal would not revive old law: see *Interpretation Act 1937* section 21 (1)(a) and (b).

<sup>134</sup> See Wylie *op cit* fn 126 paragraphs 18.102-18.016.

purchasers of the part sold off.<sup>135</sup> Subject to that section 9 should be *replaced without substantial amendment*.

**Section 41:** This section declared that land vested in a minor was to be deemed a settled estate within the *Settled Estates Act 1877*.<sup>136</sup> It was probably rendered redundant by the provisions governing minors in the *Settled Land Act 1882*<sup>137</sup> and would clearly become so under the proposed new regime whereby a minor's land would be vested in trustees with full powers of dealing with it.<sup>138</sup> Section 41 should be *repealed without replacement*.

**Sections 42 and 43:** These sections relate to the management of a minor's land by trustees and application of income for the minor's maintenance, education or benefit. These matters belong more to the general law of trusts and will be dealt with by the Commission in reviewing that area of the law.

**Section 49:** This section provides that the rather archaic word "grant" need not be used in a deed of conveyance. It can now be *repealed without replacement*.<sup>139</sup>

**Section 50:** It was recommended earlier that this section, which relates to conveyances by a person to oneself, should be consolidated with section 21 of the *Law of Property Amendment Act 1859*.<sup>140</sup> It should thereby be *replaced without substantial amendment*.

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<sup>135</sup> See Wylie *Conveyancing Law* (Butterworths Irish Annotated Statutes 1999) at 175.

<sup>136</sup> See paragraph 4.09 above.

<sup>137</sup> See paragraph 4.16 above.

<sup>138</sup> See paragraphs 4.15-4.26 above.

<sup>139</sup> Which would not revive any old law: *Interpretation Act 1937*, section 21(1) (a) and (b).

<sup>140</sup> See paragraph 8.36 above. For a precedent see Articles 10-12 of the *Property (NI) Order 1978*: see Wylie *Irish Land Law* (3<sup>rd</sup> ed Sweet & Maxwell 1997) paragraph 3.020.

**Section 51:** This section should be replaced by a provision abolishing the need for words of limitation in deeds relating to unregistered land, as was done by section 123 of the *Registration of Title Act 1964* for registered land transfers. Such a step was recommended some time ago by the Commission<sup>141</sup> and was taken in England and Wales in 1925.<sup>142</sup> Thus the section should be *replaced with substantial amendment*.

**Section 52:** This section was considered earlier in relation to powers of appointment.<sup>143</sup>

**Section 53:** This section facilitates the use of supplemental deeds and is much relied upon in practice.<sup>144</sup> The one change recommended is that it should be extended to cover any instrument and not just deeds. Subject to that it should be *replaced without substantial amendment*.

**Section 54:** This is another section much relied upon in practice, sanctioning the modern practice of including a receipt clause within a deed rather than endorsing it on the back of the deed.<sup>145</sup> It should be *replaced without substantial amendment*.

**Section 55:** This section also relates to receipts in or endorsed on deeds and enables a purchaser to rely on such a receipt. However, it is recommended that it should be a *conclusive* rather than “sufficient” discharge for a purchaser without notice.<sup>146</sup> On that basis it should be

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<sup>141</sup> *Report on Land Law and Conveyancing Law: (5) General Proposals* (LRC 44-1992) at 6-7.

<sup>142</sup> *Law of Property Act 1925 section 60*.

<sup>143</sup> See paragraph 5.08 above.

<sup>144</sup> See Laffoy *Irish Conveyancing Precedents* (Butterworths) Precedents F.1.6 and F.2.10.

<sup>145</sup> See Wylie *op cit* fn 126 paragraph 18.43-18.44.

<sup>146</sup> *Ibid* paragraph 18.45.

*replaced with substantial amendment.*

**Section 56:** This too relates to receipts and authorises a solicitor producing a deed with a receipt to receive the purchase money.<sup>147</sup> It is recommended that it be extended to cover any person employed by and acting with the authority of the solicitor in the particular transaction, whether within the solicitor's office or as agent of the solicitor, *eg* another solicitor acting as a country solicitor's town agent. Again it should be conclusive evidence in favour of the person paying the money. On that basis the section should be *replaced with substantial amendment*.

**Section 57:** This section provides for statutory forms of deeds (set out in the 4<sup>th</sup> Schedule to the Act), but these have never been used in practice. Since they seem to have become a "dead letter" section 57 and the 4th Schedule should be *repealed without replacement*.

**Section 58:** This section is one of a number of "word-saving" provisions in the 1881 Act<sup>148</sup> and on the face of it is relatively straightforward. It purports to save references to a covenantee's successors in title, but the English replacement<sup>149</sup> has caused considerable controversy. The English Court of Appeal held that it altered the substantive law and, in effect, provided a statutory annexation of the benefit of a covenant to the land owned by the covenantee.<sup>150</sup> This sort of confusion must be avoided in the new legislation and the provision in section 58 should be consolidated with the new provisions governing freehold covenants referred to

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<sup>147</sup> *Ibid* paragraph 18.46.

<sup>148</sup> Another is section 6, which was discussed earlier: see paragraphs 7.24-7.26 above. See also sections 58-60 and 63 below.

<sup>149</sup> *Law of Property Act 1925 section 78*.

<sup>150</sup> *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371. See Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum, Sweet & Maxwell, 2000) paragraphs 16.012-16.016.

earlier.<sup>151</sup> The complications of “annexation” should be abolished and, in essence, the position in future should be that, unless the deed contains an express provision to the contrary, the benefit of the freehold covenants should run automatically with the land benefited, so as to accrue to the benefit of the original covenantee’s successors in title.<sup>152</sup> On that basis section 58 should be *replaced with substantial amendment*.

**Section 59:** This is the corollary of section 58, operating in respect of successors to the original covenantor. Again it should be incorporated in the new provisions for freehold covenants, which are designed to abolish the restrictions of the rule in *Tulk v Moxhay*.<sup>153</sup>

**Section 60:** This section supplements sections 59 and 60 and deals with cases where two or more parties enter into covenants jointly. It too should be incorporated in the new provisions for freehold covenants. On that basis it should be *replaced without substantial amendment*.

**Section 61:** This section relates to the law of mortgages and is dealt with later.<sup>154</sup>

**Section 62:** This section was designed to enable an easement to be reserved by using the *Statute of Uses (Ireland) 1634*. It was recommended earlier that this sort of archaic complication should be removed, with repeal of that Statute, and reservations in deeds should

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<sup>151</sup> See paragraph 7.29 above.

<sup>152</sup> Leasehold covenants are dealt with quite separately by, *eg*, sections 10 and 11 of the 1881 Act and sections 12 and 13 of *Deasy’s Act*. This subject has been covered by the Commission’s Landlord and Tenant Project Group: see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 - 2003) Chapter 3.

<sup>153</sup> See paragraph 7.29 above.

<sup>154</sup> See paragraph 9.24 below.

operate without such necessities.<sup>155</sup> On that basis section 62 should be *repealed without replacement*.

**Section 63:** This section was designed to remove the need to include an “all estate” clause in deeds, to render them as effective as possible. It is often useful in practice, but should be extended to cover all instruments disposing of land.<sup>156</sup> On that basis it should be *replaced with substantial amendment*.

**Section 64:** This section relates to the construction of implied covenants. Its provisions should be incorporated in the general definition section in the new legislation.<sup>157</sup> In this way it would be *replaced without substantial amendment*.

**Section 66:** This section contains a somewhat odd provision, providing that powers and implied provisions of the Act are to be “deemed in law proper”, but that a solicitor is not guilty of negligence by not including them where the Act allows this to be done. This seems to state the obvious and its very inclusion in the Act is more likely to cause doubt and confusion than provide clarity.<sup>158</sup> Such a provision does not appear in more modern statutes. It should be *repealed without replacement*.

**Section 67:** This contains a very useful provision concerning service of notices, but only where required under the Act. It should be extended to cover service of notices generally (*ie* in private transactions relating to land)<sup>159</sup> and to cover modern methods of

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<sup>155</sup> See paragraph 8.20 above.

<sup>156</sup> See Wylie *op cit* fn 126 paragraphs 18.82-18.83.

<sup>157</sup> See the discussion in relation to section 2 of the 1881 Act above.

<sup>158</sup> It may have had relevance to the rule in *Patman v Harland* (see Wylie *op cit* fn 126 paragraph 14.73), but it was recommended earlier that that rule should be abolished: see paragraph 8.15 above.

<sup>159</sup> The Commission’s Landlord and Tenant Project Group made the same

electronic transmission, such as by fax and email. It should be *replaced with substantial amendment*.

**Section 69:** This section relates to the jurisdiction of the Court (the High Court for the purpose of the 1881 Act) and procedural matters. The jurisdiction of the courts is nowadays governed by the post-1922 Courts Acts, and procedural matters should be left to be dealt with by rules of court.<sup>160</sup> On that basis section 69 should be *repealed without replacement*.

**Section 70:** This section provides that court orders are to be taken to be conclusive by a purchaser despite want of jurisdiction or failure to obtain consent “whether the purchaser has notice of any such want or not”. This seems somewhat sweeping and it is recommended that the protection should cover only a purchaser without notice of the irregularity. Section 70 should accordingly be replaced with substantial amendment.

**(2)      *Conveyancing Act 1882***<sup>161</sup>

**Section 3:** This is one of the fundamental provisions governing conveyancing, which deals with the doctrine of notice.<sup>162</sup> It should be *replaced without substantial amendment*.

**Section 4:** This section also states a rule of long-standing, that a contract for a lease (as opposed to the lease itself) is not part of the title to be deduced by a vendor. It should be *replaced without substantial amendment*.

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recommendation: see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 - 2003).

<sup>160</sup> Paragraph 8.17 above.

<sup>161</sup> 45 & 46 Vic c 39.

<sup>162</sup> See Wylie *op cit* fn 126 paragraph 16.62.

(3) *Conveyancing Act 1892*<sup>163</sup>

(4) *Conveyancing Act 1911*<sup>164</sup>

Sections 1,<sup>165</sup> 6 and 11 were dealt with earlier in relation to appurtenant rights.<sup>166</sup> Sections 3-5, 9, 13 and 15 relate to mortgages and are dealt with later.<sup>167</sup> Section 8 relates to the law of trusts and is outside the scope of this Consultation Paper. Section 10 relates to settlement of land and was dealt with earlier.<sup>168</sup>

8.44 *The Commission provisionally recommends that amendments should be made to sections 2, 3, 4, 5, 6, 7, 8, 9, 41, 42, 43, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 67, 69 and 70 of the Conveyancing Act 1881. In some cases the amendment will be without replacement.*

8.45 *The Commission provisionally recommends that:*

*(i) section 3 of the Conveyancing Act 1882 which deals with the doctrine of notice should be replaced without substantial amendment;*

*(ii) section 4 of the Conveyancing Act 1882, which states that a contract for a lease (as opposed to the lease itself) is not part of the title to be deduced by a vendor, should be replaced without substantial amendment.*

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<sup>163</sup> 55 & 56 Vic c 13. The provisions of this Act still in force (sections 2-5) all relate to landlord and tenant law and have been considered by the Commission's Landlord and Tenant Project Group : see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 - 2003) paragraphs 14.21-14.25.

<sup>164</sup> 1 & 2 Geo 5 c 37.

<sup>165</sup> Section 2 relates to landlord and tenant law (section 10 of the 1881 Act): see LRC CP 28 - 2003 paragraph 3.09.

<sup>166</sup> See paragraphs 7.13 above.

<sup>167</sup> See paragraph 9.27 below.

<sup>168</sup> See paragraph 4.09 above.





## CHAPTER 9     MORTGAGES

9.01     Mortgages play a fundamental role in land transactions since most purchasers of land have to borrow a substantial proportion of the purchase money. This loan is usually secured by the lending institution (the mortgagee) taking a mortgage of the land purchased from the purchaser-borrower (the mortgagor).<sup>1</sup> Unfortunately the law of mortgages is extremely outdated and complex and, as indicated earlier,<sup>2</sup> in need of considerable reform.<sup>3</sup>

9.02     The current law of mortgages is a complicated mixture of the common law, supplemented by equitable principles developed by the old Court of Chancery and later by statute law. Three broad areas seem to merit consideration: (1) the methods of creating mortgages; (2) control of the terms of mortgages, particularly from the viewpoint of protecting mortgagors (the consumer protection aspect); (3) operation of mortgagee remedies (which does have an obvious connection with (2)). It may be convenient to examine these points before considering the pre-1922 statutes relating to mortgages.

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<sup>1</sup>     See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 23; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapters 12 and 13. See also Johnston *Banking and Security Law in Ireland* (Butterworths 1998) Chapter 10.

<sup>2</sup>     See paragraph 1.31. As regards the special statutory form of mortgage for securing a judgment creditor's debts, the judgment mortgage, see Chapter 10 below.

<sup>3</sup>     In England, notwithstanding considerable changes made by the *Law of Property Act 1925*, it has been recognised that there is still a need for major reform: see the Law Commission's *Report Transfer of Land: Land Mortgages* (Law Com No 204 1991).

## A Methods of Creating Mortgages

9.03 It remains the case in Ireland that mortgages of unregistered land can still be created by the various ways developed by conveyancers over the centuries. In particular, the traditional method remains of having the mortgagor convey or assign the ownership of the land<sup>4</sup> to the mortgagee, so that it technically owns the land until the loan is repaid and it then reconveys or reassigns the ownership back to the mortgagor, *ie* discharge of the mortgage following “redemption” by the mortgagor. In addition it is also not uncommon, indeed, it is usual, to have mortgages of leasehold land created by “sub-demise”, *ie*, instead of assigning the leasehold estate to the mortgagee, it creates a sub-lease only. The reason for this is that the mortgagee does not wish to assume the lessee’s obligations under the lease.<sup>5</sup> Apart from such formal legal mortgages it is not uncommon to have various forms of equitable mortgage. Indeed in the past one of the most common types of mortgage created in Ireland is the informal,<sup>6</sup> equitable mortgage created by depositing title documents<sup>7</sup> with the bank or other lending institution.<sup>8</sup>

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<sup>4</sup> Meaning, as has been pointed out before in this Consultation Paper (see *eg* paragraph 1.03 above), conveying or assigning the freehold or leasehold estate in the land owned by the mortgagor.

<sup>5</sup> See Lyall *op cit* fn 1 at 781-782; Wylie *op cit* fn 1 paragraphs 12.37-12.38.

<sup>6</sup> It remains the case in Ireland that no form of writing is required – all that is needed is the deposit of the title documents with the intention of creating a mortgage of the estate in the land to which they relate : see Lyall *op cit* fn 1 at 783; Wylie *op cit* fn 1 paragraphs 12.43-12.46. In England it appears that, as a result of the changes to the requirements for a valid contract for the sale or other disposition of land made by section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989*, writing is now necessary: see *United Bank of Kuwait Plc v Sahib* [1997] Ch 107; Megarry & Wade *The Law of Real Property* (6<sup>th</sup> ed by Harpum Sweet & Maxwell 2000) paragraph 19-039.

<sup>7</sup> The title deeds relating to unregistered land or the land certificate relating to registered land.

<sup>8</sup> Other forms of equitable mortgage arise where, *eg*, the mortgagor holds an equitable interest only in the property, so that this is all that can be mortgaged, and where an initial agreement to create a legal mortgage is entered into, which is not completed by execution of the formal legal mortgage.

9.04 There is clearly considerable scope for simplification of these various methods, but there is an even more pressing need for radical reform. The traditional method of creating a mortgage by transferring the ownership of the land to the mortgagee is inconsistent with the true nature of a mortgage transaction.<sup>9</sup> A mortgage is essentially a secured loan transaction. The only, albeit very substantial, interest which the mortgagee should have is security for its loan. It is of the very nature of security that the lender does not expect to have to invoke it – it expects to enforce its security as a last resort only, *ie*, where the borrower has defaulted in a serious way and all other attempts at a resolution of the problem have failed. Otherwise the mortgagee has no interest in “owning” the land and a system which involves transfer of ownership, notwithstanding this being subject to the mortgagor’s right of redemption, is divorced from reality.

9.05 The time has come both to simplify the methods of creating mortgages of unregistered land and to make them accord more with the realities of the nature of a transaction designed to provide security for a loan. The obvious way of doing this is to adopt the method of mortgaging registered land introduced by statute.<sup>10</sup> Under this the mortgagee obtains a charge only over the mortgagor’s registered title (which, therefore, remains vested in the mortgagor, as the registered owner of the land), but the legislation makes it clear that the mortgagee has nevertheless all the rights and remedies against the land necessary to enforce its security.<sup>11</sup> There is no need to have any other form for unregistered land, so long as the new legislation similarly makes it clear that a charge by way of legal mortgage provides the mortgagee with full security rights over the land.<sup>12</sup>

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<sup>9</sup> This is what Maitland had in mind when referring to the traditional form of mortgage deed as being one long “*suppressio veri* and *suggestio falsi*”: see paragraph 1.31, fn 124 above. Cf Lord Macnaghten in *Samuel v Jarrah Timber and Wood Paving Corporation* [1904] AC 323 at 326: “No one ... by the light of nature ever understood an English mortgage of real estate.”

<sup>10</sup> See now *Registration of Title Act 1964* sections 62-67.

<sup>11</sup> See especially 1964 Act section 62 (6). See Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995) Chapter 9.

<sup>12</sup> Such a charge has operated in England and Wales since introduced by the *Law of Property Act 1925*: see Megarry & Wade *op cit* fn 6 Chapter 19.

Retention of other methods, such as mortgages by demise or sub-demise, is an unnecessary complication.<sup>13</sup> It is recommended that the new legislation prescribes that in future the only method of creating a legal mortgage of unregistered land is by a charge, to operate in the same way as a charge of registered land.<sup>14</sup>

9.06 *The Commission provisionally recommends that legislation should prescribe that in future the only method of creating a legal mortgage of unregistered land is to be by a charge, to operate in the same way as a charge of registered land.*

9.07 As regards informal equitable mortgages, the primary attraction of such mortgages is their very informality.<sup>15</sup> It is true that such mortgages are not as popular as they once were, but enquiries of lending institutions, particularly banks which, in the past, have made much use of mortgages by deposit, have revealed that they are still used.<sup>16</sup> There seems to be no good reason for banning them at this stage, although there will be no place for them once a comprehensive e-conveyancing system is fully operative. It is, therefore, recommended that the existing methods of creating equitable mortgages should be retained until that development occurs.

9.08 *The Commission provisionally recommends that the existing methods of creating equitable mortgages should be retained.*

## **B Control of Terms of Mortgages**

9.09 Over the centuries the courts have evolved a considerable jurisdiction to oversee the operation of mortgages. Based upon equitable principles, various doctrines, such as those against “clogs on the equity of redemption” and “collateral advantages”, have been

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<sup>13</sup> As was done in England and Wales, fn 12 above.

<sup>14</sup> It should, therefore, be possible to use the one deed of charge to mortgage both a parcel of registered land and a parcel of unregistered land.

<sup>15</sup> And, often, their secrecy, *ie*, because no written document is involved there is nothing required to be registered in the Registry of Deeds in the case of unregistered land (see Chapter 11 below). The transaction remains a private matter between the borrower and lender (*eg* the customer and the bank).

<sup>16</sup> *Eg* for employees.

created to prevent the mortgagee taking unfair advantage of the mortgagor.<sup>17</sup> Since this is an evolving jurisdiction<sup>18</sup> based upon equitable principles, it would be inappropriate to impinge upon it by legislation – the courts should be left free to develop it. It is recommended that there be no statutory interference with equitable jurisdiction to control the terms and operation of mortgages.

9.10 *The Commission provisionally recommends that there be no statutory interference with equitable jurisdiction to control the terms and operation of mortgages.*

9.11 In passing it should be noted that a considerable amount of statutory protection of borrowers taking out housing loans was introduced recently by the *Consumer Credit Act 1995*.<sup>19</sup> Amongst matters designed to confer “consumer protection” on such borrowers are:-

- (i) requiring the borrower to be furnished with a copy of the lender’s valuation report;<sup>20</sup>
- (ii) giving the borrower a choice over insurance;<sup>21</sup>
- (iii) furnishing the borrower with information, documentation and “health” warnings;<sup>22</sup>
- (iv) furnishing the borrower with information as to interest rates;<sup>23</sup>

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<sup>17</sup> See Lyall *op cit* fn 1 at 812-819; Wylie *op cit* fn 1 paragraphs 13.089-13.099.

<sup>18</sup> One of the other interesting recent developments of the equitable jurisdiction has been the courts’ application of the doctrine of undue influence to the situation where one of joint borrowers claims that the other borrower acted improperly and that the lender is tainted by this (because it had constructive notice of the vitiating circumstances). See Johnston *op cit* fn 1 Chapter 8.

<sup>19</sup> Part IX. See also the *European Communities (Unfair Terms in Consumer Contracts) Regulations* (SI No 27 of 1995). See Johnston *op cit* fn 1 paragraphs 10.74 -10.84.

<sup>20</sup> Section 123.

<sup>21</sup> Section 124.

<sup>22</sup> Sections 126-132.

- (v) restricting penalties for early redemption.<sup>24</sup>

Given the comparatively recent nature of this legislation it seems appropriate not to recommend extension of it at this stage. Instead it is recommended that the operation of the Consumer Credit Act 1995 in relation to land mortgages should be kept under review.

9.12 *The Commission provisionally recommends that the operation of the Consumer Credit Act 1995 in relation to land mortgages should be kept under review.*

## **C Mortgagee Remedies**

9.13 There are several aspects to the law relating to mortgagee remedies which require consideration. One is that in respect of many of the remedies the law is partly complicated by the traditional way of creating mortgages<sup>25</sup> and partly driven by the courts' application of equitable principles.<sup>26</sup> This has led to the extraordinary practice of mortgage deeds specifying a very short legal date for redemption (3 or 6 months after the taking out of the mortgage), which the mortgagor is not expected to meet, particularly in the typical house purchase mortgage of some 25 years, with the mortgagor thereafter having to rely on an equitable right to redeem.<sup>27</sup> Some remedies, in particular the very important statutory powers to sell and to appoint a receiver, reflect this by drawing a distinction between when the power arises (*ie* vests in the mortgagee), which is the legal date for redemption, and when it becomes exercisable (*ie* the mortgagee can invoke it), which is usually when some default by the mortgagor occurs. The law relating to other remedies is difficult to reconcile with the security nature of a mortgage. For example, as an English judge once put it, the mortgagee, because a legal estate is usually

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<sup>23</sup> Section 134.

<sup>24</sup> Section 121.

<sup>25</sup> See paragraphs 9.03-9.05 above.

<sup>26</sup> See paragraph 9.09 above.

<sup>27</sup> See Lyall *op cit* fn 1 at 796-798; Wylie *op cit* fn 1 paragraph 12.05.

vested in it, whether by conveyance or assignment or demise,<sup>28</sup> can take possession of the land “before the ink is dry on the mortgage.”<sup>29</sup>

9.14 The above approach to the mortgagee’s remedies should be changed to reflect modern practice. In future the remedies should be based firmly on the security interest of the mortgagee and should not be exercisable unless and until it becomes necessary to protect that security or to realise it in order to obtain repayment of the outstanding debt, including interest. It is, therefore, recommended that (1) the distinction between remedies arising and becoming exercisable should be abolished; (2) the mortgagee should have all the remedies from the moment the mortgage is created, but no remedy should become exercisable unless it is necessary either to protect the mortgagee’s security<sup>30</sup> or to realise that security following default by the mortgagor; (3) except in special circumstances,<sup>31</sup> no remedy should be exercisable without giving prior written notice to the mortgagor, thereby giving the mortgagor the opportunity to redeem the situation;<sup>32</sup> (4) a special procedure should be created to enable a mortgagee to take emergency action to protect its security, eg, by taking possession of the land.<sup>33</sup>

9.15 *The Commission provisionally recommends that, in future, the remedies available to mortgagees should be based firmly on the security interest of the mortgagee and should not be exercisable unless and until it becomes necessary to protect that security or to*

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<sup>28</sup> See paragraph 9.03 above.

<sup>29</sup> *Per Harman J in Four-Maids Ltd v Dudley Marshall Properties Ltd* [1957] Ch 317 at 320.

<sup>30</sup> *Eg* taking possession may be necessary where the mortgagor abandons the land, in order to stop vandals or trespassers taking it over.

<sup>31</sup> *Eg* where the mortgagor has disappeared and cannot reasonably be found.

<sup>32</sup> *Eg* by opposing a court order for possession sought by the mortgagee: see paragraph 9.16 below.

<sup>33</sup> By adapting, *eg*, the proposals of the Commission’s Landlord and Tenant Project Group in relation to landlords: see *Consultation Paper on the General Law of Landlord and Tenant* (LRC CP 28 – 2003) at 169-175. This would involve lodging the notice in court and obtaining a summary order for possession. The alternative would be to extend section 62(7) of the *Registration of Title Act 1964*: see paragraph 9.16 below.



*realise it in order to obtain repayment of the outstanding debt, including interest.*

9.16 It may be convenient at this point to say something about specific mortgagee remedies.

(a) ***Foreclosure:***

This traditional remedy, which involves obtaining a court order destroying the mortgagor's right of redemption and thereby leaving the mortgagee as the owner of the land, has always been controversial. It is difficult to reconcile with the fundamental concept that a mortgage transaction is, in essence, a secured loan, not a method of acquiring ownership of the land. It also could work considerable hardship because in most cases the value of the land which the mortgagee is left owning will greatly exceed the amount of the outstanding debt. In practice all this is largely academic because the Irish courts determined over a century ago to stop granting foreclosure and have since preferred instead to order a sale of the land.<sup>34</sup> In that way the proceeds of sale can be divided between the mortgagor and mortgagee in accordance with what is strictly due to each. The time has come to consign the remedy to history. It is, therefore, recommended that the remedy of foreclosure be abolished.

(b) ***Possession:***

As indicated earlier,<sup>35</sup> the right to take possession should no longer be exercisable unless and until it becomes necessary to protect or realise the mortgagee's security.<sup>36</sup>

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<sup>34</sup> *Antrim County Land, Building and Investment Co Ltd v Stewart* [1904] 2 IR 357 at 369 (*per* FitzGibbon LJ); *Bruce v Brophy* [1906] 611 at 616 (*per* Walker LC). Foreclosure has also become rare in England in recent times: see *Palk v Mortgage Services Funding Plc* [1993] 2 All ER 481 at 485 (*per* Nicholls VC).

<sup>35</sup> Paragraph 9.14 above.

<sup>36</sup> Frequently a court order for possession is obtained as a preliminary to exercising the power of sale, the point being that it is much easier to sell the land with vacant possession.

Furthermore, it was also recommended that it should not be exercised unless prior written notice is given to the mortgagor, unless emergency circumstances justify speedier action.<sup>37</sup> In addition it is recommended that (1) the summary jurisdiction to order possession contained in section 62(7) of the *Registration of Title Act 1964* should be extended to mortgages of unregistered land and, in all cases, should cover not only cases of default, but also emergency or other cases involving special circumstances; (2) where the mortgagee does take possession, it should be obliged either to proceed to sell the land within a reasonable time or let it and to use the rent to reduce the mortgage debt; (3) the power to adjourn proceedings and give the mortgagor time to retrieve the situation conferred by section 7 of the *Family Home Protection Act 1976*<sup>38</sup> should be extended to all residential property, whether or not a family home.

(c) **Sale:**

Apart from complying with the recommendations made earlier in respect of all powers, such as the power not being exercisable unless it is necessary to protect or realise the mortgagee's security, it is recommended that: (1) it is made clear in the new legislation that a purchaser is not obliged to enquire as to whether the mortgagee has met the statutory requirements and will obtain a good title from a selling mortgagee unless there is actual knowledge of an irregularity; (2) the mortgagor should be entitled to seek a court order requiring the mortgagee to proceed with the sale, or to postpone it because of the state of the market and to let it in the meantime, thereby enabling the mortgagor to reduce the debt exposure<sup>39</sup>; (3) the statutory duty to obtain

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<sup>37</sup> See paragraph 9.14 fn 33 above.

<sup>38</sup> See Shatter *Family Law* (4<sup>th</sup> ed Butterworths 1997) paragraph 15.102; Duncan and Scully *Marriage Breakdown in Ireland: Law and Practice* (Butterworths 1990) paragraph 11.046.

<sup>39</sup> See on English law *Palk v Mortgage Services Funding Plc* [1993] 2 All ER 481.

the best price reasonably obtainable on a sale imposed on building societies<sup>40</sup> should be extended to all mortgagees.<sup>41</sup>

(d) ***Appointment of a receiver:***

Generally the power to appoint a receiver is a very effective one and seems to require little in the way of reform. It is, however, recommended that (1) where the statutory power is invoked, it should be possible for a mortgagee to waive the benefit of the payments schedule set out in the legislation;<sup>42</sup> (2) it should be made clear in the legislation that the same duty of care applies where a receiver sells the land on behalf of the mortgagee<sup>43</sup> and that the use of a receiver cannot be a method of getting around restrictions on the power of sale.

9.17 *The Commission provisionally recommends:*

(i) *that the remedy of foreclosure should be abolished;*

(ii) *that the right to take possession should no longer be exercisable unless and until it becomes necessary to protect or realise the mortgagee's security. Furthermore, it should not be exercised unless prior written notice is given to the mortgagor, unless emergency circumstances justify speedier action.*

(iii) *that: (1) it should be made clear in the new legislation that a purchaser is not obliged to enquire as to whether the mortgagee has met the statutory requirements and will obtain a good title from a selling mortgagee unless there is*

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<sup>40</sup> *Building Societies Act 1989* section 26(1).

<sup>41</sup> This would probably be declaratory of the current position: see the views of the Supreme Court in *Holohan v Friends Provident and Century Life Office* [1966] IR 1. *Cf Silven Properties v Royal Bank of Scotland Plc* [2003] 3 EGLR 49. And in relation to the duty of a receiver to obtain the best price, see *Bula Ltd. v Crowley* [2003] 1 IR 396.

<sup>42</sup> See paragraph 9.24 below in relation to section 24 of the *Conveyancing Act 1881*.

<sup>43</sup> Again this is probably declaratory of the current position: see *McCarter & Co Ltd v Roughan* [1986] ILRM 447; *Bula Ltd. v Crowley* [2003] 1 IR 396.

*actual knowledge of an irregularity; (2) the mortgagor should be entitled to seek a court order requiring the mortgagee to proceed with the sale, or to postpone it because of the state of the market and to let it in the meantime, thereby enabling the mortgagor to reduce the debt exposure; (3) the statutory duty to obtain the best price reasonably obtainable on a sale imposed on building societies should be extended to all mortgagees;*

*(iv) that (1) where the statutory power is invoked, it should be possible for a mortgagee to waive the benefit of the payments schedule set out in the legislation; (2) it should be made clear in the legislation that the same duty of care applies where a receiver sells the land on behalf of the mortgagee and that the use of a receiver cannot be a method of getting round restrictions on the power of sale.*

## **D        Miscellaneous Matters**

9.18        It may be useful, before turning to pre-1992 statutes, to note at this stage a few other matters which the new legislation should cover.

**Certificates of Charge:** It must be questioned whether the issue of these in the case of registered land continues to serve any useful function,<sup>44</sup> given that the existence of the charge will be noted on the mortgagor's folio and a copy of this can always be bespoken. Very recently, with the agreement of interested parties,<sup>45</sup> and in the interests of simplifying conveyancing transactions, the Land Registry has resolved that, upon registration of a new ownership, the existing land certificate will not be reissued and will instead be cancelled. It is recommended that the issue of a charge certificate upon the mortgage of registered land should be abandoned.

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<sup>44</sup> Deposit of such a charge in order to create an equitable mortgage is extremely rare: see Wylie *op cit* fn 1 paragraph 12.29.

<sup>45</sup> The Law Society and the Irish Mortgage Council (representing leading lending institutions).

**Welsh Mortgages:** These sorts of mortgages have been used in the past in Ireland, but are rarely, if ever, used nowadays.<sup>46</sup> They have various anomalous features, such as involving the lender taking possession of land and rents and profits in lieu of interest, and, sometimes, even capital repayments. All this is inconsistent with a mortgage being regarded as a means of providing security for a debt only.<sup>47</sup> It is recommended that Welsh mortgages be prohibited by the new legislation.

**Tacking:** This is a method whereby a subsequent mortgagee may acquire priority over a prior mortgage by attaching its mortgage to an earlier one which has a higher priority. One method, known as *tabula in naufragio*,<sup>48</sup> is very controversial because it involves a later mortgagee buying out an earlier mortgage with a view to squeezing out of priority an intervening mortgage. It was actually abolished by section 7 of the *Vendor and Purchaser Act 1874*, but restored by section 73 of the *Conveyancing Act 1881*. It is of very limited operation because it cannot apply where the priorities are governed by the Registry of Deeds. It is recommended that tacking in the form of *tabula in naufragio* should be abolished, but this should not affect the other form of tacking which is much used in practice, tacking of further advances.<sup>49</sup>

**Discharge by endorsed receipt:** Pending the introduction of an e-conveyancing system, it is recommended that the method of discharge of mortgages of unregistered land by endorsed receipt initially introduced for building society

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<sup>46</sup> See Lyall *op cit* fn 1 at 778-779; Wylie *op cit* fn 1 paragraphs 12.22 – 12.23.

<sup>47</sup> A particularly odd feature of a “Welsh” mortgage is that the borrower has no personal obligation to repay the debt and so the lender does not have the usual remedies to enforce the security.

<sup>48</sup> Literally “the plank in the shipwreck”: see Lyall *op cit* paragraphs 830 – 832; Wylie *op cit* paragraphs 13.159 – 13.160.

<sup>49</sup> See Lyall *op cit* fn 1 at 832-833; Wylie *op cit* fn 1 paragraphs 13.161 – 13.162.

mortgages,<sup>50</sup> and later extended to all mortgages,<sup>51</sup> should be preserved in the new legislation.

9.19 *The Commission provisionally recommends that:*

*(i) the issue of a charge certificate upon the mortgage of registered land should be abandoned;*

*(ii) Welsh mortgages should be prohibited by the new legislation;*

*(iii) tacking in the form of tabula in naufragio should be abolished, but this should not affect the other form of tacking which is much used in practice, tacking of further advances;*

*(iv) pending the introduction of an e-conveyancing system, the method of discharge of mortgages of unregistered land by endorsed receipt initially introduced for building society mortgages, and later extended to all mortgages, should be preserved in the new legislation.*

## **E Pre-1922 Statutes**

9.20 A number of pre-1922 statutes relate to the law of mortgages, in particular the *Conveyancing Acts 1881-1911* which contain substantial provisions. Before considering these it may be useful to dispose of the other statutes.

### **(1) *Clandestine Mortgages Act (Ireland) 1697***<sup>52</sup>

9.21 This ancient statute was designed to protect subsequent mortgagees, where the mortgagor failed to disclose prior judgments entered against him or prior mortgages of the same land. The need for such protection was largely removed by the later provision for registration of deeds made by the *Registration of Deeds Act (Ireland) 1707* and registration of judgments by the *Judgements (Ireland) Act 1844*. After such enactments the subsequent mortgagee could obtain

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<sup>50</sup> See now *Building Societies Act 1989* section 27.

<sup>51</sup> *Housing Act 1988* section 18.

<sup>52</sup> 9 Will 3 c 11.

protection by making Registry of Deeds and Judgments searches.<sup>53</sup> Apart from that the sanction imposed by the 1697 Act, depriving the mortgagor of the right to redeem the subsequent mortgage, was a particularly drastic one and inconsistent with the principle that a mortgage is essentially a secured loan transaction only.<sup>54</sup> It is recommended that the *Clandestine Mortgages Act 1697* be repealed without replacement.

**(2) *Satisfied Terms Act 1845***<sup>55</sup>

9.22 This Act related to mortgages of freehold land by demise, *ie* granting the mortgagee a lease of the land instead of conveying the freehold.<sup>56</sup> It is extremely rare to mortgage freehold land in this way, unless it is held under a fee farm grant which operates as in substance a lease.<sup>57</sup> Mortgages by demise are usually used only for leasehold land, where they operate essentially by way of a sub-demise.<sup>58</sup> The 1845 Act provided that where the purpose of a lease of freehold land became satisfied (where the mortgagor pays off the mortgage debt in full) the lease merges in the reversion, so that there is no need to surrender it to the mortgagor. The need for this was largely removed by the “endorsed receipt” system of discharge of mortgages introduced by statute.<sup>59</sup> Such a receipt operates both to discharge the mortgage and to reconvey or surrender the mortgaged interest in question to the mortgagor. It was recommended that the new legislation should retain this system to cover the new charge system of creating mortgages.<sup>60</sup> On that basis it is recommended that the *Satisfied Terms Act 1845* be repealed without replacement.

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<sup>53</sup> See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraphs 15.42 – 15.45.

<sup>54</sup> See paragraphs 9.04 – 9.05, 9.10 and 9.11 above.

<sup>55</sup> 8 & 9 Vic c112.

<sup>56</sup> See paragraph 9.03 above. See *Re Moore & Hulm's Contract* [1912] 2 Ch 105.

<sup>57</sup> See paragraphs 1.13 and 2.17 – 2.19 above.

<sup>58</sup> See paragraph 9.03 above.

<sup>59</sup> See paragraph 9.18 above.

<sup>60</sup> See *ibid*.

**(3) *Mortgagees Legal Costs Act 1895***<sup>61</sup>

9.23 This is a somewhat obscure provision designed to enable a solicitor or solicitor's firm lending money on mortgage to bill the borrower for the usual professional charges and fees. This sort of transaction does not occur nowadays and it is arguably inconsistent with modern rules designed to avoid a conflict of interest. It is recommended that the 1895 Act be *repealed without replacement*.

**(4) *Conveyancing Acts 1881–1911***

9.24 The *Conveyancing Acts 1881–1911* contain many provisions relating to mortgages which require consideration in some detail.

**(a) *Conveyancing Act 1881***<sup>62</sup>

The provisions of this Act which relate to mortgages are to be found largely in Parts IV and V (and the Third Schedule) of the 1881 Act. They are best considered on a section-by-section basis.

**Section 15:** This section entitles a mortgagor to transfer the mortgage to a nominee instead of redeeming it.<sup>63</sup> Although rarely involved in practice there seems to be no reason to remove the right. Indeed it is suggested that it should be clarified that it extends to all mortgages.<sup>64</sup> It should be *replaced without substantial amendment*.

**Section 16:** This confers a statutory right on the mortgagor to inspect and make copies of title documents held by the mortgagee so long as the mortgage remains undischarged. This should be retained, but it should be made clear that the mortgagee is under an obligation to take

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<sup>61</sup> 58 & 59 Vic c25.

<sup>62</sup> 44 & 45 Vic c41.

<sup>63</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 13.106.

<sup>64</sup> It was doubted in England whether it applied to building society mortgages: see *Re Rumney and Smith* [1877] 2 Ch 351; *Sun Building Society v Western Suburban and Harrow Road Building Society* [1920] 2 Ch 144, [1921] 2 Ch 438.



care of the title documents while they are in its possession or under its control.<sup>65</sup> The section should be *replaced without substantial amendment*.

**Section 17:** This section relates to the very controversial right of a mortgagee, holding from the same mortgagor two or more mortgages of different properties, to consolidate the mortgages, *ie* to insist that they are all redeemed together so as to avoid the mortgagor redeeming one which is well secured and leaving another outstanding which is not well-secured. The doctrine has long been unpopular with the courts<sup>66</sup> and is of questionable validity as a matter of principle. Why should the mortgagor be forced into having to rescue the mortgagee which has made some good loans and some bad ones? Section 17 was designed to restrict the doctrine's operation, but contained within it<sup>67</sup> the means whereby mortgagees can thwart the intention by reserving an express right to consolidate. The doctrine should be abolished altogether and so the section should be *replaced with substantial amendment*.

**Section 18:** This section confers statutory leasing powers on both the mortgagor and mortgagee, but there are doubts both as to its scope and as to the effect of a failure to comply strictly with its requirements.<sup>68</sup> The power of a mortgagor to lease is often severely restricted by the mortgage deed and arguably a mortgagee which has taken possession should only be entitled to lease where this is appropriate, *eg* where a sale would be unwise in the current state of

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<sup>65</sup> Such an obligation was disputed by Barton J in *Gilligan v National Bank Ltd* [1901] 2 IR 513.

<sup>66</sup> See the discussion in *Re Thomson's Estate* [1912] 1 IR 194 (*per* Ross J) and 460 (*per* Barry LC). See also Lyall *op cit* fn 1 at 806 – 808; Wylie *op cit* fn 1 paragraphs 13.069 – 13.073.

<sup>67</sup> Subsection (2).

<sup>68</sup> See Lyall *op cit* fn 1 at 822-823; Wylie *op cit* fn 1 paragraphs 13.114 – 13.119.

the market and a letting will generate income to be used to reduce the mortgage debt. As regards compliance with the statutory requirements, the Commission's Landlord and Tenant Project Group has criticised the "mixed message" given by the *Leases Acts 1849* and *1850*, which suggest that non-compliance is not necessarily fatal.<sup>69</sup> This seems to be an odd way of treating statutory requirements.<sup>70</sup> It is recommended that this provision should be recast to provide: (1) the mortgagor cannot lease without the consent of the mortgagee, such consent not to be unreasonably withheld, but it can impose reasonable conditions which must be complied with; (2) a mortgagee in possession can lease only where this is necessary to preserve the value of the land, or to protect the mortgagee's security, or to raise income to reduce the debt pending a suitable time for sale, or where the mortgagor consents. On that basis section 18 should be *replaced with substantial amendment*.

**Section 19:** This is, perhaps, the most important provision in the Act. It confers "default"<sup>71</sup> powers on the mortgagee: to sell, insure the land, appoint a receiver and to cut and sell timber.<sup>72</sup> The provisions should be recast to reflect the points made earlier about exercise of mortgagee remedies.<sup>73</sup> In addition the provisions as regards insurance fall short of what most mortgagees require nowadays and should reflect current practice in this regard. They should be supplemented by a provision requiring the mortgagor to keep the mortgaged property in good and substantial repair. On this basis section 19

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<sup>69</sup> Consultation Paper on the General Law of Landlord and Tenant (LRC CP 28 – 2003) paragraph 2.17.

<sup>70</sup> Note the courts' reluctance to apply the doctrine of estoppel: see *ICC Bank plc v Verling* [1995] 1 ILRM 123. See Wylie *op cit* fn 1 paragraph 13.116.

<sup>71</sup> *Ie* which operate in the absence of express provisions in the mortgage deed.

<sup>72</sup> See Lyall *op cit* fn 1 at 795-803; Wylie *op cit* fn 1 paragraphs 13.022 – 13.055.

<sup>73</sup> See paragraphs 9.04 and 9.13-9.16 above.

should be *replaced with substantial amendment*.

**Section 20:** This regulates the mortgagee's exercise of the power of sale and should be recast to reflect the recommendations made earlier.<sup>74</sup> It should, therefore, be *replaced with substantial amendment*.

**Section 21:** This also regulates the operation of a sale by a mortgagee and should be recast to reflect the fact that under the recommended new regime a mortgagee of unregistered land will have a charge only on the land.<sup>75</sup> It should provide that such a mortgagee, and a chargee of registered land, has full power to sell whatever estate or interest is vested in the mortgagor, without the need for any power of attorney. Some consequential amendments should also be made, *eg* dropping any reference to foreclosure, which it was recommended earlier should be abolished.<sup>76</sup> The section should be *replaced with substantial amendment*.

**Section 22:** This is an important provision giving protection to purchasers from mortgagees. That protection should be enhanced by making the mortgagee's receipt a *conclusive*, rather than merely sufficient, discharge, unless the purchaser has actual knowledge of any impropriety. The section should, therefore, be *replaced with substantial amendment*.

**Section 23:** As recommended earlier in relation to section 19 this should be recast to reflect current practice in relation to insurance of mortgaged land. It should also be made explicit that any insurance money received in respect of the mortgaged land may be required by the mortgagee to be applied in discharge of the mortgage debt.<sup>77</sup> On

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<sup>74</sup> Paragraphs 9.14-9.16 above.

<sup>75</sup> See paragraph 9.05 above.

<sup>76</sup> See paragraph 9.16 above.

<sup>77</sup> This would reflect the view taken by Irish judges: see *Re Doherty* [1925] 2

that basis the section should be *replaced with substantial amendment*.

**Section 24:** This relates to receivers appointed by mortgagees and should be recast as recommended earlier.<sup>78</sup> It is also recommended that the order of payments laid down in subsection (8) should be mandatory,<sup>79</sup> unless the mortgagee or mortgagees, where there are several, agree otherwise. On that basis the section should be *replaced with substantial amendment*.

**Section 26:** The form of statutory mortgage set out in the Third Schedule is never used in practice and there seems to be no point in keeping this provision. The section and Third Schedule should be repealed without replacement.

**Section 27:** The forms referred to here are also never used and so this section should be *repealed without replacement*.

**Sections 28 and 29:** These sections relate to the forms in the Third Schedule and should also be *repealed without replacement*.

**Section 61:** This contains a useful statutory provision rendering it unnecessary to include an express “joint account” clause in a mortgage involving more than one mortgagee.<sup>80</sup> It should be *replaced without substantial amendment*.

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IR 246; *Myles v Mr Pussy's Nite Club Ltd* High Court (McWilliam J), 11 December 1979.

<sup>78</sup> See paragraph 9.16 above.

<sup>79</sup> This was the view of Keane J in *Donohoe v Agricultural Credit Corporation* [1986] IR 165 at 170.

<sup>80</sup> See Wylie *op cit* fn 1 paragraph 9.050.

(b) *Conveyancing Act 1882*<sup>81</sup>

The only section of this Act which relates to mortgages is section 12, which amends section 15 of the 1881 Act. Like section 15<sup>82</sup> it should be replaced without substantial amendment.

(c) *Conveyancing Act 1911*<sup>83</sup>

This Act contains several provisions relating to mortgages which merit consideration.

**Section 3:** This section supplements section 18 of the 1881 Act and should be incorporated in the amended version of it.<sup>84</sup> It should also be *replaced with substantial amendment*.

**Section 4:** This section supplements section 19 of the 1881 Act, so far as it relates to the mortgagee's power of sale, and should be incorporated in the new version of section 19.<sup>85</sup> It should be *replaced without substantial amendment*.

**Section 5:** This section supplements section 21 of the 1881 Act and should be incorporated in the new version of it.<sup>86</sup> It should be *replaced without substantial amendment*.

**Section 9:** This is a somewhat obscure provision dealing with the situation where settled or trust property is used as security for a loan and the mortgagor's equity of redemption becomes barred under the *Statute of Limitations 1957*.<sup>87</sup> This will arise where the mortgagee takes and remains in possession of the mortgaged land without

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<sup>81</sup> 45&46 Vic C 39.

<sup>82</sup> See paragraph 9.24 above.

<sup>83</sup> 1&2 Geo 5 c 37.

<sup>84</sup> See paragraph 9.24 above.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> See Chapter 12 below.

acknowledging the mortgagor's title or receiving any payments of capital or interest. This is a principle of highly questionable validity. First, it seems inconsistent with the notion that the mortgagee should not exercise any remedies except to protect or enforce its security.<sup>88</sup> Secondly, like foreclosure, it may result in the mortgagee acquiring an asset worth considerably more than the mortgage debt, plus interest. The inherent unfairness of this is why the Irish courts have refused to grant an order for foreclosure for several centuries.<sup>89</sup> Thirdly, it is also difficult to reconcile the principle with another well-established principle of the law of mortgages that a mortgagee in possession is liable to account strictly to the mortgagor.<sup>90</sup> It is recommended that it should no longer be possible for a mortgagee to bar the mortgagor's title by taking possession of the mortgaged land and, on that basis, section 9 should be *repealed without replacement*.

**Section 13:** This section relates to investigation of title and is designed to relieve a purchaser from an obligation to investigate why a transfer of a mortgage has been stamped with a fixed rate of duty only.<sup>91</sup> This is a principle of wider application<sup>92</sup> and the new legislation should enshrine the wider principle. On that basis section 13 should be *replaced with substantial amendment*.

9.25 *The Commission provisionally recommends that the following statutes should be repealed without replacement:*

*Clandestine Mortgages Act (Ireland) 1667*

*Satisfied Terms Act 1845*

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<sup>88</sup> See paragraph 9.14 above.

<sup>89</sup> See paragraph 9.16 above.

<sup>90</sup> See Lyall *op cit* fn 1 at 794 – 795; Wylie *op cit* fn 1 paragraphs 13.046 – 13.047.

<sup>91</sup> See *Re Soden and Alexander's Contract* [1960] 2 Ch 258.

<sup>92</sup> See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraph 15.19.

*Mortgagees Legal Costs Act 1895*

9.26 *The Commission provisionally recommends that the provisions relating to mortgages in the Conveyancing Act 1881 should be amended and in some cases without replacement.*

9.27 *The Commission provisionally recommends that the Conveyancing Act 1882 section 12 should be replaced without substantial amendment.*

9.28 *The Commission provisionally recommends that the provisions relating to mortgages in the Conveyancing Act 1911 should be amended.*

## CHAPTER 10 JUDGMENT MORTGAGES

10.01 The special method of enabling a judgement creditor to recover the judgment debt by registering a judgment mortgage against the debtor's land introduced by the *Judgement Mortgage (Ireland) Acts 1850 and 1858*<sup>1</sup> was reviewed recently by the Law Reform Commission. The resultant Consultation Paper<sup>2</sup> recommended a radical overhaul of those statutory provisions and the new legislation should incorporate the recommendations. The consequence of this would be that the 1850 and 1858 Acts should be replaced with substantial amendments.

10.02 *The Commission provisionally recommends that the Judgement Mortgage (Ireland) Acts 1850 and 1858 should be replaced with substantial amendment in line with the recommendations outlined in its Consultation Paper on Judgment Mortgages (LRC CP 30-2004).*

10.03 Two further matters merit consideration. One relates to the decision in *AS v GS and AIB*<sup>3</sup> and concerns the issue as to what prior "equities" or "rights" a judgment mortgagee, as a volunteer,<sup>4</sup> should take subject. Geoghegan J suggested in that case that, where the prior claimant does not already have an established equitable interest in the land and the land is not a family home,<sup>5</sup> a claim should not be treated as creating a prior equity or right subject to which a creditor subsequently registering a judgment mortgage should take, unless the

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<sup>1</sup> See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall 2000) at 776-778 and 873-877; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 13.163-13.182.

<sup>2</sup> *Judgment Mortgages* (LRC CP 30-2004).

<sup>3</sup> [1994] 1 IR 407.

<sup>4</sup> See Lyall *op cit* fn 1 at 873; Wylie *op cit* fn 1 paragraph 13.181.

<sup>5</sup> In which case the court has a wide jurisdiction as to orders that can be made in respect of the land under the *Family Home Protection Act 1976*.



prior claim lodged in court specifically seeks an order against the land in question. It is recommended that this suggestion be given statutory recognition.

10.04 *The Commission provisionally recommends that the suggestion in AS v GS and AIB relating to prior equities should be given statutory recognition.*

10.05 Another method of enforcing a debt against land is the seizure of leasehold land by the sheriff.<sup>6</sup> This matter was reviewed by the Law Reform Commission some time ago, in which it was concluded that it was not a very effective means of enforcement and rarely used.<sup>7</sup> Having to make searches in the Sheriff's Office adds to the complications of conveyancing practice<sup>8</sup> and so it is recommended that this method of enforcing debts against land be abolished.

10.06 *The Commission provisionally recommends that seizure of leasehold land by the sheriff as a method of enforcing debts against land should be abolished.*

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<sup>6</sup> It seems clear that it does not apply to freehold land: see Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraph 15.46.

<sup>7</sup> *Report on Debt Collection: (1) The Law Relating to Sheriffs* (LRC 27-1988)

<sup>8</sup> See Wylie *op cit* fn 1 paragraph 15.46.

## CHAPTER 11 REGISTRATION OF DEEDS

11.01 The statutes relating to the operation of the Registry of Deeds remain those enacted in the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>1</sup> They are couched in archaic language and provide for many practices and procedures which are inconsistent with the increasingly computerised operation of the Registry today. The old legislation clearly needs recasting in modern form and the draft *Registration of Deeds and Titles Bill* included in the Government's Legislation Programme published on 28 September 2004 will aim to do just that.

11.02 *The Commission provisionally recommends that the old legislation relating to registration of deeds should be recast in modern form.*

11.03 The 2004 Bill will make provision for various procedural matters relating to registration of deeds to be dealt with by regulations. It is recommended that such regulations should aim at greatly simplifying the current requirements, such as those relating to memorials and their execution. One way of doing this would be to have a statutory form of the necessary information for registration purposes, which could comprise the first page of deeds. The complications over execution of memorials, and witnessing, should be removed, so that simplifications recommended for execution of deeds should apply also to memorials.<sup>2</sup>

11.04 *The Commission provisionally recommends that regulations should aim to simplify greatly the current requirements governing procedural matters, such as those relating to memorials and their execution.*

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<sup>1</sup> See paragraphs 1.26 – 1.28 above.

<sup>2</sup> See paragraph 8.32 above.

11.05 A consequence of the enactment of the draft Bill included in the Government's recently announced programme<sup>3</sup> would be that the following pre-1922 statutes would be *replaced with substantial amendment*:

*Registration of Deeds Act (Ireland) 1707*<sup>4</sup>

*Registration of Deeds Act (Ireland) 1709*<sup>5</sup>

*Registration of Deeds (Amendment) Act (Ireland) 1721*<sup>6</sup>

*Registration of Deeds (Amendment) Act (Ireland) 1785*<sup>7</sup>

*Registry of Deeds (Ireland) Act 1822*<sup>8</sup>

*Registry of Deeds (Ireland) Act 1832*<sup>9</sup>

*Land Transfer (Ireland) Act 1848*<sup>10</sup>

*Registration of Deeds (Ireland) Act 1864*<sup>11</sup>

*Registry of Deeds (Ireland) Act 1875*<sup>12</sup>

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<sup>3</sup> See paragraph 11.01 above.

<sup>4</sup> 6 Anne c 2.

<sup>5</sup> 8 Anne c 10.

<sup>6</sup> 8 Geo 1 c 15.

<sup>7</sup> 25 Geo 3 c 47.

<sup>8</sup> 3 Geo 4 c116.

<sup>9</sup> 2 and 3 Will 4 c87.

<sup>10</sup> 11 & 12 Vic c120.

<sup>11</sup> 27 & 28 Vic c76.

<sup>12</sup> 38 & 39 Vic c5.

## CHAPTER 12 ADVERSE POSSESSION

12.01 The law of adverse possession, which governs how a “squatter” can acquire title to land, is now enshrined in a relatively modern statute, the *Statute of Limitations 1957*.<sup>1</sup> The issue of pre-1922 statutes does not, therefore, arise. However, this subject does play an important role in land law and conveyancing law, as its application is often a key factor in determining the title to land.<sup>2</sup>

12.02 The operation of adverse possession was recently reviewed by the Law Reform Commission and the resultant Report recommended fundamental changes.<sup>3</sup> The new legislation should implement those recommendations.<sup>4</sup>

12.03 *The Commission provisionally recommends that the Report on Title by Adverse Possession of Land (LRC 67-2002) should be implemented.*

12.04 The opportunity should be taken to implement also other recommendations relating to adverse possession contained in an earlier Report issued by the Law Reform Commission. These relate to:-

- (i) Amending the 1957 Statute to provide that the intention of the dispossessed owner is not the decisive factor in determining if adverse possession has been established;<sup>5</sup>

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<sup>1</sup> See Brady and Kerr *The Limitation of Actions* (2<sup>nd</sup> Butterworths 1994). See also Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 25; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 23.

<sup>2</sup> See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraphs 14.12, 14.54, 14.61 and 14.81-14.82.

<sup>3</sup> *Report on Title by Adverse Possession of Land* (LRC 67-2002).

<sup>4</sup> Note the draft Bill set out in Appendix A to the 2002 Report.

<sup>5</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC

(ii) Amending the 1957 Statute so as to abolish the distinction drawn by it between tenancies from year to year created in writing and those created orally;<sup>6</sup>

(iii) Amending the law governing claims involving a deceased person's estate.<sup>7</sup>

12.05 *The Commission provisionally recommends that the opportunity should be taken to implement also other recommendations relating to adverse possession contained in earlier reports.*

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30-1989) paragraphs 52-53.

<sup>6</sup> *Ibid* paragraphs 54-55.

<sup>7</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70-2003) Chapter 6.

## CHAPTER 13 MISCELLANEOUS MATTERS

13.01 This Chapter is concerned with various miscellaneous matters to do with reform of the land law and conveyancing law system, which do not fall naturally within the topics dealt with in the previous chapters. They are concerned for the most part<sup>1</sup> with the wider concept of general reform of the law rather than with replacement of pre-1922 statutes. Most of the matters dealt with below are ones which the Law Reform Commission has raised in previous reports.

### A Registration of Title

13.02 Notwithstanding that this subject is now governed by a relatively modern statute, the *Registration of Title Act 1964*,<sup>2</sup> it has become clear that there are a number of flaws in the drafting and a need for modernisation. Some of these were referred to by the Law Reform Commission in previous Reports<sup>3</sup> and the *Registration of Deeds and Titles Bill* included in the Government's recently announced Legislation Programme will seek to implement the recommendations contained in those Reports and to introduce other changes.<sup>4</sup> Given the key role which the Land Registry is likely to play in modernising conveyancing practice, and, in particular, in an e-

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<sup>1</sup> But note paragraph 13.12 below.

<sup>2</sup> See McAllister *Registration of Title in Ireland* (Incorporated Council of Law Reporting for Ireland 1973); Fitzgerald *Land Registry Practice* (2<sup>nd</sup> ed Round Hall 1995).

<sup>3</sup> See for example *Report on Land Law and Conveyancing: (1) General Proposals* (LRC 30-1989) paragraphs 43-44; *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44-1992) at 11-12; *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70-2003) Chapter 4.

<sup>4</sup> In the context of pre-1922 statutes, consideration should be given as to whether the *Record of Title (Ireland) Act 1865* could be repealed.

conveyancing system, it is imperative that this Bill is enacted or, alternatively, it is recommended that its provisions are incorporated in the legislation to implement the recommendations in this Consultation Paper.

13.03 *The Commission provisionally recommends that various recommendations relating to the Land Registry made in previous Commission Reports should be implemented.*

## **B Planning**

13.04 Earlier Reports of the Law Reform Commission drew attention to problems arising from the planning legislation. These concerned time-limits for bringing enforcement action in respect of breaches of planning law, a critical factor in purchaser's enquiries,<sup>5</sup> and extending the jurisdiction of a planning authority to land below the high water mark.<sup>6</sup> Notwithstanding the general seven year time limit for enforcement proceedings now contained in the *Planning and Development Act 2000*, non-conforming developments remain subject to numerous disadvantages, such as a refusal of sewage and water connections.<sup>7</sup> This means that the need to make planning enquiries relating to possible unauthorised developments since 1 October 1964 remains, despite the increasing difficulties in obtaining such information. Not least of such difficulties is the fact that many planning authorities do not have complete or, indeed, have not retained any records going that far back. The case for a planning amnesty, similar to that relating to building byelaws introduced by section 22 of the *Building Control Act 1990*, is compelling.<sup>8</sup> It is

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<sup>5</sup> See *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 35-36.

<sup>6</sup> See *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44-1992) at 9-10. Under section 225 of the *Planning and Development Act 2000*, planning permission is now required for a development of the foreshore where this adjoins the planning authority's functional area. The part of the foreshore which involves the development is then deemed to be within the authority's functional area.

<sup>7</sup> See 2000 Act, sections 258 and 259.

<sup>8</sup> See Gore-Grimes *Key Issues in Planning and Environmental Law* (Butterworths 2002) at 326-329.

recommended that urgent consideration is given to the introduction of a planning amnesty.

13.05 *The Commission provisionally recommends that urgent consideration should be given to the introduction of a planning amnesty, to operate either 10 years after an unauthorised development has taken place or 10 years after the expiration of a planning permission, the terms of which have not been complied with.*

## **C Succession**

13.06 Earlier Reports of the Commission drew attention to problems arising in connection with the law of succession. Apart from those concerning claims against a deceased person's estate mentioned earlier,<sup>9</sup> these relate to vesting assents<sup>10</sup> and the definition of "purchaser" in the *Succession Act 1965*.<sup>11</sup> It is recommended that the recommendations contained in those earlier Reports be implemented.

13.07 *The Commission provisionally recommends that recommendations relating to the law of succession contained in earlier Reports should be implemented.*

## **D Family Home Protection Act 1976**

13.08 An earlier Report of the Commission recommended that consent under the 1976 Act should no longer be required for execution of an assent by a personal representative.<sup>12</sup> It is recommended that this be implemented in the new legislation.

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<sup>9</sup> See paragraph 12.03 above.

<sup>10</sup> See *Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds* (LRC 56-1998) paragraphs 1.8-1.20.

<sup>11</sup> See *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70-2003) Chapter 2.

<sup>12</sup> *Report on Land Law and Conveyancing Law: (6) Further General Proposals Including the Execution of Deeds* (LRC 56-1998) paragraphs 1.1-1.7.



13.09 *An earlier Report of the Commission recommending that consent under the Family Home Protection Act 1976 should no longer be required for execution of an assent by a personal representative should be implemented.*

## **E Merger**

13.10 An earlier Report of the Commission recommended that a doctrine of partial merger of a leasehold interest in the freehold reversion should be introduced, to resolve problems which arise where a lessee acquires the fee simple which is part of a “pyramid” title.<sup>13</sup> It is recommended that this be implemented in the new legislation.

13.11 *An earlier Report of the Commission, recommending that a doctrine of partial merger of a leasehold interest in the freehold reversion should be introduced, should be implemented in the new legislation.*

## **F Drainage and Improvement of Land Legislation**

13.12 During the 19<sup>th</sup> century numerous statutes were enacted to promote the drainage and improvement of land. In so far as these facilitated such works being carried out by limited owners of land, they were superseded by the later general provisions governing improvements contained in the *Settled Land Acts 1882-90*.<sup>14</sup> Furthermore, there would be no need for such statutory provisions under the new scheme for settlements of land which was recommended earlier, whereby the trustees would have full powers of dealing with the land.<sup>15</sup> In so far as the pre-1922 statutes related to schemes carried out by the Commissioners of Public Works, they are defunct because such schemes are nowadays carried out under post-1922 legislation, in particular the *Arterial Drainage Acts 1945 and 1955*.<sup>16</sup>

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<sup>13</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 10-12.

<sup>14</sup> See Chapter 4 above.

<sup>15</sup> See paragraph 4.21 above.

<sup>16</sup> Section 59 of the 1945 Act provides that “no drainage scheme shall be

13.13 On that basis it is recommended that the pre-1922 statutes relating to drainage and improvement of land should be repealed without replacement. The statutes in question are:-

*Drainage (Ireland) Act 1842*<sup>17</sup>

*Settled Estates Drainage Act 1845*<sup>18</sup>

*Drainage (Ireland) Act 1845*<sup>19</sup>

*Drainage (Ireland) Act 1846*<sup>20</sup>

*Landed Property Improvement (Ireland) Act 1847*<sup>21</sup>

*Drainage (Ireland) Act 1847*<sup>22</sup>

*Landed Property Improvement (Ireland) Act 1849*<sup>23</sup>

*Drainage Act 1850*<sup>24</sup>

*Improvement of Land (Ireland) Act 1850*<sup>25</sup>

*Landed Property Improvement (Ireland) Act 1852*<sup>26</sup>

*Drainage and Improvement of Lands (Ireland) Act 1853*<sup>27</sup>

*Drainage and Improvement of Lands (Ireland) Act 1855*<sup>28</sup>

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prepared or carried into execution under any of the Acts specified in Part I of the First Schedule” to that Act. The Acts specified include the *Drainage and Navigation (Ireland) Acts 1842 to 1857* and *Drainage and Improvement of Lands (Ireland) Acts 1863 to 1892*.

<sup>17</sup> 5 & 6 Vic c 89.

<sup>18</sup> 8 & 9 Vic c 56.

<sup>19</sup> 8 & 9 Vic c 69.

<sup>20</sup> 9 & 10 Vic c 4.

<sup>21</sup> 10 & 11 Vic c 32.

<sup>22</sup> 10 & 11 Vic c 79.

<sup>23</sup> 12 & 13 Vic c 59.

<sup>24</sup> 13 & 14 Vic c 31.

<sup>25</sup> 13 & 14 Vic c 113.

<sup>26</sup> 15 & 16 Vic c 34.

<sup>27</sup> 16 & 17 Vic c 130.

*Drainage (Ireland) Act 1856*<sup>29</sup>  
*Landed Property Improvement (Ireland) Act 1860*<sup>30</sup>  
*Landed Property Improvement (Ireland) Act 1862*<sup>31</sup>  
*Land Drainage (Ireland) Act 1863*<sup>32</sup>  
*Drainage and Improvement of Lands (Ireland) Act 1863*<sup>33</sup>  
*Drainage and Improvement of Lands (Ireland) Act 1864*<sup>34</sup>  
*Improvement of Land Act 1864*<sup>35</sup>  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1865*<sup>36</sup>  
*Landed Property Improvement (Ireland) Act 1866*<sup>37</sup>  
*Drainage and Improvement of Lands (Ireland) Act 1866*<sup>38</sup>  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1869*<sup>39</sup>  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1872*<sup>40</sup>  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1874*<sup>41</sup>

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<sup>28</sup> 18 & 19 Vic c 110.  
<sup>29</sup> 19 & 20 Vic c 62.  
<sup>30</sup> 23 & 24 Vic c 153.  
<sup>31</sup> 25 & 26 Vic c 29.  
<sup>32</sup> 26 & 27 Vic c 26.  
<sup>33</sup> 26 & 27 Vic c 88.  
<sup>34</sup> 27 & 28 Vic c 72.  
<sup>35</sup> 27 & 28 Vic c 114.  
<sup>36</sup> 28 & 29 Vic c 52.  
<sup>37</sup> 29 & 30 Vic c 26.  
<sup>38</sup> 29 & 30 Vic c 40.  
<sup>39</sup> 32 & 33 Vic c 72.  
<sup>40</sup> 35 & 36 Vic c 31.

*Drainage and Improvement of Lands (Ireland) Act 1878*<sup>42</sup>

*Drainage and Improvement of Lands (Ireland) Act 1892*<sup>43</sup>

*Improvement of Land Act 1899*<sup>44</sup>

## **G Definitions**

13.14 It was indicated earlier that the new legislation will have to contain comprehensive definitions to supplement, *eg*, those contained in section 2 of the *Conveyancing Act 1881*.<sup>45</sup>

13.15 *The Commission provisionally recommends that the new legislation should contain a comprehensive list of definitions, such as those contained in section 2 of the Conveyancing Act 1881.*

## **H Transitional Provisions**

13.16 At the drafting stage of the Bill or Bills to implement the recommendations contained in this Consultation Paper considerable thought should be given to transitional provisions. These should be designed to achieve so far as is practicable a smooth transition from the old law to the new law. In particular, the need to refer back to the old law should be kept to a minimum.

13.17 The Commission provisionally recommends that at the drafting stage of the Bill or Bills to implement the recommendations contained in this Consultation Paper, considerable thoughts should be given to transitional provisions.

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<sup>41</sup> 37 & 38 Vic c 32.

<sup>42</sup> 41 & 42 Vic c 59.

<sup>43</sup> 55 & 56 Vic c 65.

<sup>44</sup> 62 & 63 Vic c 46.

<sup>45</sup> See paragraph 8.43 above.



## CHAPTER 14 SUMMARY OF RECOMMENDATIONS

### Chapter 2 Tenures and Estates

14.01 The Commission provisionally recommends that the concept of tenure should be abolished, and that old statutes relating to tenure should be repealed, for the most part without replacement (paragraph 2.09):

(a) Repeal without replacement

*Forfeiture Act (Ireland) 1639*

*Tenures Abolition Act (Ireland) 1662*

*Copyhold Acts 1843-1887*

*Crown Private Estates and Crown Lands Acts 1800-1913*

(b) Replace with substantial amendment

*Quia Emptores 1290*

14.02 The Commission provisionally recommends that the concept of an estate in land should be retained (paragraph 2.13).

14.03 The Commission provisionally recommends that it should be made clear in the new legislation that a modified fee standing on its own does not attract settlements legislation (paragraph 2.16).

14.04 The Commission provisionally recommends that it should be made clear that the *Landlord and Tenant (Ground Rents) Act 1978* prohibits the creation of a ground rent by way of fee farm grant (paragraph 2.20).

14.05 The Commission provisionally recommends that the creation of new fee farm grants should be prohibited. In future where it is desired to create an arrangement whereby rent is payable, a lease should be used (paragraph 2.22).

14.06 The Commission provisionally recommends that the ground rents legislation should be extended to enable all existing fee farm grantees to redeem the rent (paragraph 2.24).

14.07 The Commission provisionally recommends that the *Fee Farm Rents (Ireland) Act 1851* should be repealed without replacement (paragraph 2.26).

14.08 The Commission provisionally recommends the abolition of the fee tail estate and that the new legislation should bring about an automatic barring of entails, with the same result as the tenant in tail could produce by executing a fully effective disentailing deed under that *Fines and Recoveries (Ireland) Act 1834* (paragraph 2.29).

14.09 The Commission provisionally recommends that the Statute of *Westminster II 1285 (De Donis Conditionalibus)* and the *Fines and Recoveries (Ireland) Act 1834* should be repealed without replacement (paragraph 2.30).

14.10 The Commission provisionally recommends that, in future, a life estate should create an equitable interest in land only (paragraph 2.32).

14.11 The Commission provisionally recommends that, in the interests of simplification, the future creation of certain leases, including a simple lease for lives with or without any term of years attached, should be prohibited (paragraph 2.36).

14.12 The Commission provisionally recommends that the following statutes should be repealed without replacement (paragraph 2.37):-

*Life Estates Act (Ireland) 1695*

*Timber Act (Ireland) 1767, section 11*

*Leases for Lives Act (Ireland) 1777, section 11*

*Tenantry Act (Ireland) 1779*

*Renewal of Leases (Ireland) Act 1838*

*Renewable Leasehold Conversion Act 1849*

*Renewable Leaseholds Conversion (Ireland) Act 1868*

### **Chapter 3     Future Interests**

14.13     The Commission provisionally recommends that the Law Reform Commission *Report on the Rule Against Perpetuities and Cognate Rules* should be implemented (paragraph 3.01) subject to the qualification that the common law contingent remainder rules should be abolished (paragraph 3.04).

14.14     The Commission provisionally recommends that several pre-1922 statutes should be repealed without replacement. These are (paragraph 3.05):-

*Real Property Act 1845, section 8*

*Law of Property Amendment Act 1860, section 7*

*Contingent Remainders Act 1877*

*Accumulations Act 1892*

*Conveyancing Act 1911, section 6*

### **Chapter 4     Settlements and Trusts of Land**

14.15     The Commission provisionally recommends that certain pre-1922 statutes conferring leasing powers should be repealed without replacement. These are (paragraph 4.04):-

*Ecclesiastical Lands Act (Ireland) 1634*

*Mining Leases Act (Ireland) 1723*

*Timber Act (Ireland) 1735*

*Mining Leases Act (Ireland) 1741*

*Mining Leases Act (Ireland) 1749*

*Hospitals Act (Ireland) 1761*

*Timber Act (Ireland) 1765*

*County Hospitals Act (Ireland) 1765*

*County Hospitals Act (Ireland) 1767*

*Timber Act (Ireland) 1767*

*Timber Act (Ireland) 1775*



*County Hospitals Act (Ireland) 1777*  
*Timber Act (Ireland) 1777*  
*Leases for Lives Act (Ireland) 1777*  
*Leases by Schools Act (Ireland) 1781*  
*Timber Act (Ireland) 1783*  
*Leases by Schools Act (Ireland) 1785*  
*Leases for Corn Mills Act (Ireland) 1785*  
*Timber Act (Ireland) 1791*  
*Ecclesiastical Lands Act (Ireland) 1795*  
*Leases for Cotton Manufacture Act (Ireland) 1800*  
*Mines (Ireland) Act 1806*  
*School Sites (Ireland) Act 1810*  
*Mining Leases (Ireland) Act 1848*  
*Leases for Mills (Ireland) Act 1851*  
*Trinity College, Dublin, Leasing and Perpetuity Act 1851*  
*Leasing Powers Act for Religious Worship in Ireland Act 1855*  
*Limited Owners Residences Act 1870*  
*Limited Owners Residences Act (1870) Amendment Act 1871*  
*Leasing Powers Amendment Act for Religious Purposes in Ireland Act 1875*  
*Limited Owners Reservoirs and Water Supply Further Facilities Act 1877*  
*Leases for Schools (Ireland) Act 1881*

14.16 The Commission provisionally recommends that legislation relating to the Landed Estates Court should be repealed without replacement. The Commission provisionally recommends the repeal of (paragraph 4.08):

*Landed Estates Court (Ireland) Act 1858*

*Landed Estates Court (Ireland) Act 1861*

14.17 The Commission provisionally recommends the repeal without replacement of the following (paragraph 4.10):

*Settled Land (Ireland) Act 1847*

*Settled Estates Act 1877*

14.18 The Commission provisionally recommends that a new scheme involving all forms of settlements operating as a trust of land, with the trustees having the powers of dealing with it of an absolute owner should be introduced (paragraph 4.14).

14.19 The Commission provisionally recommends that the holder of a modified fee that is vested, without any limitations over in favour of other successive parties, should continue to hold the legal title to the land, rather than under trustees in whom that title would be vested. It is recommended that the same rule should apply in other cases where a person holds the substantial (fee simple) interest in the land subject only to minor interests or charges, such as an annuity in favour of someone else. The new scheme would also apply only where a right of residence is exclusive and relates to the whole of the land in question. The new statutory scheme should not apply to land held for charitable or other public purposes (paragraph 4.18).

14.20 The Commission provisionally recommends that the new legislation should provide a “fall-back” provision in case no express nomination of trustees is made in a particular case (paragraph 4.20).

14.21 The Commission provisionally recommends that a key feature of the recommended new statutory scheme should be that the trustees would have the full power of dealing with the land that an absolute (as opposed to a limited) owner has. This should, however, be regarded as essentially a “default” position, so that, in accordance with the general law of trusts, it should be open to a settlor to impose restrictions on those powers in a particular case. The trustees should be obliged to consider the interests of the beneficiaries in exercising their powers (paragraph 4.22).

14.22 The Commission provisionally recommends that the new statutory scheme should contain very clear provisions concerning the position of third parties dealing with the trustees in exercise of their powers. Generally, in the absence of fraud or other improper

conduct, a purchaser from the trustees should be protected (paragraph 4.24).

14.23 The Commission provisionally recommends that the new statutory scheme should contain an effective mechanism for resolution of disputes between the beneficiaries and trustees. The most appropriate method would be to permit any person interested in the trust and the trust land, including both the trustees and the beneficiaries, to apply to the court for an appropriate order to resolve the dispute (paragraph 4.26).

14.24 The Commission provisionally recommends that, as a consequence of enactment of the proposed new statutory scheme, the following pre-1922 statutes should be replaced with substantial amendment (paragraph 4.27):-

*Settled Land Act 1882*

*Settled Land Act 1884*

*Settled Land Acts (Amendment) Act 1887*

*Settled Land Act 1889*

*Settled Land Act 1890*

*Conveyancing Act 1911, section 10*

## **Chapter 5 Powers of Appointment**

14.25 The Commission provisionally recommends that a provision similar to section 158 of the English *Law of Property Act 1925* should be adopted so as to replace the *Illusory Appointments Act 1830* and the *Powers of Appointment Act 1874* without substantial amendment (paragraph 5.05).

14.26 The Commission provisionally recommends that a donee of a non-testamentary power should only have to meet the requirements for valid execution of a deed (paragraph 5.07).

14.27 The Commission provisionally recommends that section 52 of the *Conveyancing Act 1881* should be replaced without substantial amendment, subject to the inclusion of an express exception of powers in the nature of a trust and fiduciary powers (paragraph 5.09).

14.28 The Commission provisionally recommends that the general right of donees of powers of appointment to disclaim the power under

section 6 of the *Conveyancing Act 1882* should be replaced without substantial amendment (paragraph 5.11).

## **Chapter 6 Co-Ownership**

14.29 The Commission provisionally recommends that there should be no prohibition on the creation of legal tenancies in common (paragraph 6.05).

14.30 The Commission provisionally recommends that its previous recommendations relating to the severance of joint tenancies and *commorientes* should be implemented (paragraphs 6.09).

14.31 The Commission provisionally recommends that the *Partition Acts 1868* and *1876* should be replaced with substantial amendment with a view to their simplification, and that the Acts should no longer apply to judgment mortgages (paragraph 6.12).

14.32 The Commission provisionally recommends that section 23 of the *Administration of Justice Act (Ireland) 1707* should be replaced without substantial amendment in the new legislation (paragraph 6.14).

14.33 The Commission provisionally recommends that the *Bodies Corporate (Joint Tenancy) Act 1899* should be replaced without substantial amendment (paragraph 6.16).

14.34 The Commission provisionally recommends that in future any claim to an equitable interest in land should be unenforceable against a purchaser or mortgagee of the land unless it has been protected by prior registration in the Land Registry or Registry of Deeds, as appropriate (paragraph 6.20).

14.35 The Commission provisionally recommends that the *Commons Acts (Ireland) 1789* and *1791* should be replaced without substantial amendment in the new legislation (paragraph 6.22).

14.36 The Commission provisionally recommends that the new legislation should contain a modern version of the *Boundaries Act (Ireland) 1721* dealing with neighbouring parties' rights in respect of party walls or other structures dividing their respective properties (paragraph 6.24).

14.37 The Commission provisionally recommends that legislation should be enacted to resolve disputes between neighbouring owners

by enabling an owner to obtain a court “access” order where appropriate (paragraph 6.26).

## **Chapter 7     Appurtenant Rights**

14.38     The Commission provisionally recommends that pre-1922 statutes relating to tithe rentcharges should be repealed without replacement. These are (paragraph 7.06):-

*Tithes Act 1835*

*Tithe Rentcharge (Ireland) Act 1838*

*Tithe Arrears (Ireland) Act 1839*

*Tithe Rentcharge (Ireland) Act 1848*

14.39     The Commission provisionally recommends that the *Plus Lands Act (Ireland) 1703* should be repealed without replacement (paragraph 7.09).

14.40     The Commission provisionally recommends that the future creation of rentcharges should be prohibited, but without prejudice to statutory rentcharges (paragraph 7.12).

14.41     The Commission provisionally recommends that the *Chief Rents Redemption Act (Ireland) 1864* and section 5 of the *Conveyancing Act 1881* as amended by section 1 of the *Conveyancing Act 1911* should be repealed without replacement (paragraph 7.14).

14.42     The Commission provisionally recommends that (paragraph 7.16):

(i) section 10 of the *Law of Property Amendment Act 1859* should be replaced without substantial amendment subject to the recommendation that it should be made explicit that where a rentcharge is partially released, the amount not released remains charged on the entire land, unless it is apportioned to part of the land only by the parties;

(ii) sections 27 and 28 of the *Law of Property Amendment Act 1859* should be replaced without substantial amendment so as to allow personal representatives to be protected in the distribution of a deceased’s land subject to the payment of a rent;

(iii) the provisions of section 44 of the *Conveyancing Act 1881* should be replaced without substantial amendment subject to deletion of references to the right of distress. The Commission also recommends the repeal of section 6 of the *Conveyancing Act 1911* without replacement.

14.43 The Commission provisionally recommends that the *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002) should be implemented and that the *Prescription Act 1832* and the *Prescription (Ireland) Act 1858* should be replaced with substantial amendment (paragraph 7.19).

14.44 The Commission provisionally recommends that the requirement that words of limitation be used upon the express creation or express transfer of easements appurtenant to registered land should be removed as part of the general removal of the need for words of limitation in deeds generally (paragraph 7.21).

14.45 The Commission provisionally recommends that the Rule in *Wheeldon v Burrows* should be abolished and that, in future, a claim to an easement or profit by way of implied grant should be based solely on the doctrine of non-derogation from grant. The legislation should provide that there should be implied, in favour of a grantee of land, any easement or profit à prendre which it is reasonable to assume, in all the circumstances of the case, would have been within the contemplation of the parties as being included in the grant, had they adverted to the matter (paragraph 7.23).

14.46 The Commission provisionally recommends that section 6 of the *Conveyancing Act 1881* should be replaced with substantial amendment so as to make it explicit that section 6 cannot be used to enlarge what was previously a purely informal arrangement, such as a revocable licence personal to the licensee, into a full legal easement (paragraphs 7.25 and 7.27).

14.47 The Commission provisionally recommends that Chapter 1 of the *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003) relating to freehold covenants should be implemented (paragraph 7.30).

14.48 The Commission provisionally recommends that section 11 of the *Conveyancing Act 1911*, should be repealed without replacement (paragraph 7.32).

## **Chapter 8 Contracts and Conveyances**

14.49 The Commission provisionally recommends that section 2 of the *Statute of Frauds (Ireland) 1695* should be replaced without substantial amendment (paragraph 8.05).

14.50 The Commission provisionally recommends that (paragraph 8.07):

- (i) the decision in *Tempany v Hynes* be reversed and that the “orthodox” position be restored, whereby a binding contract for the sale of land will transfer the entire beneficial interest to the purchaser;
- (ii) the rule in *Bain v Fothergill* should be abolished;
- (iii) legislation should be implemented to abolish the consents required for certain transactions under the *Land Act 1965*;
- (iv) its proposals in relation to section 23 of the *Registration of Title Act 1964* be implemented;
- (v) a power to make regulations by statutory instrument concerning contracts for and conditions of sale should be included in the new legislation.

14.51 The Commission provisionally recommends that the provisions of the *Sale of Land by Auction Act 1867* should be recast in a simpler form. It is also recommended that the provisions relating to court sales and re-opening of biddings should be dealt with by rules of court. Subject to that the 1867 Act should be replaced without substantial amendment (paragraph 8.09).

14.52 The Commission provisionally recommends that the statutory period of title that needs to be shown on an open contract should be reduced from 40 to 20 years (paragraph 8.12).

14.53 The Commission provisionally recommends that section 2 of the *Vendor and Purchaser Act 1874*, and sections 3 and 13 of the

*Conveyancing Act 1881* be modified to allow the purchaser of a lease or of leasehold property to insist upon the vendor producing more evidence of title than these sections provide for (paragraph 8.14).

14.54 The Commission provisionally recommends that the rule in *Patman v Harland* should be abolished (paragraph 8.16).

14.55 The Commission provisionally recommends that section 9 of the *Vendor and Purchaser Act 1874* in relation to a vendor and purchaser summons should be examined by the Court Rules Committee to assess whether it could be made more efficient for parties (paragraph 8.18).

14.56 The Commission provisionally recommends that the *Statute of Uses (Ireland) 1634* should be repealed without replacement (paragraph 8.21).

14.57 The Commission provisionally recommends that sections 1-5 of the *Conveyancing Act (Ireland) 1634* as amended by the *Voluntary Conveyances Act 1893* should be replaced with substantial amendment (paragraph 8.23).

14.58 The Commission provisionally recommends the repeal without replacement of sections 10, 11 and 14 of the *Conveyancing Act (Ireland) 1634* (paragraph 8.25).

14.59 The Commission provisionally recommends that sections 2, 4 and 6 of the *Maintenance and Embracery Act (Ireland) 1634* should be repealed without replacement (paragraph 8.28).

14.60 The Commission provisionally recommends that the simple deed should become the only method of conveying or transferring land pending the introduction of electronic methods under an e-conveyancing system (paragraph 8.31).

14.61 The Commission provisionally recommends that section 2 of the *Real Property Act 1845* should be replaced with substantial amendment so as to overhaul the requirements for valid creation or execution of deeds, including the requirements in relation to foreign corporate bodies dealing with land in the State (paragraph 8.33).

14.62 The Commission provisionally recommends that section 3 of the *Real Property Act 1845* should be replaced without substantial amendment. Similarly, the Commission provisionally recommends that section 4 of the same Act should be replaced without substantial



amendment. Section 6, should also be replaced without substantial amendment. Section 5 should be replaced with substantial amendment to resolve a number of doubts (paragraph 8.35).

14.63 The Commission provisionally recommends that section 21 of the *Law of Property Amendment Act 1859*, as one of a number of provisions designed to enable a person to transfer property to himself and another should be consolidated into a general provision governing such transactions, so that it would be replaced without substantial amendment. The Commission also recommends that section 24 of the 1859 Act should be recast in much more simple form and language, but otherwise be replaced without substantial amendment (paragraph 8.37).

14.64 The Commission provisionally recommends that Section 10 of the *Law of Property Amendment Act 1860* should be repealed without replacement (paragraph 8.39).

14.65 The Commission provisionally recommends that the *Sale of Reversions Act 1867* should be repealed without replacement (paragraph 8.41).

14.66 The Commission provisionally recommends that amendments should be made to sections 2, 3, 4, 5, 6, 7, 8, 9, 41, 42, 43, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 66, 67, 69 and 70 of the *Conveyancing Act 1881*. In some cases the amendment will be without replacement (paragraph 8.44).

14.67 The Commission provisionally recommends that:

(i) section 3 of the *Conveyancing Act 1882* which deals with the doctrine of notice should be replaced without substantial amendment;

(ii) section 4 of the *Conveyancing Act 1882*, which states that a contract for a lease (as opposed to the lease itself) is not part of the title to be deduced by a vendor, should be replaced without substantial amendment (paragraph 8.45).

## **Chapter 9 Mortgages**

14.68 The Commission provisionally recommends that legislation should prescribe that in future the only method of creating a legal mortgage of unregistered land is to be by a charge, to operate in the same way as a charge of registered land (paragraph 9.06).

14.69 The Commission provisionally recommends that the existing methods of creating equitable mortgages should be retained (paragraph 9.08).

14.70 The Commission provisionally recommends that there be no statutory interference with equitable jurisdiction to control the terms and operation of mortgages (paragraph 9.10).

14.71 The Commission provisionally recommends that the operation of the *Consumer Credit Act 1995* in relation to land mortgages should be kept under review (paragraph 9.12).

14.72 The Commission provisionally recommends that, in future, the remedies available to mortgagees should be based firmly on the security interest of the mortgagee and should not be exercisable unless and until it becomes necessary to protect that security or to realise it in order to obtain repayment of the outstanding debt, including interest (paragraph 9.15).

14.73 The Commission provisionally recommends:

(i) that the remedy of foreclosure should be abolished;

(ii) that the right to take possession should no longer be exercisable unless and until it becomes necessary to protect or realise the mortgagee's security. Furthermore, it should not be exercised unless prior written notice is given to the mortgagor, except where emergency circumstances justify speedier action.

(iii) that: (1) it should be made clear in the new legislation that a purchaser is not obliged to enquire as to whether the mortgagee has met the statutory requirements and will obtain a good title from a selling mortgagee unless there is actual knowledge of an irregularity; (2) the mortgagor should be entitled to seek a court order requiring the mortgagee to proceed with the sale, or to postpone it because of the state of the market and to let it in the meantime, thereby enabling the mortgagor to reduce the debt exposure; (3) the statutory duty to obtain the best price reasonably obtainable on a sale imposed on building societies should be extended to all mortgagees;

(iv) that (1) where the statutory power is invoked, it should be possible for a mortgagee to waive the benefit of the payments schedule set out in the legislation; (2) it should be made clear in the legislation that the same duty of care applies where a receiver sells the land on behalf of the mortgagee and that the use of a receiver cannot be a method of getting round restrictions on the power of sale (paragraph 9.17).

14.74 The Commission provisionally recommends that:

(i) the issue of a charge certificate upon the mortgage of registered land should be abandoned;

(ii) Welsh mortgages should be prohibited by the new legislation;

(iii) tacking in the form of *tabula in naufragio* should be abolished, but this should not affect the other form of tacking which is much used in practice, tacking of further advances;

(iv) pending the introduction of an e-conveyancing system, the method of discharge of mortgages of unregistered land by endorsed receipt initially introduced for building society mortgages, and later extended to all mortgages should be preserved in the new legislation (paragraph 9.19).

14.75 The Commission provisionally recommends that the following statutes should be repealed without replacement (paragraph 9.25):

*Clandestine Mortgages Act (Ireland) 1667*

*Satisfied Terms Act 1845*

*Mortgagees Legal Costs Act 1895*

14.76 The Commission provisionally recommends that the provisions relating to mortgages in the *Conveyancing Act 1881* should be amended and in some cases without replacement (paragraph 9.26).

14.77 The Commission provisionally recommends that the *Conveyancing Act 1882* section 12 should be replaced without substantial amendment (paragraph 9.27).

14.78 The Commission provisionally recommends that the provisions relating to mortgages in the *Conveyancing Act 1911* should be amended (paragraph 9.28).

#### **Chapter 10 Judgment Mortgages**

14.79 The Commission provisionally recommends that the *Judgement Mortgage (Ireland) Acts 1850 and 1858* should be replaced with substantial amendment in line with the recommendations outlined in its *Consultation Paper on Judgment Mortgages (LRC CP 30-2004)* (paragraph 10.02).

14.80 The Commission provisionally recommends that the suggestion in *AS v GS and AIB* relating to prior equities should be given statutory recognition (paragraph 10.04).

14.81 The Commission provisionally recommends that seizure of leasehold land by the sheriff as a method of enforcing debts against land should be abolished (paragraph 10.06).

#### **Chapter 11 Registration of Deeds**

14.82 The Commission provisionally recommends that the old legislation relating to registration of deeds should be recast in modern form (paragraph 11.02).

14.83 The Commission provisionally recommends that regulations should aim to simplify greatly the current requirements governing procedural matters, such as those relating to memorials and their execution (paragraph 11.04).

14.84 The Commission provisionally recommends that the following pre-1922 statutes be replaced with substantial amendment (paragraph 11.05):

*Registration of Deeds Act (Ireland) 1707*

*Registration of Deeds Act (Ireland) 1709*

*Registration of Deeds (Amendment) Act (Ireland) 1721*

*Registration of Deeds (Amendment) Act (Ireland) 1785*

*Registry of Deeds (Ireland) Act 1822*

*Registry of Deeds (Ireland) Act 1832*

*Land Transfer (Ireland) Act 1848*

*Registration of Deeds (Ireland) Act 1864*

*Registry of Deeds (Ireland) Act 1875*

## **Chapter 12 Adverse Possession**

14.85 The Commission provisionally recommends that the *Report on Title by Adverse Possession of Land* (LRC 67-2002) should be implemented (paragraph 12.03).

14.86 The Commission provisionally recommends that the opportunity should be taken to implement also other recommendations relating to adverse possession contained in earlier Reports (paragraph 12.05).

## **Chapter 13 Miscellaneous Matters**

14.87 The Commission provisionally recommends that various recommendations relating to the Land Registry made in previous Commission Reports should be implemented (paragraph 13.03).

14.88 The Commission provisionally recommends that urgent consideration should be given to the introduction of a planning amnesty, to operate either 10 years after an unauthorised development has taken place or 10 years after the expiry of planning permission, the terms of which have not been complied with (paragraph 13.05).

14.89 The Commission provisionally recommends that recommendations relating to the law of succession contained in earlier Reports should be implemented (paragraph 13.07).

14.90 An earlier Report of the Commission recommending that consent under the *Family Home Protection Act 1976* should no longer be required for execution of an assent by a personal representative should be implemented (paragraph 13.09).

14.91 An earlier Report of the Commission, recommending that a doctrine of partial merger of a leasehold interest in the freehold reversion should be introduced, should be implemented in the new legislation (paragraph 13.11).

14.92 The Commission provisionally recommends that the pre-1922 statutes relating to drainage and improvement of land should be repealed without replacement. These are (paragraph 13.13):-

*Drainage (Ireland) Act 1842*

*Land Drainage Act 1845*  
*Drainage (Ireland) Act 1845*  
*Drainage (Ireland) Act 1846*  
*Landed Property Improvement (Ireland) Act 1847*  
*Drainage (Ireland) Act 1847*  
*Landed Property Improvement (Ireland) Act 1849*  
*Drainage Act 1850*  
*Improvement of Land (Ireland) Act 1850*  
*Landed Property Improvement (Ireland) Act 1852*  
*Drainage and Improvement of Lands (Ireland) Act 1853*  
*Drainage and Improvement of Lands (Ireland) Act 1855*  
*Drainage (Ireland) Act 1856*  
*Landed Property Improvement (Ireland) Act 1860*  
*Landed Property Improvement (Ireland) Act 1862*  
*Land Drainage (Ireland) Act 1863*  
*Drainage and Improvement of Lands (Ireland) Act 1863*  
*Drainage and Improvement of Lands (Ireland) Act 1864*  
*Improvement of Land Act 1864*  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1865*  
*Landed Property Improvement (Ireland) Act 1866*  
*Drainage and Improvement of Lands (Ireland) Act 1866*  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1869*  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1872*  
*Drainage and Improvement of Lands Amendment (Ireland) Act 1874*  
*Drainage and Improvement of Lands (Ireland) Act 1878*

*Drainage and Improvement of Lands (Ireland) Act 1892*

*Improvement of Land Act 1899*

14.93 The Commission provisionally recommends that the new legislation should contain a comprehensive list of definitions, such as those contained in section 2 of the *Conveyancing Act 1899* (paragraph 13.15).

14.94 The Commission provisionally recommends that at the drafting stage of the Bill or Bills to implement the recommendations contained in this Consultation Paper, considerable thought should be given to transitional provisions (paragraph 13.17).

## APPENDIX A LISTINGS OF PRE-1922 STATUTES

### Repeal Without Replacement

- 1285 Statute of Westminster II (De Donis Conditionalibus)
- 1634 Ecclesiastical Lands Act (Ireland) (10 & 11 Chas 1, c 3)
- 1634 Statute of Uses (Ireland) (10 Chas 1, sess 2 c 1)
- 1634 Conveyancing Act (Ireland) (10 Chas 1, sess 2 c 3), sections 10, 11, and 14
- 1634 Maintenance and Embracery Act (Ireland) (10 Chas 1, sess 3 c 15), sections 2, 4, and 6
- 1639 Forfeiture Act (Ireland) (15 Chas 1 sess 2 c 3)
- 1662 Tenures (Abolition) Act (Ireland) (14& 15 Chas 2 sess 4 c1 9)
- 1667 Clandestine Mortgages Act (Ireland) (9 Will 3 c 11)
- 1695 Life Estates Act (Ireland) (7 Will 3 c 8)
- 1703 Plus Lands Act (Ireland) (2 Anne c 8)
- 1723 Mining Leases Act (Ireland) (10 Geo 1 c 5)
- 1735 Timber Act (Ireland) (9 Geo 2 c 7)
- 1741 Mining Leases Act (Ireland) (15 Geo 2 c 10)
- 1749 Mining Leases Act (Ireland) (23 Geo 2 c 9)
- 1761 Hospitals Act (Ireland) (1 Geo 3 c 8)
- 1765 Timber Act (Ireland) (5 Geo 3 c 17)
- 1765 County Hospitals Act (Ireland) (5 Geo 3 c 20)
- 1767 County Hospitals Act (Ireland) (7 Geo 3 c 8)
- 1767 Timber Act (Ireland) (7 Geo 3 c 20)
- 1775 Timber Act (Ireland) (15 & 16 Geo 3 c 26)
- 1777 County Hospitals Act (Ireland) (17 & 18 Geo 3 c 15)
- 1777 Timber Act (Ireland) (17 & 18 Geo 3 c 35)
- 1777 Leases for Lives Act (Ireland) (17 & 18 Geo 3 c 49)
- 1779 Tenantry Act (Ireland) (19 & 20 Geo 3 c 30)



1781 Leases by Schools Act (Ireland) (21 & 22 Geo 3 c 27)  
 1783 Timber Act (Ireland) (23 & 24 Geo 3 c 39)  
 1785 Leases by Schools Act (Ireland) (25 Geo 3 c 55)  
 1785 Leases for Corn Mills Act (Ireland) (25 Geo 3 c 62)  
 1791 Timber Act (Ireland) (31 Geo 3 c 40)  
 1795 Ecclesiastical Lands Act (Ireland) (35 Geo 3 c 23)  
 1800 Crown Private Estate Act (39 & 40 Geo 3 c 88)  
 1800 Leases for Cotton Manufacture Act (Ireland) (40 Geo 3 c 90)  
 1806 Mines (Ireland) Act (46 Geo 3 c 71)  
 1810 School Sites (Ireland) Act (50 Geo 3 c 33)  
 1819 Crown Lands Act (59 Geo 3 c 94)  
 1822 Crown Lands (Ireland) Act (3 Geo 4 c 63)  
 1825 Crown Lands Act (6 Geo 4 c 17)  
 1834 Fines and Recoveries (Ireland) Act (4 & 5 Will c 92)  
 1835 Tithes Act (5 & 6 Will 4 c 74)  
 1838 Renewal of Leases (Ireland) Act (1 & 2 Vic c 62)  
 1838 Tithe Rentcharge (Ireland) Act (1 & 2 Vic c 109)  
 1839 Tithe Arrears (Ireland) Act (2 & 3 Vic c 3)  
 1841 Crown Lands Act (5 Vic c 1)  
 1842 Drainage (Ireland) Act (5 & 6 Vic c 89)  
 1843 Copyhold Act (6 & 7 Vic c 23)  
 1844 Copyhold Lands Act (7 & 8 Vic c 55)  
 1845 Settled Estates Drainage Act (8 & 9 Vic c 56)  
 1845 Drainage (Ireland) Act (8 & 9 Vic c 69)  
 1845 Crown Lands Act (8 & 9 Vic c 99)  
 1845 Real Property Act (8 & 9 Vic c 106), section 8  
 1845 Satisfied Terms Act (8 & 9 Vic c 112)  
 1846 Drainage (Ireland) Act (9 & 10 Vic c 4)  
 1847 Landed Property Improvement (Ireland) Act (10 & 11 Vic c 32)  
 1847 Settled Land (Ireland) Act (10 & 11 Vic c 46)  
 1847 Drainage (Ireland) Act (10 & 11 Vic c 79)  
 1848 Mining Leases (Ireland) Act (11 & 12 Vic c 13)  
 1848 Tithe Rentcharges (Ireland) Act (11 & 12 Vic c 80)

- 1848 Crown Lands Act (11 & 12 Vic c 102)
- 1849 Landed Property Improvement (Ireland) Act (12 & 13 Vic c 59)
- 1849 Renewable Leasehold Conversion Act (12 & 13 Vic c 105)
- 1850 Drainage Act (13 & 14 Vic c 31)
- 1850 Improvement of Land (Ireland) Act (13 & 14 Vic c 113)
- 1851 Leases for Mills Act (14 & 15 Vic c 7)
- 1851 Fee Farm Rents (Ireland) Act (14 & 15 Vic c 20)
- 1851 Crown Lands Act (14 & 15 Vic c 42)
- 1851 Trinity College Dublin, Leases and Perpetuity Act (14 & 15 Vic cxxviii) (Local and Personal Act)
- 1852 Landed Property Improvement (Ireland) Act (15 & 16 Vic c 34)
- 1852 Copyhold Act (15 & 16 Vic c 51)
- 1852 Crown Lands Act (15 & 16 Vic c 62)
- 1853 Crown Lands Act (16 & 17 Vic c 56)
- 1853 Drainage and Improvement of Lands (Ireland) Act (16 & 17 Vic c 130)
- 1855 Drainage and Improvement of Lands (Ireland) Act (18 & 19 Vic c 110)
- 1855 Leasing Powers Act for Religious Worship in Ireland (18 & 19 Vic c 39)
- 1856 Drainage (Ireland) Act (19 & 20 Vic c 62)
- 1858 Landed Estates Court (Ireland) Act (21 & 22 Vic c 72)
- 1858 Copyhold Act (21 & 22 Vic c 94)
- 1860 Law of Property Amendment Act (23 & 24 Vic c3 8), sections 7, 8 and 10
- 1860 Landed Property Improvement (Ireland) Act (23 & 24 Vic c 153)
- 1861 Landed Estates Court (Ireland) Act (24 & 25 Vic c 123)
- 1862 Landed Property Improvement (Ireland) Act (25 & 26 Vic c 29)
- 1862 Crown Private Estates Act (25 & 26 Vic c 37)
- 1863 Land Drainage (Ireland) Act (26 & 27 Vic c 26)

- 1863 Drainage and Improvement of Lands (Ireland) Act (26 & 27 Vic c 88)
- 1864 Drainage and Improvement of Lands (Ireland) Act (27 & 28 Vic c 72)
- 1864 Improvement of Land Act (27 & 28 Vic c 114)
- 1864 Chief Rents Redemption (Ireland) Act (27 & 28 Vic c 38)
- 1865 Drainage and Improvement of Lands Amendment (Ireland) Act (28 & 29 Vic c 52)
- 1866 Landed Property Improvement (Ireland) Act (29 & 30 Vic c 26)
- 1866 Drainage and Improvement of Lands (Ireland) Act (29 & 29 Vic c 40)
- 1866 Crown Lands Act (29 & 30 Vic c 62)
- 1867 Sales of Reversions Act (31 & 32 Vic c 4)
- 1868 Renewable Leaseholds Conversion (Ireland) Act (31 & 32 Vic c 62)
- 1869 Drainage and Improvement of Lands Amendment (Ireland) Act (32 & 33 Vic c 72)
- 1870 Limited Owners Residences Act (33 & 34 Vic c 56)
- 1871 Limited Owners Residences Act (1870) Amendment Act (34 & 35 Vic c 84)
- 1872 Drainage and Improvement of Lands Amendment (Ireland) Act (35 & 36 Vic c 31)
- 1873 Crown Lands Act (36 & 37 Vic c 36)
- 1873 Crown Private Estates Act (36 & 37 Vic c 61)
- 1874 Drainage and Improvement of Lands Amendment (Ireland) Act (37 & 38 Vic c 32)
- 1875 Leasing Powers Amendment Act for Religious Purposes in Ireland (38 & 39 Vic c 11)
- 1877 Settled Estates Act (40 & 41 Vic c 18)
- 1877 Limited Owners Reservoirs and Water Supply Further Facilities Act (40 & 41 Vic c 31)
- 1877 Contingent Remainders Act (40 & 41 Vic c 33)
- 1878 Drainage and Improvement of Lands (Ireland) Act (41 & 42

- Vic c 59)
- 1881 Conveyancing Act (44 & 45 Vic c 41), sections 4, 5, 8, 26, 27, 28, 29, 41, 49, 52, 57, 62, 66 and 69.
  - 1881 Leases for Schools (Ireland) Act (44 & 45 Vic c 65)
  - 1885 Crown Lands Act (48 & 49 Vic c 79)
  - 1887 Copyhold Act (50 & 51 Vic c 73)
  - 1892 Drainage and Improvement of Lands (Ireland) Act (55 & 56 Vic c 65)
  - 1892 Accumulations Act (55 & 56 Vic c 58)
  - 1894 Crown Lands Act (57 & 58 Vic c 43)
  - 1895 Mortgagees Legal Costs Act (58 & 59 Vic c 25)
  - 1899 Improvement of Land Act (62 & 63 Vic c 46)
  - 1906 Crown Lands Act (6 Edw 7 c 28)
  - 1911 Conveyancing Act (1 & 2 Geo 5 c 37), sections 1, 6, 9, and 11.
  - 1913 Crown Lands Act (3 & 4 Geo 5 c 8)

#### **Replace with Substantial Amendment**

- 1290 Statute of Westminster III (Quia Emptores) (18 Edw 1 cc1-3)
- 1634 Conveyancing Act (Ireland) (10 Chas 1, sess 2 c3), sections 1, 2, 3, 4, and 5.
- 1707 Registration of Deeds Act (Ireland) (6 Anne c2)
- 1709 Registration of Deeds Act (Ireland) (8 Anne c10)
- 1721 Boundaries Act (Ireland) (8 Geo 1 c 5)
- 1721 Registration of Deeds (Amendment) Act (Ireland) (8 Geo 1 c 15)
- 1785 Registration of Deeds (Amendment) Act (Ireland) (25 Geo 3 c 47)
- 1822 Registry of Deeds (Ireland) Act (3 Geo 4 c 116)
- 1832 Prescription Act (2 & 3 Will 4 c 71)
- 1832 Registry of Deeds (Ireland) Act (2 & 3 Will 4 c 87)
- 1845 Real Property Act (8 & 9 Vic c 106), sections 2 and 5.

- 1848 Land Transfer (Ireland) Act (11 & 12 Vic c 120)
- 1850 Judgment Mortgage (Ireland) Act (13 & 14 Vic c 29)
- 1858 Prescription (Ireland) Act (21 & 22 Vic c 42)
- 1858 Judgment Mortgage (Ireland) Act (21 & 22 Vic c 1 05)
- 1859 Law of Property Amendment Act (22 & 23 Vic c 35), section 12
- 1864 Registration of Deeds (Ireland) Act (27 & 28 Vic c 76)
- 1868 Partition Act (31 & 32 Vic c 40)
- 1875 Registry of Deeds (Ireland) Act (39 & 39 Vic c 5)
- 1876 Partition Act (39 & 40 Vic c 17)
- 1881 Conveyancing Act (44 & 45 Vic c 41), sections 2, 3, 6, 7, 17, 18, 19, 20, 21, 22, 23, 24, 51, 55, 56, 58, 59, 63, 67, and 70.
- 1882 Settled Land Act (45 & 46 Vic c 38)
- 1884 Settled Land Act (47 & 49 Vic c 18)
- 1887 Settled Land Acts Amendment Act (50 & 51 Vic c 30)
- 1889 Settled Land Act (52 & 53 Vic c 36)
- 1890 Settled Land Act (53 & 53 Vic c 69)
- 1893 Voluntary Conveyances Act (56 & 57 Vic c 21)
- 1911 Conveyancing Act (1 & 2 Geo 5 c 37), sections 3, 10, and 13.

### **Replace Without Substantial Amendment**

- 1695 Statute of Frauds (Ireland) (7 Will 3 c 12)
- 1707 Administration of Justice Act (Ireland) (6 Anne c 10), section 23
- 1789 Commons Act (Ireland) (29 Geo 3 c 30)
- 1791 Commons Act (Ireland) (31 Geo 3 c 38)
- 1830 Illusory Appointments Act (11 Geo 4 & 1 Will 4 c 46)
- 1845 Real Property Act (8 & 9 Vic c 106), section 3, 4, 6
- 1859 Law of Property Amendment Act (22 & 23 Vic c 35), sections 10, 21, 24, 27, and 28.
- 1867 Sale of Land by Auction Act (30 & 31 Vic c 48)
- 1874 Powers of Appointment Act (37 & 38 Vic c 37)

- 1874 Vendor and Purchaser Act (37 & 38 Vic c 78), section 9
- 1881 Conveyancing Act (44 & 45 Vic c 41), sections 9, 13, 15, 16,  
44, 50, 52, 53, 54, 60, 61, and 64
- 1882 Conveyancing Act (45 7 46 Vic c 39), section 3, 4, and 6.
- 1899 Bodies Corporate (Joint Tenancy) Act (62 & 63 Vic c 20)
- 1911 Conveyancing Act (1 & 2 Geo 5 c 37), sections 4, and 5.



**APPENDIX B    LAW REFORM COMMISSION REPORTS  
AND CONSULTATION PAPERS ON LAND  
LAW AND CONVEYANCING LAW**

Report on Land Law and Conveyancing Law: (1) General Proposals (LRC 30-1989) (June 1989)

Report on Land Law and Conveyancing Law: (2) Enduring Powers of Attorney (LRC 31-1989) (October 1989)

Report on Land Law and Conveyancing Law: (3) The Passing of Risk from Vendor to Purchaser (LRC 39-1991) (December 1991); (4) Service of Completion Notices (LRC 40-1991) (December 1991)

Report on Land Law and Conveyancing Law: (5) Further General Proposals (LRC 44-1992) (October 1992)

Report on Interests of Vendor and Purchaser in Land during the period between Contract and Completion (LRC 49-1995) (April 1995)

Report on Land Law and Conveyancing Law: (6) Further General Proposals including the Execution of Deeds (LRC 56-1998) (May 1998)

Report on Gazumping (LRC 59-1999) (October 1999)

Report on the Rule Against Perpetuities and Cognate Rules (LRC 62-2000) (December 2000)



Report on the Variation of Trusts (LRC 63-2000) (December 2000)

Report on the Acquisition of Easements and Profits à Prendre by Prescription (LRC 66-2002) (December 2002)

Report on Title by Adverse Possession of Land (LRC 67-2002) (December 2002)

Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals (LRC 70-2003) (March 2003)

Consultation Paper on Judgment Mortgages (LRC CP30-2004) (March 2004)

## APPENDIX C    LIST OF LAW REFORM COMMISSION PUBLICATIONS

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27

Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbours of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
Working Paper No 9-1980, The Rule Against Hearsay (April 1980)	€2.54
Third (Annual) Report (1980) (Prl 9733)	€0.95

First Report on Family Law – Criminal Conversation, Enticement and Harbours of a Spouse or Child, Loss of Consortium, Personal Injury to a Child, Seduction of a Child, Matrimonial Property and Breach of Promise of Marriage (LRC 1-1981) (March 1981)	€2.54
Working Paper No 10-1981, Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (September 1981)	€2.22
Fourth (Annual) Report (1981) (Pl 742)	€0.95
Report on Civil Liability for Animals (LRC 2-1982) (May 1982)	€1.27
Report on Defective Premises (LRC 3-1982) (May 1982)	€1.27
Report on Illegitimacy (LRC 4-1982) (September 1982)	€4.44
Fifth (Annual) Report (1982) (Pl 1795)	€0.95
Report on the Age of Majority, the Age for Marriage and Some Connected Subjects (LRC 5-1983) (April 1983)	€1.90

Report on Restitution of Conjugal Rights, Jactitation of Marriage and Related Matters (LRC 6-1983) (November 1983)	€1.27
Report on Domicile and Habitual Residence as Connecting Factors in the Conflict of Laws (LRC 7-1983) (December 1983)	€1.90
Report on Divorce a Mensa et Thoro and Related Matters (LRC 8-1983) (December 1983)	€3.81
Sixth (Annual) Report (1983) (Pl 2622)	€1.27
Report on Nullity of Marriage (LRC 9-1984) (October 1984)	€4.44
Working Paper No 11-1984, Recognition of Foreign Divorces and Legal Separations (October 1984)	€2.54
Seventh (Annual) Report (1984) (Pl 3313)	€1.27
Report on Recognition of Foreign Divorces and Legal Separations (LRC 10-1985) (April 1985)	€1.27
Report on Vagrancy and Related Offences (LRC 11-1985) (June 1985)	€3.81

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

Report on Private International Law Aspects of Capacity to Marry and Choice of Law in Proceedings for Nullity of Marriage (LRC 19-1985) (October 1985)	€4.44
Report on Jurisdiction in Proceedings for Nullity of Marriage, Recognition of Foreign Nullity Decrees, and the Hague Convention on the Celebration and Recognition of the Validity of Marriages (LRC 20-1985) (October 1985)	€2.54
Eighth (Annual) Report (1985) (Pl 4281)	€1.27
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