



Northern Ireland
Law Commission

promoting law reform in Northern Ireland

Consultation Paper

Land Law

CONSULTATION PAPER

LAND LAW

NILC 2 (2009)

Northern Ireland Law Commission
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NORTHERN IRELAND LAW COMMISSION

BACKGROUND

The Northern Ireland Law Commission (NILC) was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the new Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must also submit to the Secretary of State programmes for the examination of different branches of the law with a view to reform. The Secretary of State must consult with the Lord Chancellor, the First and deputy First Minister and the Attorney General before approving any programme submitted by the Commission.

MEMBERSHIP

The Northern Ireland Law Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

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Chief Executive:	Ms Judena Goldring MA, BLegSc, Solicitor

Legal Staff

Mrs Sarah Witchell LLB, Solicitor
Mrs Diane Drennan LLB, M Phil, Solicitor
Mrs Leigh McDowell LLB, Solicitor
Ms Katie Quinn LLB, MSc (joining August 2009)

Legal Researchers: Miss Joan Kennedy BCL
Miss Lisa McKibbin BSc Hons, Msc
Mr Darren McStravick LLB, LLM

Administration Staff

Business Manager: Mr Derek Noble

Corporate Planning
& Communications

Manager: Mrs Philippa Spiller BA Hons

Private Secretary
to the Chairman
and Chief

Executive: Ms Paula Sullivan

Administrative

Officers: Mr Chris Gregg BA Hons
Mr Andrew McIlwrath

The Legal Team for this project was

Mrs Sarah Witchell LLB, Solicitor
Professor John Wylie LLM (Harvard), LLD (Belfast), Professor
of Law at Cardiff University (Consultant)
Mrs Diane Drennan LLB, M Phil, Solicitor
Mrs Leigh McDowell LLB, Solicitor

CONTACT DETAILS

Further information can be obtained from:

Business Manager
Northern Ireland Law Commission
Linum Chambers
2 Bedford Square
Bedford Street
Belfast
BT2 7ES

Tel: +44 (0)28 9054 4860
Email: info@nilawcommission.gov.uk
Website: www.nilawcommission.gov.uk

THE LAND LAW PROJECT

The land law reform project was referred to the Northern Ireland Law Commission in April 2007 by the Department of Finance and Personnel. The Land & Property Services Agency funds two of the legal posts within the project. The Commission gratefully acknowledges this support.

THE NORTHERN IRELAND LAW COMMISSION

LAND LAW REFORM

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EXECUTIVE SUMMARY

CHAPTER 1

Chapter 1 explains the background and sets the context for the proposed reforms. The Commission believes it is now time to modernise land law and conveyancing law in Northern Ireland because the system is both outdated and outmoded. There is no doubt that land law is long overdue for reform and that there is an urgent need for modernisation. The law must be more easily understood and accessible.

Land law in Northern Ireland is based on ancient concepts and a legislative framework that is essentially 19th century in origin, with some parts dating to a much earlier period. Although at one time similar systems would have existed throughout the common law world, extensive reforms have taken place in most other jurisdictions.

It is difficult to define precisely the boundaries of land law or conveyancing law. Nevertheless the Commission has had to work out its priorities and accordingly has concluded that it will focus on the areas of substantive land law that are most in need of reform and modernisation. The following have been selected as the subject headings which form a coherent framework of land law and accordingly are the subject of this Consultation Paper: feudal tenure, estates in land, easements and other rights over land, future interests, settlements and trusts, concurrent interests, mortgages, contracts for the sale of land and conveyances. The subjects of adverse possession and ground rents will be the subject of a separate supplementary Consultation Paper.

The Commission recognises that there are other topics that might be regarded as coming under the general umbrella of land law and which are worthy of consideration in their own right. After due reflection and taking into account the fact that there are limited resources available, the Commission has come to the conclusion that these areas of law cannot sensibly or properly be covered by the Consultation Paper. Examples of these areas are: land registration, business tenancies, agricultural tenancies, housing, planning, flats and apartments,

wills and succession, the general law of trusts and vesting, compulsory acquisition and compensation. Further, the Commission has not sought to venture into the realms of social policy, nor to interfere with particular case law issues.

It seems to the Commission that there are two underlying principles in the formulation of the proposals for reform:

- (1) Simplicity, clarity and certainty
- (2) Freedom of contract

The Commission has sought to balance these principles in its consideration of the issues in the Consultation Paper. Whilst land law should be comprehensible to everyone, there is no escape from the fact that dealings in property require a law of considerable sophistication. The law should facilitate the transfer of land and an owner should have the freedom to own, use and dispose of the land as he or she pleases, so long as it does not impinge substantially on the interests of other members of society. There is no advantage in the law being comprehensible and unambiguous if it is not sufficiently flexible to allow people to reach agreement on terms that are commercially acceptable to them.

The Commission recognises that for the general public the transfer of property depends on much more than the principles and foundations of land law. Most people are more concerned about the cost, speed and efficiency of the conveyancing process than about the finer points of the title to their property. The Commission recognises that reform of the law, which underpins the conveyancing process, is only one part of the wider development of modern systems which will update and improve the transfer of property in general.

The Commission appreciates that other organisations also have a vital role to play in the reform of land law and the conveyancing process. In particular, it recognises the importance of the work of the Land Registers of Northern Ireland in rolling out compulsory registration of title and in the development of electronic processes. It also values the work of

the Law Society of Northern Ireland in laying down procedures and setting out standards of good practice. Each is important in its own right but they are also mutually dependent and only when all the strands are joined together can a modern and effective system of property transfer be properly built.

CHAPTER 2

In Chapter 2 the Commission considers the concept of tenure which was a key feature of the feudal system. The Consultation Paper explains that the feudal system, which originated in continental Europe, was adopted first in England and then later in other common law countries. All land is ultimately owned by the Crown and the greatest interest that anyone can have in land is an estate in fee simple which is held from the Crown. Although the owner of an estate is technically a tenant of the Crown, nowadays an estate in fee simple is considered by everyone except lawyers as equivalent to absolute ownership. It is generally accepted that tenure is outmoded and is of only technical significance today. There are no longer any duties or services to be performed by the tenant to a lord of the manor or to the Crown. However, it is important to be aware that in law the owner of land owns an estate in land and not the land itself. The doctrine of estates is inextricably linked to the doctrine of tenure. This leads to the question whether the legal position can now be aligned with the public perception of ownership. To inform its thinking on this subject the Commission undertook some comparative research and looked at the measures introduced in other common law jurisdictions to modernise ownership.

It seems to the Commission that there are three possible options in relation to feudal tenure:

- (1) To preserve the *status quo*, retaining the concepts of both tenure and estates, on the basis that the system has worked perfectly well for over a thousand years and forms an important foundation of land law;

- (2) To abolish feudal tenure, because it is of no practical significance, but retain the doctrine of estates because it is a well understood and accepted concept;
- (3) To abolish both feudal tenure and the doctrine of estates which are conceptual fictions, since by making radical change a simpler concept of ownership could be introduced.

On balance, the Commission is inclined to recommend option (3).

CHAPTER 3

In Chapter 3 the Consultation Paper looks at the different types of estate in more detail. The current law is undoubtedly too complicated and if the concept of estates is to be retained, it is clear that it should be simplified. The Commission proposes that there should only be two possible legal estates in land – the fee simple absolute in possession and a leasehold term. Further, it is suggested that there should be a “curtain” between those legal estates and the various equitable “family” interests which would be overreached. In this context it is important to consider which rights and interests should appear on the title, which rights and interests should affect a purchaser and how much protection should be given to any equitable rights of occupation. This is a matter of striking a proper balance between the needs of the conveyancer and the rights of the family or other occupiers.

Broadly, there are four possible options:

- (1) To give a purchaser a clean title free of equitable interests as long as the property is sold by at least two trustees and the purchaser had made proper enquiries as to any occupiers;
- (2) To increase protection for occupiers and provide that their interests should not be overreached unless they consented to the sale – this would correspondingly increase the burden on a purchaser to obtain their consent to the sale;

- (3) To extend the principle of overreaching to sales by a single owner and to require an occupier to register his or her interest in order to protect it – this would facilitate conveyancing and alleviate the burden on the purchaser to make enquiries, but might potentially cause injustice to the occupier whose rights would be reduced;
- (4) To couple an extended principle of overreaching with reform of the law of cohabittees – this seems to raise substantial issues which go beyond the scope of the Consultation Paper.

The Commission also looks at existing forms of estate that would cease to have legal effect (such as modified fees and fees tail) and considers possible conversion provisions.

CHAPTER 4

In Chapter 4 the Consultation Paper addresses the subject of easements and other rights over land. Various different types of right are identified and the view is taken that there is no need for new legislation to deal with matters such as licences or ancient rights such as titles and offices. On the other hand it may be useful to clarify the position of rights of residence. This chapter has a particular focus on easements and profits because of their prevalence and importance. The Commission rejects the idea of a general scheme of “land obligations” as being too prescriptive and inflexible. However, it does propose to reform the methods of acquisition, particularly prescription. It is inclined to recommend that the doctrine of prescription should no longer apply to profits *à prendre*, but that it should continue to apply to the acquisition of both positive and negative easements. The Consultation Paper proposes that there should be a simpler statutory scheme of acquisition and also that the law of prescription should be modernised. It suggests that the legal right to an easement would not be acquired until it has been perfected by registration in the Land Registry or Registry of Deeds as appropriate.

CHAPTER 5

Chapter 5 deals with future interests. There is no denying that this is an arcane and complex area of law which has little relevance to modern life. The concepts are difficult to understand and it is uncontroversial for the Consultation Paper to take a sweeping approach to reform in this context. The Commission has no hesitation in proposing abolition of legal remainder interests and the conversion of most other future interests into equitable interests. Whilst it feels that the rule against inalienability should be retained, it strongly favours abolition of the rule against perpetuities.

CHAPTER 6

In Chapter 6 it is proposed that there should be a single statutory trust of land which would encompass both the traditional settlement and trust for sale. It would always be a holding trust by default and full legal title would be vested in the trustees; the trustees would be given full power to deal with the land as if they were the absolute owners. The exercise of the powers by the trustees would be for the general benefit of the beneficiaries and the general law of trusts would be applicable.

CHAPTER 7

Chapter 7 is concerned with concurrent ownership of land where several persons own estates or interests in it at the same time. There is an emphasis on joint tenancies and tenancies in common, which are the only surviving forms of concurrent interest that are of any significance. The Commission considers that each serves a useful purpose and it is not inclined to make any changes to the basic proposition that both should continue to exist as legal concepts. The Consultation Paper examines the question of severance of a joint tenancy and on balance inclines towards the proposition that it should not be possible for one party to sever a joint tenancy unilaterally without first registering such severance in the Registry of Deeds or Land Registry as appropriate and then giving notice of the registration to the other joint tenants. The Consultation Paper also examines the position in relation to partition of interests in the event of a dispute arising between concurrent owners and it recommends that the courts should be given a wider discretion

to make orders in relation to the property in question. It also looks at the principle of *commorientes* (simultaneous deaths) which it proposes should be treated as an event severing a joint tenancy so that joint tenants would become tenants in common on death.

In passing the Commission notes that there are major shortcomings in the present law of cohabitation and that this has been the subject of many reports in recent years. It acknowledges that this area of law is presently unsatisfactory and that the rights of some vulnerable occupants may not be adequately protected. However, the Commission takes the view that there are such conflicting interests here that it would not be appropriate in the current project to venture into the realms of social policy and family law in order to find solutions to the serious problems which undoubtedly exist. Finally, whilst also recognising that there are issues surrounding the ownership of common land that require urgent investigation, the Commission considers that these are also too far divorced from the land and conveyancing matters which are the subject of the Consultation Paper to justify their inclusion within it.

CHAPTER 8

Chapter 8 relates to mortgages. This is a very wide subject but the analysis in this chapter is confined to an examination of the technical and conveyancing aspects of loans on the security of land. It does not encroach on the consumer and regulatory matters which the Commission believes are outside the scope of the Consultation Paper. The Commission inclines to the view that borrowers in residential property are best protected by specific legislation aimed at consumer protection and that any new legislation proposed in the Consultation Paper should provide default provisions only, which operate subject to the mortgage deed, as under the current law. It considers that in some circumstances residential mortgages may need to be more strictly regulated than commercial ones. For example, a requirement for a mortgagee to obtain a court order for possession should be confined to residential property. The Consultation Paper draws attention to one of the most important proposals which is that all mortgages should be created by way

of charge. It also proposes that a lender's powers and rights should only be exercised for the purposes of protecting the property or realising the security.

CHAPTER 9

Chapter 9 turns to the question of formalities for contracts for the sale of land. The fundamental issue here is whether the current statutory requirement for a contract to be evidenced in writing should be recast in more modern language or whether a provision for the contract itself to be in writing should be introduced. After considering the arguments for both options, the Commission inclines towards postponing consideration of substantive changes to the law governing formalities until the way forward is clearer. It recognises that this is likely to be an interim measure pending the further development of electronic conveyancing processes.

CHAPTER 10

Chapter 10 is of more practical application because it relates to deeds of conveyance and is mostly concerned with unregistered land. Although all land in Northern Ireland is subject to compulsory registration, it will be some considerable time before every title will be registered and in the meantime transactions involving unregistered title will continue to take place. Accordingly, the Commission takes the view that there remains a need to update the technical provisions for the conveyancing of unregistered land. The issues that the Consultation Paper deals with include reducing the length of title to be deduced on sale, repealing the Statute of Uses (Ireland) 1634, abolishing the need for words of limitation and updating the covenants for title implied by statute.

CHAPTER 11

Chapter 11 outlines the Commission's proposals for modernisation of legislation affecting land law and conveyancing. The need for accessibility of the law suggests that the new legislation should consolidate all statutory provisions, including recently enacted ones which come within the scope of the subject matter of the Consultation Paper. The chapter lists the main statutes that the Commission proposes to

repeal without replacement; those that would be replaced with substantial amendment and those which would be consolidated or replaced without substantial amendment.

CHAPTER 1. INTRODUCTION

A TIME FOR CHANGE

- 1.1 It has long been recognised that the land law of Northern Ireland is complex, outdated and opaque. Although reform of land law has been on the agenda since the late 1960s, a major reform programme has still to be undertaken and the law has become increasingly out of touch with contemporary needs. The Northern Ireland Law Commission (“the Commission”) believes that it is time to focus on modernisation of land law. A systematic rationalisation of both legislation and the general law will be necessary in order to achieve a modern and relevant framework for land law and the conveyancing process.
- 1.2 Many of the basic concepts derive from the feudal system introduced to England in the 11th century and exported to Ireland in the late 12th century. Much of the legislation relating to the subject was enacted centuries ago and, as is explained in Chapter 11, since the 13th century there have been at least seven different legislative regimes enacting legislation for Northern Ireland.
- 1.3 Although at one time similar systems would have existed throughout the common law world, extensive reforms have taken place in most other jurisdictions. In England and Wales, sweeping legislative changes took place in 1925 which have been followed by further updates, most recently in 2002 by legislation which has provided for modernisation of land registration. Extensive reforms have also now taken place in Scotland following devolution in 1998 and in the Republic of Ireland major modernisation is currently under way. These developments are discussed throughout the following chapters.
- 1.4 The Commission acknowledges that reform of the law which underpins the conveyancing process is only one part of the wider development of modern systems, which will update and improve the transfer of property in general. The move towards more straightforward concepts of land law together with an

improved conveyancing process may also help to generate inward investment and to encourage diversification of land use. This is particularly important in the purchase of commercial property which tends to be more valuable but is also structured in a more complex fashion. Currently, any large national or international companies interested in coming to Northern Ireland are surprised to find that the law in this jurisdiction remains so antiquated and has not been modernised.

- 1.5 Now that devolution has come to Northern Ireland again, there is an opportunity to create an agenda and to deal with matters which are of particular concern to this jurisdiction. The Commission should endeavour to bring the law into line with both economic reality and popular perception. Uniquely, there is the chance to make a difference and it should be grasped.

BACKGROUND TO THE PROJECT

- 1.6 There have already been three major reports reviewing the substantive law of Northern Ireland and making proposals for reform:

- (1) Report of the Committee on the Registration of Title to Land (1967) (the “**1967 Lowry Report**”)
- (2) Survey of the Land Law of Northern Ireland (1971) (the “**1971 Survey**”)
- (3) Final Report of the Land Law Working Group (1990) (the “**1990 Final Report**”)

- 1.7 Following the **1971 Survey** and the **1990 Final Report** some new legislative provisions were introduced in a piecemeal fashion but there have been no comprehensive measures.

- 1.8 That legislation includes:

- (1) Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971
- (2) Property (Northern Ireland) Order 1978

- (3) Registration (Land and Deeds) (Northern Ireland) Order 1992
- (4) Property (Northern Ireland) Order 1997
- (5) Ground Rents Act (Northern Ireland) 2001
- (6) Compulsory Registration of Title (Northern Ireland) Orders 1995 – 2002
- (7) Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005

SCOPE OF THE LAND LAW REFORM PROJECT (“THE PROJECT”)

- 1.9 This is the first major reform project for the Commission. The Project was originally set up in the Office of Law Reform before being transferred to the Commission on its establishment. After the project was transferred, the Commission subsequently received a reference from the Minister of Finance and Personnel to undertake a review of the ground rents legislation.
- 1.10 There are many aspects to Northern Ireland’s land law but, as will be explained at several points in this Consultation Paper, the Commission takes the view that some limits must be imposed on the Project. This is not because the Commission considers that certain areas of land law do not merit reform, but rather that resources are finite. Although it is difficult to define precisely the boundaries of land law or conveyancing law, the Commission has had to work out its priorities. This Consultation Paper concentrates on the basic structure of the land law and conveyancing system.
- 1.11 There are other restrictions which the Commission considers should be imposed on the Project. One is where land law impinges on major areas of social policy. For instance, in Chapter 7, the Commission has concluded that the law relating to cohabitation is outside the scope of the Project. The Commission considers that it involves major issues going well beyond the scope of land law reform as such and so merits its

own specific treatment. Particular case law issues, unless they relate directly to the basic structure of the land law and conveyancing system, will not be dealt with by the Project.

OTHER ASPECTS OF THE REFORM PROCESS

- 1.12 It is clear to the Commission that land law should be as clear and comprehensible as possible; in line with the principle of the rule of law. For this reason the Commission believes thorough reform is necessary rather than further selective amendment of the existing framework of law. As a first step towards this goal, the Commission has undertaken a comprehensive analysis of the current law, so that it can justify all of its proposals for reform on appropriate grounds.
- 1.13 Land law and the conveyancing process depend on more than the reform of land law itself. The integrity of the system is reliant on fundamental and effective processes for the registration of the title to land. The completion of any dealing with land, whatever its nature (for example a sale, purchase, mortgage or gift) is dependent on effective procedures being in place. Accordingly, the Commission recognises that other organisations also have a vital role to play in the reform of Northern Ireland's land law and conveyancing processes. In particular, the Commission recognises the importance of:
- (1) The work of the Land Registers of Northern Ireland in developing e-registration and the technical requirements for the introduction of electronic procedures;
 - (2) The work of the Land Registers of Northern Ireland in extending the requirement for compulsory first registration of titles with the ultimate aim that the title to all land in Northern Ireland should be registered in the Land Registry;
 - (3) The fundamental role that other bodies, such as the Law Society of Northern Ireland, have in instigating and implementing reform. For example, through its Home Charter Scheme, the Law Society of Northern Ireland

has already achieved much needed co-ordination of conveyancing practices and procedures throughout Northern Ireland. In its regulatory role, the Law Society of Northern Ireland has also laid down procedures and set out standards of good practice.

- (4) The work of conveyancing and other property professionals, especially solicitors, in promoting and operating efficient transfers and conveyancing practices.

1.14 Although every aspect is important in its own right, each of these may have to be dependent on the others if Northern Ireland is to have a modern and effective land law and conveyancing process.

1.15 The Commission has been engaging in close consultation with both the Land Registers of Northern Ireland and the Law Society of Northern Ireland. It has also had discussions with solicitors experienced in conveyancing about its initial proposals for reform. In addition, preliminary meetings have been held with representatives of other organisations involved in conveyancing, such as the lending institutions and the chartered surveyors. Their input, and that of others interested in land law (including members of the Judiciary, Bar of Northern Ireland, academics and the Lands Tribunal of Northern Ireland) have greatly assisted the Commission in formulating the proposals set out in this Consultation Paper. The expectation is that such consultations will continue and inform both the Final Report and the draft legislation which the Commission will publish in due course.

A BALANCING ACT

1.16 The Commission considers that there are two underlying principles in the Project:

- (1) Simplicity, clarity and certainty
- (2) Freedom of contract

- 1.17 It is plain that Northern Ireland's land law should be simplified and clarified into a coherent, clear and certain set of principles enshrined in legislation. However, the principle of freedom of contract is also a fundamental feature of land ownership. Every owner should have the freedom to own, use and dispose of the land as he or she pleases, so long as it does not impinge substantially on the interests of other members of society (including other landowners). For decades, legislation such as planning and environmental statutes have sought to achieve a balance between these competing tensions. In more recent times, the advent of human rights legislation has resulted in the conflict between individual rights and the public interest being tested further.
- 1.18 Dealings in property require a law of considerable sophistication. The Commission acknowledges that land law does require a high degree of technicality and it recognises that lawyers and other specialists will remain indispensable to all but the simplest transactions with valuable property. There is no advantage in the law being comprehensible and unambiguous if it is not sufficiently flexible to allow people to reach agreement on terms that are commercially acceptable to them.
- 1.19 The Commission also wishes to draw attention to the wider context in which this project is being carried out. At the formal launch of the Commission the Chairman, Mr Justice Morgan, said

“The Commission is an independent statutory body which is charged with the responsibility of reviewing and systematically developing the law of Northern Ireland. The work of the Commission therefore has the potential to impact on the lives of many citizens of Northern Ireland and the establishment of the Commission represents an opportunity to achieve local solutions for technically complex areas where law reform agencies have shown themselves effective in other jurisdictions.”

- 1.20 It is this search for the local solution to a technically complex area which informs the Commission's approach to land law reform.

AREAS COVERED IN THE PROJECT

- 1.21 The following have been selected as the areas of land law and conveyancing law which will be dealt with as part of the current Project:

- (1) Feudal tenure
- (2) Estates in land
- (3) Easements and other rights over land
- (4) Future interests
- (5) Settlements and trusts
- (6) Concurrent interests
- (7) Mortgages
- (8) Contracts for the sale of land
- (9) Conveyances
- (10) Adverse possession
- (11) Ground rents

Topics (1) – (9) are covered by this Consultation Paper.

The last two topics will be included in a separate Supplementary Consultation Paper.

- 1.22 The Commission recognises that there are also many other topics which might be regarded as coming within the scope of the Project but which have for various reasons been excluded from it. All of these are well defined areas of law which could be considered under the general umbrella of land law and which

are worthy of consideration as separate subjects in their own right. After considering the available resources, the Commission has concluded that the following areas of law cannot be covered by the Project:

- (1) Land registration
- (2) Landlord and tenant
- (3) Housing
- (4) Business tenancies
- (5) Agricultural tenancies
- (6) Wills and succession
- (7) General law of trusts
- (8) Powers of attorney
- (9) Flats and other interdependent buildings
(commonhold/condominium ownership)
- (10) Planning and environmental law
- (11) Vesting, compulsory acquisition and compensation

It should also be noted that some of these areas, such as land registration and succession, have been the subject of recent legislation.

PHASES OF THE PROJECT

1.23 The Project is divided into five phases:

- (1) Publication of this Consultation Paper
- (2) A consultation process on the questions raised and the proposals made by the Consultation Paper. It includes:

- (a) Review of the substantive law relating to land law and the conveyancing process with regard to its need for reform
 - (b) Topic by topic approach to the subject
 - (c) Identification of anomalies and anachronisms
 - (d) Screening of all statutes currently in force affecting land law and the conveyancing process. It contains a chapter on legislation which is an important strand of the Project.
- (3) Publication of the Supplementary Consultation Paper
 - (4) A consultation process on the Supplementary Consultation Paper
 - (5) Publication of a Final Report containing recommendations on the issues raised by both Consultation Papers and including a draft Bill to give effect to the conclusions reached.

THE CONSULTATION PROCESS

- 1.24 This Consultation Paper sets out and explains the possibilities for reform as well as identifying the policy options preferred by the Commission. The Commission would very much welcome the views and thoughts of consultees on the issues raised: both on the general principles and on the particular questions in the following chapters. The Commission will then carefully consider the responses and suggestions received before preparing a Final Report setting out its final recommendations with draft legislation to implement them.
- 1.25 This Consultation Paper marks the completion of the first phase of the Project and prepares the ground for the consultation process which forms the second phase. Responses to the questions raised may be made either in writing or electronically.

- 1.26 Any responses to this Consultation Paper should be forwarded by post for attention of: -

Derek Noble
Northern Ireland Law Commission
Linum Chambers
2 Bedford Square
Bedford Street
Belfast
BT2 7ES

Or alternatively by e-mail to: info@nilawcommission.gov.uk

- 1.27 This consultation shall run until 18th September 2009. All responses should therefore be submitted by that date as the Commission cannot guarantee that it will be able to consider responses received after that date. Responses will be acknowledged on receipt.
- 1.28 An electronic version of this document is available for download on the Northern Ireland Law Commission website www.nilawcommission.gov.uk. Hard copies will be posted on request.

If this format does not meet your needs please contact the Commission.

QUERIES

- 1.29 Any queries regarding the proposals should be sent to: - sarah.witchell@nilawcommission.gov.uk
telephone: +44(0)28 9054 4860

CONFIDENTIALITY OF RESPONSES

- 1.30 Unless individual respondents specifically indicate that they wish their response to be treated in confidence or the Commission considers it appropriate to do so, then all responses will be treated as public documents in accordance with the Freedom of Information Act. Comments may be attributed and a list of all respondents' names may be included in any final report published by the Commission. If you wish your response to be treated in confidence please advise the Commission accordingly.

CHAPTER 2. FEUDAL TENURE

GENERAL PRINCIPLES

- 2.1 The feudal system of land ownership was brought to England by the Normans in 1066 and, along with the common law, was later exported to other countries. Ireland was the first country to receive the feudal system from England and in due course many aspects of it were also exported to parts of the United States, Canada, Australia, New Zealand, the Caribbean and parts of Africa. As a result, the feudal system is a common inheritance of the common law world.
- 2.2 Amongst the key features of the feudal system was the principle that the Crown had acquired a sovereign title to all land and that individual subjects could only hold land from a superior lord and ultimately from the Crown. Such subjects owed a duty of fealty or loyalty to the Crown and would forfeit their right to hold the land if services or conditions (such as military or agricultural services or taxation) upon which it was held were not performed. (See Wylie *ILL* Chapter 2; Pearce and Mee Chapter 6).
- 2.3 Under the feudal system the greatest interest that anyone other than the Crown could have in land was an estate in fee simple (see Chapter 3 for a discussion of estates). The only exception to lands held in fee simple was the land held in demesne by the Crown as sovereign or lord paramount. Currently the main categories of Crown land (summarised from the Law Commission of England and Wales's Report *Land Registration for the Twenty-first Century, A Conveyancing Revolution* (2001) Law Com No. 271 para. 11.3) are as follows:-
 - (1) Land belonging to Government Departments. Much of this land is properties that are in the name of the monarch.
 - (2) Land held under the management of the Crown Estate Commissioners, which is known as the Crown Estate.

This comprises land held by the monarch in right of the Crown in her constitutional capacity.

- (3) The Crown's Private Estate which comprises land which is owned by the monarch in her private capacity.
- (4) The two Royal Duchies of Cornwall and Lancaster.
- (5) A residual category of land which is subject to the Crown Lands Act 1702 (c. 1) including the Royal Palaces and parks.

2.4 Although feudal incidents have in practice disappeared and many of the different forms of feudal tenure have been abolished (see para. 2.13 below), the principle remains in Northern Ireland, as in many other common law jurisdictions, that all land is held under the Crown as the ultimate owner of it. An estate in fee simple (the most common type of freehold land) still does not amount to absolute ownership because land continues to be the object of feudal tenure. The title "tenant in fee simple" is still technically the correct description of the person who owns the freehold and is popularly regarded as the owner of the land. This position is by no means universal in a world-wide context because under the vast majority of other legal systems outside the common law world, ownership of land is absolute. Where land is owned independently and outright in this way, the ownership is "allodial" which means that it involves no obligation to some lord nor to anyone else. Thus allodial ownership is the converse of feudal ownership and has neither a concept of tenure nor a doctrine of estates.

2.5 The doctrine of estates is an integral part of the feudal system and is inextricably linked to the concept of tenure (see Chapter 3). Whilst tenure involves the notion of one person holding land from another person and governs the terms upon which the landowner holds the land, the doctrine of estates determines for how long that person can hold the land. A feudal tenant, including a tenant in fee simple, holds an estate in land for a limited length of time. In that sense, it can be said that no-one actually owns the land itself (the physical entity); what is owned

or held is an “estate” and several people may own different estates in the same piece of land.

- 2.6 The concept of tenure under the feudal system applied to what nowadays would be regarded as freehold land. Leasehold tenure, on the other hand, was not recognised by the feudal system. Historically, grants of land for a term of years were regarded as creating personal contracts only before they gradually came to be recognised as creating an estate in the land. The nature of a leasehold estate has always been regarded as something quite different from and less than a freehold estate. The relationship between a landlord and a tenant for a term of years, although not a form of feudal tenure nevertheless was a type of tenure; the tenant held the land from the landlord and normally paid a rent for it. However, it should be noted that a major change was made in Ireland by section 3 of the Landlord and Tenant Law Amendment Act, Ireland, 1860 (c. 154) (Deasy’s Act) which provided that “the relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service ...”. The significance of this provision has been somewhat controversial (see Wylie, *ILT* Chapter 2), but need not be pursued here since landlord and tenant law is outside the scope of the present Project (see para. 1.22 above).

LEGISLATION

- 2.7 Before 1290 there was no theoretical limit to the number of intervening tenures that could exist between the Crown and the person in occupation of the land. It was always possible to add another layer onto the bottom of the pyramid of title and to create a new estate by the process of subinfeudation (the granting of land to another to be held from the grantor as mesne (intermediate) lord in return for services).

Statutes of Westminster the Third 1289 – 1290 (*Quia Emptores*) (18 Edw. I) (cc. 1, 2, 3)

- 2.8 *Quia Emptores* is an English statute which was applied to Ireland. It prohibited alienation by way of subinfeudation and it also provided that no new tenures in fee simple could be

created except by the Crown. As the Statute is expressly confined to alienation in fee simple it does not prevent a tenant in fee simple from granting a lesser freehold estate, such as a life estate or a fee tail to someone else (see again Chapter 3 on these estates). Nor does it affect transfer of an estate by substitution of a new tenant in fee simple for the old one, as is normal practice today. The result of substitution is that every conveyance of a fee simple substitutes the new tenant as holder of the fee simple for the old one.

- 2.9 *Quia Emptores* also conferred on all landowners holding under one of the forms of free tenure (as opposed to unfree tenures, which were of lower status) the right to dispose of the land without having to obtain the consent of the superior grantor. This established the rule against inalienability, the consequence of which is that any attempt to prevent a freeholder from alienating (disposing of) the land is void (see para. 5.9 below). The rule against inalienability remains a fundamental principle of land law today.
- 2.10 The prohibition of subinfeudation and of the creation of new tenurial relationships could have resulted in the gradual disappearance of all mesne (intermediate) tenants in Ireland as it did in England. However, it did not have this effect because of the 17th century Plantation policy of confiscation, forfeiture and resettlement. The Crown made new grants by way of letters patent in favour of landowners who would owe allegiance to the Crown. The land was conveyed to the grantee by fee farm grant to hold of the Crown subject to a chief rent, known as a quit rent. The Crown was able to create feudal tenure in this way because it was not bound by *Quia Emptores* and could freely continue to make freehold grants of the confiscated land.
- 2.11 In addition, the letters patent frequently contained a *non obstante* (notwithstanding) clause, authorising the grantee to subinfeudate to other grantees *non obstante Quia Emptores*. It may be questioned whether the Crown had the right to grant this dispensation to those who were clearly otherwise bound by the Statute, but the validity of these grants was confirmed by legislation enacted by the Irish Parliament and has not been

queried in modern times (see Wylie *ILL* paras. 2.42 – 2.47; Pearce and Mee p 49). There is no doubt that most grantees did exercise their powers to subinfeudate the fee simple and thereby to create a feudal relationship between themselves and their grantees. This has no parallel in the common law world post-1290 except in Scotland, where *Quia Emptores* did not apply (see para. 2.30 below).

- 2.12 Some of these grants continued to operate well into the 20th century and it was noted in the **1971 Survey** (para. 459) that in 1969 there were eight surviving quit rents collected in Northern Ireland. Recent enquiries of the Crown Estate Commissioners indicate that no quit rents at all are now collected either because they were bought out by the grantees or because of the difficulties of locating the person currently responsible for payment. The cost of attempting to collect the rents had become disproportionate to their monetary value. Although the rents may no longer be paid, this does not necessarily mean that the grants themselves no longer exist.

Tenures Abolition Act (Ireland) 1662 (c. 19)

- 2.13 The system of landholding in return for services fell into decay long before the most onerous incidents of tenure were legally abolished. In England the Tenures Abolition Act 1660 (c. 24) (followed by the 1662 Act in Ireland) abolished most of the forms of feudal tenure which had previously existed, together with their incidents and converted those which remained into a single form of freehold tenure. Consequently, in Ireland, as in England, feudal tenure came to be confined to one category (free and common socage) and that category came to be known as freehold. Any future tenure to be created by the Crown could only be in free and common socage, subject to incidents appropriate to such tenure.

Administration of Estates Act (Northern Ireland) 1955 (c. 24)

- 2.14 As part of its general scheme for assimilation of real property with personal property for the purposes of devolution on intestacy, section 1(5) of the 1955 Act abolished the principal

form of escheat to the Crown (following section 45 of the English Administration of Estates Act 1925 (c. 23)). Escheat was a surviving tenurial incident under which real property reverted to the Crown on the death of the landowner intestate without heirs. With the abolition of this type of escheat the concept of tenure has been deprived of virtually all its practical significance, as the other remaining forms of escheat are of much less importance. Now when a landowner dies intestate leaving no successors, the Crown has a statutory right under section 16 of the 1955 Act to take the land as *bona vacantia* (following section 46 (1)(vi) of the 1925 Act).

- 2.15 However, the possibility of other forms of escheat remains to ensure that land will never be without an owner and if there is no owner it will return to the Crown when a freehold estate determines. Escheat may still take place today if the trustee in bankruptcy of a landowner, or the liquidator on the winding up of a company, exercises the statutory power to disclaim the land under the Insolvency (Northern Ireland) Order 1989 (No. 2405 N.I. 19) (Articles 152 & 288). Escheat takes place automatically and the freehold is extinguished (see *SCMLLA Properties Ltd v Gesso Properties (B.V.I.) Ltd* [1995] BCC 793 – the leading modern case which contains a very detailed discussion of the issues). On the dissolution of a company in Northern Ireland governed by the Companies (Northern Ireland) Order 1986 (No. 1032 N.I. 6), its property is vested in the Crown as *bona vacantia* (Article 605).
- 2.16 In England and Wales there is a similar provision in section 654 of the Companies Act 1985 (c. 6). That provision was considered in the *SCMLLA* case where Stanley Burnton QC (sitting as a deputy judge of the Chancery Division) pointed out (at page 805) that although the Crown may disclaim the freehold of a dissolved company, this has a “boomerang effect” because the property ultimately comes back to a different part of the Crown (the Crown Estate) as an escheat (see Megarry and Wade para. 2-024). The object of these provisions is not therefore easy to see in so far as they concern freeholds. Where the corporation dissolved is not governed by the Companies legislation, there will be an escheat of its real

property, but its leasehold property passes to the Crown under the Crown's right to *bona vacantia*, i.e. personal property without an owner. Special provision is made for company property to vest in the Crown where the land was subject to a rentcharge which has been disclaimed (Insolvency (Northern Ireland) Order 1989, Article 292).

- 2.17 Section 1 of the 1955 Act also abolished primogeniture (succession by the eldest male to the exclusion of all others) along with dower and curtesy (rights of a widow/widower to a life interest in the estate of their deceased spouse), all of which had survived from the feudal system. Similar reforms had been introduced in England and Wales by the Administration of Estates Act 1925 (sections 45 & 46(1)(vi) which provided for *bona vacantia* in lieu of escheat). **Question 1:** *The Commission takes the view that those forms of escheat which still remain also ought to be removed. We suggest that in circumstances where escheat can still arise, it ought to be replaced by a statutory provision for the ownerless property to pass to the Crown as bona vacantia. DO CONSULTEES AGREE?*

PREVIOUS REPORTS IN NORTHERN IRELAND

- 2.18 The concept of feudal tenure was considered by both the **1971 Survey** and the **1990 Final Report**. The **1971 Survey** favoured abolition, whilst the **1990 Final Report** was strongly of the view that feudal tenure could not be abolished without fatally undermining the doctrine of estates.

The 1971 Survey

- 2.19 The **1971 Survey** (para. 37) argued that:

“The theory that all land in the United Kingdom is still ultimately held under the Crown ... has no practical significance because the feudal incidents attaching to ownership and services have long since been abolished and any exercise of rights of paramount ownership by the Crown, such as compulsory acquisition of property for public

purposes, is now invariably made by statutory powers. We can see no justification for retaining this feudal theory in the mid-twentieth century and recommend its abolition so that the fee simple absolute in possession would become equivalent as far as the law permits to absolute ownership.”

The 1990 Final Report

2.20 The **1990 Final Report** (Volume 1 para. 2.1.26) disagreed with the proposals of the **1971 Survey** contending that:

“The word ‘estate’ has no significance outside the feudal context nor for that matter have the words ‘fee simple’. What the Survey proposed to do was to cut away the basic principle of land law while keeping a whole vocabulary which is inexplicable apart from that principle. Perhaps it is possible that the exercise which the Survey proposed could be carried through to its logical conclusion although we feel it is unrealistic to imagine that the ownership of land could ever be simplified on the lines of the law governing the ownership of chattels If the Survey’s proposal were implemented without a fundamental change in the language of the law, it would have no practical effect whatever It may be thought that a review of the whole land law is the ideal occasion on which a new departure in vocabulary should be made; but the Survey suggested no such thing and we do not think it would be right for us to make such a far-reaching suggestion. We fear the confusion that such a change would inevitably cause in a field of work which is minutely regulated by precedents. A change of language would be apt, and probably readily digested, if all titles to land were registered; but total registration of title in Northern Ireland, if it ever comes about, seems at the present time to be far in the future. **We recommend that the Survey’s proposal for the abolition of feudal tenure should not be implemented.**”

Since then no further action has been taken.

REPUBLIC OF IRELAND

- 2.21 In the Republic of Ireland, the question of feudal tenure was considered in the context of a project for the major reform and modernisation of land law and conveyancing law which was set up in 2003. It was a joint project which was established by the Department of Justice, Equality and Law Reform and the Irish Law Reform Commission. The publication of a Consultation Paper in 2004 (*Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* LRC Consultation Paper 34-2004) marked the completion of the first phase of that Project.
- 2.22 The 2004 Consultation Paper (see para. 2.03) clearly considered that certain aspects of the subject of tenure and estates were quite inappropriate to a 21st century system of land ownership. That was considered especially so in an independent state, particularly where the relationship between the State and its citizens is governed by a written Constitution. It was pointed out that the courts had emphasised on a number of occasions, that former Crown prerogatives were inconsistent with the democratic character of the State, as enshrined in the Constitution (see *Webb v Ireland* [1988] IR 353). This inconsistency with the principles of a democratic state governed by a written constitution was also recognised in the United States of America (2004 Consultation Paper para. 2.04; also see para. 2.49 below).
- 2.23 The State in the Republic of Ireland has “radical” (ultimate) title derived from the concept of tenure but this does not afford it any special status. For example, when the State or any other public body wishes to acquire land, it must invoke some statutory power of compulsory purchase. 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. That would be inconsistent with the Constitution, in particular the guarantee of the right to private ownership (Article 43).

- 2.24 The 2004 Consultation Paper (para. 2.07(4)) recommended that feudal tenure be abolished and this was reiterated by the subsequent Final Report of the Irish Law Reform Commission (*Report on the Reform and Modernisation of Land Law and Conveyancing Law* LRC 74-2005). Pursuant to that recommendation, section 9 of the Republic of Ireland's Land and Conveyancing Law Reform Bill 2006, abolishes the feudal concept of tenure, but preserves ownership of land through the related concept of estates. Section 9 also specifically provides that the position of the State under the State Property Act 1954 (No. 25/1954) (which covers disclaimer on dissolution of a company) and the Succession Act 1965 (No. 27/1965) (which provides for the State to be the ultimate successor on intestacy) is not effected. The 2006 Bill was passed by the Senate but further passage was interrupted by the 2007 General Election. Recently the Bill passed through the Committee Stage in the Dáil (Parliament, House of Representatives).
- 2.25 The 2004 Consultation Paper (para. 2.11) concluded that on balance for the time being it was preferable to retain the existing concept of estates. The Irish Law Reform Commission considered that eventually, at some point in the future when all land in the State has become registered land, it would probably be more appropriate to consider an alternative. (Compare the view expressed by the **1990 Final Report** quoted in para. 2.20 above). In the meantime, an estate would continue to denote the nature and extent of land ownership and would retain its pre-existing characteristics, but without any tenurial incidents. Any surviving customary right or franchise would also specifically survive along with any remaining fee farm grants made in derogation of *Quia Emptores* (see para. 2.10 above).

ENGLAND AND WALES

- 2.26 The real property reform legislation of 1925, (see List of Statutes – Birkenhead legislation) such as the Law of Property Act 1925 (c. 20), did not abolish the doctrine of tenure, but confined legal estates (as distinct from equitable interests) that could be created in future, to the fee simple absolute in possession and leases for a term of years absolute (see Chapter 3 below).

- 2.27 The Law Commission of England and Wales made a proposal for the abolition of freehold tenure in a draft Statute Law Reform Bill which was circulated to interested parties in 1968. The draft Bill contained a clause providing for the abolition of freehold tenure to the intent that a legal estate in fee simple absolute in possession would, subject to any encumbrances, be at law, but without prejudice to any equities, equivalent so far as the law permits, to absolute ownership.
- 2.28 That clause was removed from the draft Bill before the Commission published its report on the Statute Law (Repeals) Bill (*Statute Law Revision: First Report* (1969) Law Com No. 22 (Cmnd 4052). Those who were given the opportunity to comment on the proposal before formal publication, who included representatives of the legal profession, were apparently able to persuade the Law Commission not to proceed with the proposal.
- 2.29 However, questions continue to be asked about the relevance of such an ancient doctrine in a modern system of land law. Recognising the need to examine the case for reform, the Law Commission of England and Wales has put forward feudal land law for consideration in its Eleventh Programme of Law Reform (Law Com No. 306 para. 6.12). (See also Nugee “The feudal system and the Land Registration Acts” (2008) 124 LQR 586).

SCOTLAND

- 2.30 Feudalism arrived relatively late in Scotland from England in the 12th century, but over time the English and Scottish systems grew further apart (see Reid K, *The Abolition of Feudal Tenure in Scotland* (2003) Tottel Publishing). The system in Scotland assimilated more of the features typical of those in other European countries whilst that in England developed in a unique way which was not followed elsewhere (except where exported by the English). A key point of divergence was *Quia Emptores* which never applied to Scotland but which had an important influence on later developments in England because it prevented subinfeudation (see paras. 2.8 – 2.12 above).

- 2.31 In Scotland, subinfeudation was always permitted and continued to be practised until very recently, because it provided a useful means of imposing new rights and obligations. Over the years, as urbanisation and property development took place in the cities, various layers of ownership were created by the process of subinfeudation. A hierarchy of title was created with each person paying a “feu duty” (like a ground rent) to his or her superior and being responsible for the observation of various rights (both feudal and non-feudal). The result was a tiered structure of titles similar to the pyramid titles which are so common in Northern Ireland (as a result of fee farm grants and extensive use of long leases: see Wylie *ILL* paras. 4.179 – 4.182).
- 2.32 The revival of Roman law also had an impact in Scotland where its principles were received to a certain extent. There was a clash between the fundamental tenets of the two systems which eventually led to compromise. The final outcome was that feudal law in Scotland became partially Romanised. One obvious point of difference between Roman law and feudal law, which was permitted to remain, arose in relation to the notion of ownership of land. In Roman law there is no concept of estates; ownership is both absolute and undivided. In the feudal system the respective rights of superior (person from whom the land is held) and vassal (person holding land and in occupation) were evenly balanced; both had an estate or interest in the land and neither could be said to be an outright owner. The compromise achieved in Scotland resulted in acceptance of the fact that ownership was divided, but that put together the fragmented rights amounted to full ownership. The different rights were made up of three parts: the vassal held the *dominium utile* (useful ownership – a standard European term), the intermediate owners the *dominium directum* (qualified ownership) and the Crown the *dominium eminens* (paramount superiority).
- 2.33 Proposals for the abolition of feudal tenure had been on the table since the publication of a White Paper on Land Tenure in Scotland in 1969 (*Land Tenure in Scotland : A Plan for Reform* (1969) Cmnd 4099), although the Land Tenure Reform

(Scotland) Act 1974 (c. 38), which eventually followed those deliberations, did not include any provision for abolition. Nevertheless it did introduce some important reforms, including the phasing out of feu duties, which paved the way for complete abolition at a later date. It provided a mechanism for dealing with outdated or restrictive real burdens (like covenants), prohibited the creation of feu duties, conferred a right to redeem these voluntarily and provided for the compulsory redemption of existing feu duties on the next sale of the property. Subsequently, as part of its Fifth Programme of Law Reform, the Scottish Law Commission published its *Report on Abolition of the Feudal System* (1999) Scot Law Com No. 168 with draft legislation to abolish and replace the feudal system.

- 2.34 That legislation became the Abolition of Feudal Tenure etc. (Scotland) Act 2000 (asp 5). The 2000 Act completely abolished the remaining vestiges of the feudal system of land tenure and made new provisions for the ownership of land. From the appointed day (28 November 2004) all feudal estates in land have ceased to exist and the former vassal has become the owner of the land. The appointed day was fixed sufficiently long after the date when the Act was passed to give people time to make any necessary arrangements to adapt to the new law. For example, in some cases provision was made for rights to be preserved by registering a notice. Where the feu duty had not been redeemed already, it was extinguished on the appointed day but the former superior could, up to two years afterwards, serve a notice on the former vassal requiring payment of the compensation specified (calculated according to a statutory formula). In Scotland it is now the position that an owner of land is the absolute owner and the interest of any superior is extinguished. There is no place for the doctrine of tenure or of estates and the concept of outright ownership is very straightforward. The law has thus been brought into line with both economic reality and popular perception.
- 2.35 Although the concept of ownership in Scotland has been simplified, any other rights and interests which were a burden on the title before the appointed day, such as a mortgage or a lease, continue to affect the new outright ownership after that

day. Only rights which had depended on the feudal system, which were mostly feudal real burdens, were extinguished. Even they could be preserved, albeit in a slightly different form, because the 2000 Act included a mechanism for preservation by registration in certain circumstances at the option of the former superior. It is also important to note that the 2000 Act contains a specific saving for Crown prerogative rights, such as those relating to ownerless or unclaimed property (section 58). Also preserved are rights in respect of the seabed and foreshore (section 60).

- 2.36 Thus the position in Scotland today seems to illustrate that it is possible to transform an outdated and outmoded conceptual framework into a suitable modern structure for private ownership of land without losing any of the flexibility afforded by the older system.

NEW ZEALAND

- 2.37 In May 1840 Captain William Hobson RN proclaimed British sovereignty over New Zealand. The Crown acquired a “radical” or underlying title to the whole of the territory of New Zealand by virtue of its sovereignty. The courts there from the earliest times applied English law and feudal principles were extended to New Zealand as part of the law accompanying the settlers, notwithstanding the fact that a proper feudal system had never operated there.
- 2.38 Although the orthodox doctrines of tenure and estates were applied virtually unquestioned in New Zealand, (see for example in *Veale v Brown* (1866) 1 CA 152) queries were raised in a number of cases, though largely dismissed, in relation to Maori customary title. Of its nature Maori title predates the claim of British sovereignty. It could not sensibly be regarded as deriving from the Crown, still less from any Crown grant, so it did present conceptual difficulties on occasion. One case where the nature of native rights was considered was *Manu Kapua v Para Haimona* [1913] AC 761, in which the Privy Council explained that land which had been held by natives under their customs and usages had never been granted by the Crown but was vested in the Crown subject

to the burden of native customary title to occupancy. Thus the constitutional principle behind the doctrine of tenure applied to customary land, but the doctrine of estates did not.

- 2.39 In 1992 the New Zealand Law Commission published a preliminary discussion paper on *Tenure and Estates in Land* (1992) NZLC PP 20 in the context of a review of the law of property. The Law Commission argued strongly for reform on the basis that the feudal origin and significance of the doctrine of tenure had no contemporary relevance and that feudal tenure was a fiction. It was inconsistent with modern notions of property and with a modern system of land law. If it had any practical consequences it would be politically unacceptable.
- 2.40 The New Zealand Law Commission asked the rhetorical question as to whether it would be feasible to declare that the owner of an estate in fee simple in a piece of land would become the (allodial) owner of that land and to leave it at that, as appeared to have been done by several states in the United States of America (see paras. 2.49 – 2.53 below). In doing so, it pointed out that the aim would be not to affect the concept of tenure in other cases (notably between lessor and lessee). The Law Commission went on to explain that it considered that to stop at that point (abolishing tenure without addressing the concept of estates) would be neither logically nor conceptually sound, nor perhaps would it be adequate if the law was to be sensibly modernised. Taking that step alone might also create unnecessary uncertainties and problems that only litigation could resolve.
- 2.41 If owners in fee simple were to become allodial owners, they would own the land itself. It would be meaningless and contradictory to say that owners would also have an estate in the land or that they would any longer hold it in fee simple. To that extent at least the New Zealand Law Commission argued that the concept of an estate must disappear. At the time, the Law Commission was persuaded that there would be advantages in converting existing estates in fee simple into allodial ownership and making consequential changes, so it drafted a scheme making provision to this effect. However in

the course of the Law Commission's further work on this Project it emerged that there were difficulties with the nature of Maori rights and it was decided to cease work on it. (See Hinde McMorland & Sim, *Land Law in New Zealand* Volume 1, (2003) LexisNexis, para. 2.014). As a result, the scheme was not implemented.

2.42 In the subsequent Report published in 1994 entitled, *A New Property Law Act* (1994) NZLC R29, the New Zealand Law Commission reported that many helpful submissions had been received on their preliminary paper, most of them supportive of the proposals. They reported that they were continuing to give consideration to the matter but did not wish it to be a cause of delay to the long overdue reform of the Property Law Act of 1952 (No. 51) (NZ). The draft legislation which was set out in that Report eventually became the Property Law Act 2007 (No. 91) (NZ) (becoming operative on 1 January 2008). The provisions in that Act which relate to feudal tenure are very limited. Section 57 provides for the abolition of feudal incidents of tenure for the benefit of the Crown but goes no further. The 2007 Act was drafted on the assumption that the present land title system would continue, at least in the meantime, although the New Zealand Law Commission made the point that it would not be difficult to convert the terminology of the Act to achieve consistency with the final recommendations it thought would be likely in terms of the 1992 preliminary paper.

2.43 The scheme originally put forward by the New Zealand Law Commission in its 1992 preliminary paper is of considerable interest in the present context because it proposed both the abolition of feudal tenure and the conversion of fee simple estates into allodial ownership. If it had been implemented the scheme would have resulted in a system that is very similar to the one now operating in Scotland. The difference is that in Scotland there never was a doctrine of estates in the common law sense of the word and that may have assisted in facilitating the acceptance of the reform of the concept of ownership of land.

AUSTRALIA

- 2.44 By the Australian Courts Act 1828 (c. 33) (an Act of the Westminster Parliament), so much of the English land law at that time as was applicable to the colonial conditions of New South Wales and ultimately all the Australian colonies became the basis of Australian land law. It was accepted that the principle of feudal tenure was applicable and that all land was held directly or indirectly from the Crown. The two-fold fiction that all lands were once owned by the Crown and that all titles were originally derived from Royal grants was regarded as of universal application. Consequently, at common law there was no basis for the recognition of any communal occupation of land by aboriginal inhabitants.
- 2.45 The issue of feudal tenure in Australia has not been considered by the legislature although the Australian Law Reform Commission has published a Report on *The Recognition of Aboriginal Customary Laws* (1986) ALRC 31. However, there was an important decision on the matter by six justices of the High Court of Australia (its highest court) in the case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1. The court agreed that the common law, as it had been previously understood, should be reinterpreted to recognise native title rights to land: rights which do not derive from a Crown grant.
- 2.46 The means by which the court was able to arrive at that decision was by developing the concept of “radical” title to explain the interest retained by the Crown. The occupation of Australian territory had been consistently rationalised under the settlement principle. Australia was presumed to be “uninhabited” and the colonists were able to disregard any indigenous existence. As English land law had been incorporated into Australia by statute, it was accepted that the principle of feudal tenure was applicable to land. Although there was no legal precedent for the recognition of any communal occupation of land by aboriginal inhabitants, the High Court in *Mabo* made a distinction between acquisition of sovereignty and beneficial ownership of land, explaining that one does not necessarily lead to the other. By rejecting the view that sovereignty conferred absolute beneficial ownership of

all land on the Crown and holding that the Crown acquired only a “radical” or ultimate title to all land, *Mabo* undermined the basic assumption that had guided Australian property law since colonisation. In this context, “radical” title was the interest in the land (as distinct from beneficial ownership) which the Crown had obtained when it acquired territory in Australia.

2.47 While it confirmed that the doctrine of tenure is an essential principle of Australian land law, the High Court made it clear that the basis of this is no longer the feudal doctrine of tenure; instead it is the Australian doctrine of tenure which has “radical” or ultimate title as its foundation. Following this approach, the recognition of native title and rights in land created outside the doctrine of tenure is possible. Title to land is no longer exclusively derivative. It is recognised that all titles to land can no longer be traced back theoretically to a Crown grant. Only when the Crown exercises its power to grant an estate is such land brought within the tenorial regime. The fiction of original Crown ownership is excluded in respect of land which has not been the subject of a Crown grant. This is consistent both with the Crown’s “radical” title and the doctrine of tenure.

2.48 Following the *Mabo* decision the Commonwealth Parliament of Australia enacted the Native Title Act 1993 to provide statutory recognition and protection of native title. Since then there has been some interesting academic debate on feudal tenure, with some writers arguing for its abolition and replacement with an allodial model. (See for example, Devereux and Dorsett “Towards a Reconsideration of the Doctrine of Estates and Tenure” (1996) 4 APLJ No 1; Secker “The Doctrine of Tenure in Australia Post-Mabo: Replacing the Feudal Tenure Fiction with Mere Radical Title Fiction, Parts 1 & 2” (2006) 13 APLJ No 2 107 & 140; Hepburn “Disinterested Truth: Legitimation of the Doctrine of Tenure Post-Mabo” [2005] MULR 1).

Although post-*Mabo* there was a judicial trend to question the utility of the tenure system in Australia (see for example *Wik Peoples v Queensland* (1996) 187 CLR 1, *Fejo v Northern Territory* (1998) 195 CLR 96 and *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1), a distinction between common law

native title and native title under the Native Title Act 1993 emerged in the influential decisions of the High Court of Australia in *Western Australia v Ward* (2002) 213 CLR 1 and *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58, in which the primacy of the 1993 Act was affirmed. The possibility of claiming common law native title has not been fully explored in Australia since then, but *Mabo* has been influential internationally. For example, it has been relied on by the courts in Malaysia (*Kerajaan Negeri Selango v Sagong bin Tasi* [2005] AILR 71) and Belize (*Aurelio Cal, et al. v Attorney General of Belize*, (Claim 121/2007) (18 October 2007)) in achieving their own recognition of native title.

UNITED STATES OF AMERICA

- 2.49 Originally English land law, and consequently the doctrines of tenure and estates, were part of the law of many of the American colonies. It might have been expected that tenure would have disappeared with the United States Declaration of Independence in 1776, but that was not the case. Under the United States constitution, both the national and state governments are granted certain powers. The United States government is based on federalism which involves a division of power between the national and state governments.
- 2.50 After independence, the common law continued to be the basic law of most of the new States and in some States (such as Georgia and South Carolina) the owners of fee simple estates now simply hold their land from the State. However, tenure has on the face of it been done away with in the great majority of States, either by their constitutions, by legislation or through judicial decision. Thus in Minnesota for example, section 15 of the 1857 Constitution declared that all land was allodial (see para. 2.4 above). The same provision is in Article I: section 14 of the Wisconsin Constitution, and in section 28 of the Arkansas Declaration of Rights, which goes on to prohibit “feudal tenures of every description, with their incidents.”
- 2.51 Tenures were abolished in Virginia as early as 1779 (also by derivation in a number of the North West Territory States formed within the very large boundaries of post-colonial

Virginia) and in Connecticut in 1793. The ownership of land was declared to be allodial by statute in Kentucky. The courts in some other States, for example California and Maryland, have held that tenures do not exist in the State and that all land is allodially owned (see Vance "The Quest for Tenure in the United States" (1924) 33 Yale LJ 248).

2.52 Arguably, this does not add up to very much because the difference between land held by tenure from the Crown and that held allodially in some of the United States seems to have been little more than a variation of words. One may speculate that the purpose of the legislation was symbolic, to remove the shadow of colonial status. On the practical side it served the limited end of doing away with vestigial feudal obligations attaching to the land, notably the quit rents that existed in a number of the former colonies and which were a serious source of grievance before the American Revolution. In most States, the doctrine of escheat has been replaced by a statutory provision making land belonging to a deceased owner dying without any successors pass to the State.

2.53 The purpose of abolishing tenure does not seem to have been to make other substantial reforms of land law because no other measures were taken to modernise or to simplify title. In particular, unlike Scotland (para. 2.30 above) and what was proposed for New Zealand (para. 2.37 above), but as has been proposed for the Republic of Ireland (para. 2.21 above), the doctrine of estates was not abolished in the United States. Estates in fee simple and life estates, along with reversions, vested and contingent remainders, and the rest of the inherited paraphernalia, continue to be part of American property law except in Louisiana. Only fee tail estates have been abolished in many States. (Edgworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*" (1994) 23 Anglo-American Law Review 397).

OTHER LEGAL SYSTEMS

2.54 In a Roman law system there is generally no concept of tenure or of estates (for example, as in France, where the old feudal

system exported to England by the Normans was abolished during the Revolution in 1789). Ownership attaches not to estates of various duration but to the land itself. There must always be an owner of the land and limited rights are simply an encumbrance on that ownership. The notion that people can “own” land in the same way and to the same extent as they own furniture, cars or shares seems ordinary and natural to anyone who has been brought up under European-based civil law systems or indeed probably to most non-lawyers in Northern Ireland. Although civil law systems of property ownership may be simpler, they do not lack flexibility or sophistication (see Buckland and McNair *Roman Law and Common Law* (2nd ed. Cambridge University Press).

OPTIONS FOR REFORM

2.55 Feudal tenure is an ancient and outmoded concept of only technical significance today. The vast majority of people are not aware of its continuing existence and it is of little practical significance. It is only relevant in relation to the surviving forms of escheat (see para. 2.14 above) and it has already been suggested that these remaining vestiges of feudalism ought to be removed (see para. 2.17 above). Land law has in most respects moved on from the ancient concepts and practices employed by the feudal system, so it seems inconsistent that remnants of feudal law remain in operation. Ownership of land concerns many people and a majority of the population deals in land at some time in their lives. Those who are not lawyers generally have little knowledge or understanding of the notions of tenure or of estates. To the lay person, the owner-occupier of the property is the “owner” of it and there the matter ends. The Land Registry uses the phrase “full owner” and to that extent the term “owner” is already in use (see para. 2.56(3) below), although admittedly it applies to ownership of an estate in that context. The question we have to consider now is whether this is the time to reform the legal position.

2.56 It seems to the Commission that there are three possible ways forward;

- (1) Preserve the *status quo*, retaining the concepts of both feudal tenure and estates.

This option would involve accepting the recommendations of Volume 1 para. 2.1.26 of the **1990 Final Report**, taking the view that feudal tenure should not be abolished because it is inextricably bound up with the doctrine of estates and because there are hidden difficulties involved in cutting away the doctrine of tenure on its own. The arguments in support of retention of the doctrine of tenure include drawing attention to the fact that the system has worked well for several hundred years and that it forms an important foundation for the whole framework of land law. It could be said that there is no pressing need to modernise for its own sake when there appears to be no pressure for a replacement set of principles. There is no guarantee that a modern simplified notion of ownership would be as suitable for the purpose as the traditional one has proved to be.

- (2) Abolish feudal tenure but retain the concept of estates.

The second option would be to adopt the proposals of paras. 37 – 38 of the **1971 Survey** and to abolish feudal tenure but retain the doctrine of estates. If the concept of estates was retained, the fee simple absolute would become equivalent, so far as the law permits, to absolute ownership. This would align the law in Northern Ireland with the position in the Republic of Ireland and many of the states in the United States of America.

The argument for this option is that feudal tenure should be abolished because it no longer has any practical significance; any exercise of rights of paramount ownership by the Crown, such as compulsory acquisition of property for public purposes, is now invariably made under statutory powers and the prerogative rights of the Crown would not be affected, for example, as was done under the 2000 Act in Scotland (see para. 2.35 above). It can also be argued that any changes which update the law and assist in making it more intelligible are desirable unless there are

overriding disadvantages or insurmountable difficulties. Reforming tenure would remove an arcane concept without introducing any new untried alternative theory that might be the source of unforeseen complications. It would be an important first step towards achieving a simpler framework of ownership.

The abolition of tenure would not involve the necessity of reinterpreting the wording commonly used in documents of title. There is no reference to tenure in deeds relating to unregistered land and phrases such as “in fee simple” could continue to be used. Eventually, when compulsory first registration is further advanced and has resulted in the vast majority of title being registered in the Land Registry, it may be more appropriate to consider a move to absolute or allodial ownership. In the meantime, it must be recognised that making the choice to abolish the doctrine of tenure can only be considered a half measure in many respects because it preserves the doctrine of estates (see Chapter 3 for a consideration of estates).

(3) Abolish both feudal tenure and the concept of estates.

The third and most far-reaching option would be to abolish both feudal tenure and estates. Arguably, this radical approach is to be preferred because abolishing one whilst retaining the other may be viewed as neither logically nor conceptually sound. A simpler concept also fits in with European notions of ownership and is more widely understood by everyone, which is part of a move towards achieving common systems wherever possible.

If the concept of estates was abolished along with that of tenure, the person who was the fee simple owner would become the absolute or allodial owner of the land and own the land itself. However, it would still be possible to divide the rights of ownership in time without the need for the conceptual fiction of ownership of an estate. To illustrate this idea one needs only to consider the ownership of chattels. There are no estates in cars or industrial

machinery but leases are possible and not uncommon. If ownership of land becomes absolute or allodial, that ownership would continue to be subject to other interests affecting the land, such as leases, mortgages, easements and covenants. Whilst the concepts can be simplified, the number of interests does not necessarily have to be correspondingly reduced. It would also be important to have a saving for Crown prerogative and other rights, as was done in Scotland by the 2000 Act, section 58.

Interestingly, section 12 of the Land Registration Act (Northern Ireland) 1970 (c. 18) provides that, in the case of a freehold estate, a person may be registered as owner in fee simple. In that Act the owner is referred to as the “full owner” of an estate whether it is a leasehold or a freehold estate. It is not thought that there was any intention behind the legislation to alter the existing doctrines, but it may be possible for full ownership of an estate to be redefined to mean full ownership of the land itself without consequent ill effects. Now that compulsory first registration has been introduced on the trigger of the sale of property, this will ultimately lead to a position where all title becomes registered in the Land Registry. It might be argued, that removing the concept of an estate and replacing it with a simpler concept of ownership, would be much more straightforward now since significant steps have been taken towards achieving universal registration of title, than it would have been when most property was unregistered. Perhaps it could also be said that this is only a logical development of the concept of ownership as it is currently used in the Land Registration Act (Northern Ireland) 1970.

The Commission is fully aware that particular attention will have to be paid to the issue of adapting the land registration scheme to the new conceptual framework. Provision will also have to be made for converting unregistered land, including title deeds and other documentation relating to such land, to that framework. Textual amendments will have to be made to many statutory provisions referring to estates such as the fee

simple. However, the Commission does not view these matters as insuperable (see the views recently expressed in Nugee “The feudal system and the Land Registration Acts 2002” (2008) 124 LQR 586).

Question 2: *In the light of the move towards a system of universal registration of title, the Commission is inclined to recommend that both feudal tenure and the doctrine of estates should be abolished. DO CONSULTEES AGREE?*

CHAPTER 3. ESTATES IN LAND

INTRODUCTION

- 3.1 As was discussed in the previous Chapter, the other fundamental feature of the feudal system imposed on Ireland by the Normans was the abstract concept of “estates” in land. What a person or body owns in respect of land is not the physical entity itself (the “land”), but rather some “estate” in the land. In this context the word “estate” indicates a substantial interest and is often used to distinguish what is held from other interests in land, which may be described as appurtenant and other interests or rights. Such interests (for example, an easement or profit à *prendre* or covenant) are discussed in the next Chapter. The previous Chapter raised the issue of whether the concept of “estates” should be retained. The Commission regards this as a difficult question on which it has reached no firm conclusion. However, it was pointed out in the previous Chapter that, even if our land law system adopted a form of “allodial” ownership, it should remain possible to create “sub-interests” out of the land. It is contemplated that it should remain possible to create, for example, a life interest in favour of another person, various “leasehold” interests or tenancies and other interests like easements. The present Chapter proceeds, therefore, on the assumption that the concept of an “estate” or interest in land will be retained in one form or other.
- 3.2 As the current law in Northern Ireland stands, there remains the full panoply of estates which were developed under the feudal system. These are what have come to be known as “freehold” estates (see Pearce and Mee Chapters 4 – 7; Wylie *ILL* Chapter 4). There are three such estates, with several variants: (1) the fee simple, (2) the fee tail, (3) the life estate. A much later development were “leasehold” estates, which only became recognised as creating an interest in land from the 17th century onwards. These estates indicate the extent of the rights enjoyed by the holder in respect of the land in question and for

how long they may be enjoyed (for example, by successors in title).

- 3.3 While the existence of so many estates may provide much flexibility and sophistication in relation to land ownership, there is no doubt that it causes problems for conveyancing, in particular the investigation of title. A solicitor acting for a purchaser of land in Northern Ireland must bear in mind that several estates held by different persons or bodies may exist with respect to the same parcel of land. It is not surprising, therefore, that previous reports have recommended simplification.
- 3.4 What is striking about the recommendations concerning estates in land contained in the previous reports relating to the law of Northern Ireland is the high degree of unanimity on most points. This is perhaps, not surprising because many of the points had been dealt with by legislation in other jurisdictions, such as England and Wales (in particular by the 1925 “Birkenhead” property legislation (see List of Statutes)) and New Zealand (in particular its Property Law Act 1952 (No. 51), recently replaced by the Property Law Act 2007 (No. 91)). The main points covered by the previous reports were, reduction in the freehold estates which would confer legal title on the holder, abolition or modification of certain estates and the concept of “overreaching” (which governs the extent to which a purchaser is concerned with certain estates or interests attaching to land). The ensuing paragraphs deal with these points.

REDUCTION IN LEGAL ESTATES

- 3.5 The **1967 Lowry Report** drew attention to the 1925 Birkenhead legislation and set down what it described as “tentative conclusions” (para. 141) as follows:

“(a) The basic principles of the scheme seem to us to be as sound for Northern Ireland as they appear to have been for England, namely (i) that the legal estates capable of subsisting in land (i.e. the ‘commodities’ that are normally bought and sold in the land market) should be reduced to the essential

minimum – the fee simple absolute in possession (including the fee simple subject to a perpetual rent) and the term of years absolute; and (ii) that there should be a ‘curtain’ between those estates and the various ‘family’ interests which are not normally dealt with in the market and can be given their full effect out of the proceeds of sale of the estates.

(b) The principle that, so far as possible, there is always one person or a small group of persons with full power to convey the fee simple in any given piece of land free from ‘family’ interests (if any) that affect it, seems to us to be an essential one if the free transfer of land is to be promoted.”

In accordance with these principles a prospective purchaser of land would not be concerned with “family” interests hidden behind the “curtain” protecting the estate being sold, because on completion of the purchase those interests would be “overreached”, i.e. they would cease to attach to the land sold and would thereafter attach to the proceeds of sale in the hands of the vendor (see para. 3.9 below).

3.6 The **1971 Survey** cited the above view and agreed “that the policy behind the 1925 provisions is both acceptable and desirable for Northern Ireland” (para. 15). It went on to state:

“While we acknowledge that social and commercial relations require some ‘fragmentation’ of ownership of land, we are convinced that a reduction in the number and character of estates in land must be made to facilitate maximum speed and efficiency, with minimum cost, in land transactions.”

The **1990 Final Report** took the same view (Volume 1 Chapter 2.1) and its draft Property Bill contained provisions to implement this policy (based on provisions in the **1971 Survey’s** draft Property Bill Volume 2). Much of what was contained in these parts of the draft Bills has not been implemented. However, it should be noted that the Republic of Ireland’s Land and

Conveyancing Law Reform Bill 2006, currently before the Oireachtas (Parliament) does contain such provisions (Part 2).

- 3.7 It is important to appreciate that the recommendations made in the previous reports were not as revolutionary as might have appeared. They were concerned with freehold estates only. They did not affect leasehold estates which are, of course, very much commercial transactions. With respect to freehold estates, they reflected the fact that estates less than the fee simple (i.e. the fee tail and life estate) were used primarily to create the old family settlements designed to control the succession to family land through the generations, which became so common during the 17th and 18th centuries. By the 19th century the Westminster Parliament became concerned at the harmful effect such tying-up of much land had on the agricultural industry and, indeed, the economy generally. Legislative reform culminated in the Settled Land Acts 1882 – 1890 (see Harvey, *Settlements of Land* Sweet & Maxwell (1973)). A key feature of this legislation was the statutory powers to deal with the land conferred on owners of “limited” freehold estates (the fee tail and life estates). These included the power to sell the fee simple subject to provisions designed to protect persons due to succeed to the land on determination of such limited estates. The Acts introduced what was a form of “overreaching” in the sense that, when a limited owner sold the fee simple, the interests of persons due to succeed ceased to bind the land and instead attached to the purchase money raised on the sale. The purchaser would obtain a good title to the fee simple provided the purchase money was paid to trustees, to be held by them as a substitute for the land (see generally Wylie *ILL* Chapter 8).
- 3.8 An inevitable consequence of the Settled Land Acts was that the limited freehold estates (fee tail and life estates) ceased to have any practical significance from the point of view of the legal title to land and conveyancing. A person holding one of these estates was automatically entitled to deal with the fee simple and such statutory powers could not be excluded or curtailed by the terms of the instrument creating the settlement (Settled Land Act 1882 (c. 38) sections 51 & 52). Since

exercise of the statutory powers would usually “overreach” the limited estate held by the person exercising the power, treating such an estate as equitable only was taking the effect of the Settled Land Acts to its logical conclusion. So far as freehold land was concerned, legal title would be held by a person who either had the fee simple vested in him or her, or was given a statutory power to convey the fee simple.

- 3.9 **Question 3:** *In light of the above the Commission takes the view that the recommendations in the previous reports for reduction in the legal estates in freehold land remain sound. In particular the fee simple should become the sole estate conferring legal title to freehold land and any other freehold estate would create an equitable interest only. Such an equitable interest would be overreached on a conveyance of the fee simple and would thereafter attach to the “capital money” raised on the sale or other conveyance. DO CONSULTEES AGREE?*

FREEHOLD ESTATES

- 3.10 There are several detailed matters which must be addressed with respect to implementation of the “reduction in legal estates” policy, partly because the previous reports made different recommendations with respect to them. These are best considered by taking each freehold estate in turn.

Fee Simple

- 3.11 If the recommendations in previous paragraph (3.7 – 3.9) were accepted, the consequence would be that, so far as freehold land was concerned, the fee simple estate would remain the largest estate capable of being held in respect of land. It would also remain a superior estate to leasehold estates. **Question 4:** *If the suggestion mooted in Question 2, Chapter 2 (that the concept of estates should be abolished along with the concept of tenure) were adopted, the Commission takes the view that a fee simple should, in future, be regarded as conferring “ownership” of the land, with the holder of that estate being the owner with legal title to the land and, in the case of registered land, registered as “owner”. The current Land Registry system*

of registering a person as “full owner” would seem to be easily adaptable to such a concept. DO CONSULTEES AGREE?

(i) Fee Simple in possession

- 3.12 A matter which requires further discussion is what is meant by “fee simple” in this context. There are two main points. The first is that a fee simple may be held in possession (in the sense that the holder is currently entitled to occupy the land and to enjoy its other benefits) or in reversion or remainder (in the sense that some other person, such as the holder of another estate like a fee tail or life estate, has the current right to occupy the land). A reversion exists where the holder of a fee simple grants a lesser estate to another person and makes no disposition of the fee simple. Thus if A (holder of the fee simple) grants a life estate to B, A has a fee simple in reversion which will not fall into possession until B dies. Alternatively, A could grant a life estate to B, with remainder to C in fee simple. Here C has a fee simple in remainder which again will not fall into possession until B dies. Since, as pointed out earlier, in such case B, although granted a life estate only, would have the power to convey the fee simple under the Settled Land Acts 1882 – 1890, he or she has, in effect, a fee simple in possession. B is, therefore, the person who really has legal title to deal with the land and not A or C. Because a reversionary or remainder interest confers no current right to occupy or enjoy other benefits of the land it usually has little commercial value. It is not surprising, therefore, that the previous reports and the legislation in both England and Wales and the Republic of Ireland specify that it is only a fee simple “in possession” which confers legal title. **Question 5:** *The Commission takes the view that this is again a sound principle which should be implemented. DO CONSULTEES AGREE?*

(ii) Modified fees

- 3.13 Rather more controversial is what the position should be with respect to “modified” fees simple. This is where the fee simple is regarded as not “absolute” but, instead, subject to some limitation. The typical examples are a determinable fee (the word “simple” is usually dropped) and a fee simple subject to a

condition subsequent. The former involves a grant of a fee simple to be held by the grantee until some event happens: for example, A (holder of a fee simple absolute) grants the land to B in fee simple until the Northern Ireland soccer team wins the World Cup. Here B, unlike A, holds a determinable fee only, which will end automatically if (but only if) the event specified happens (it may, of course, never happen!). Until the event happens A holds a “possibility of reverter” only (that is, the mere hope that the fee simple will revert to him or her).

- 3.14 A fee simple subject to a condition subsequent is a similar estate, but there are important distinguishing features. Taking the example given above, the grant by A could have been worded instead – to B in fee simple subject to the right of A to re-enter and take back the fee simple if the Northern Ireland soccer team wins the World Cup. Here A (the grantor) has the right of re-entry. An alternative version of a fee simple subject to a condition subsequent would be a grant by A to B in fee simple, but if the Northern Ireland soccer team wins the World Cup, then to C in fee simple absolute (using a conveyance to uses executed by the Statute of Uses (Ireland) 1634 (c. 1) to create a legal executory interest: see Wylie *ILL* para. 5.019). Here A has retained no interest in the land and instead C has a right to enter the land if the event happens. If that right is exercised B loses his fee simple and C acquires a fee simple in possession. The crucial point is that in both versions, unlike in the case of a determinable fee, there is no automatic determination of B’s fee simple on the happening of the event – A or, as the case may be, C, must exercise the right of re-entry or the right to enter; until they do B’s fee simple will continue.
- 3.15 In passing, attention should be drawn to a confusing use of terminology in this context. The expressions “right of re-entry” and “right of entry” as used in the previous discussion refer to a right of someone else (the original grantor or a person entitled to a gift over) to take the land away from the person hitherto entitled to it. It is what is sometimes referred to as a right of “forfeiture” (similar to a landlord’s right to forfeit a tenancy for breach of covenant by the tenant). The point about such a right is that its exercise terminates (forfeits) the estate or interest

hitherto held by the person whose estate was subject to the right. It should be distinguished from a different kind of “right of entry” which may be attached to an estate, which is the right of the grantor to take possession of the land and to hold on to it until some breach by the grantee is remedied. A typical example was a right of entry to enforce payment of a rentcharge and such a right was recognised by section 44 of the Conveyancing Act 1881 (c. 41) (the remedies conferred by this section were expressly excluded from the operation of the rule against perpetuities: Conveyancing Act 1911 (c. 37), section 6; Perpetuities Act (Northern Ireland) 1966 (c. 2), section 12). Exercise of such a right of entry does not forfeit the grantee’s estate in the land; it simply suspends the grantee’s right to possession until the breach causing its exercise is remedied. Conversely, the grantor is entitled usually to retain possession only until the breach is remedied. In the present context of modified fees, the Commission has in mind both categories of right of entry.

- 3.16 Another version of a fee simple subject to condition subsequent, which was not uncommon, is a fee simple subject to a power of revocation by the grantor. Exercise of this power may also be linked to the happening of an event, but it may be a general power exercisable at the discretion of the grantor.
- 3.17 For completeness sake, it should be mentioned that a very common grant in Northern Ireland involving a fee simple was the fee farm grant (see Wylie *ILL* paras. 4.057 – 4.111). Such grants took various forms, including ancient grants creating feudal tenure and, somewhat rarer ones involving creation of a rentcharge. In more modern times the most common form of grant was one creating the non-feudal relationship of landlord and tenant. These were either “conversion” grants created under statutory provisions for conversion of various categories of renewable leases (such as the Renewable Leasehold Conversion Act 1849 (c. 105)) or grants facilitated by section 3 of Deasy’s Act (the Landlord and Tenant Law Amendment Act, Ireland, 1860 (c. 154), which provided that the relationship of landlord and tenant could be created without a reversion being retained by the landlord. Such grants do not require further

consideration here since their creation was prohibited by Article 28 of the Property (Northern Ireland) Order 1997 (No. 1179 N.I. 8). Provision for redemption of existing fee farm rents was made by a series of statutes: the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 (c. 7) and Part II of the 1997 Order, which was replaced by the Ground Rents Act (Northern Ireland) 2001 (c. 5). These provisions will be considered in a supplementary Consultation Paper, where the issue will be raised as to whether some more radical redemption or conversion scheme should be introduced to deal with existing fee farm grants.

- 3.18 The issue which remains to be considered is how modified fees, such as a determinable fee and a fee simple subject to a condition subsequent or a power of revocation, should be treated by a provision making the fee simple in possession the sole freehold estate conferring legal title to land or, in an “allodial” system, legal ownership. The practical significance of this issue is that, if such modified fees are not regarded as conferring legal title on the grantee, the grantee will not have an unrestricted right to convey that title to someone else. At the very least, the grant will be treated as creating a settlement of the land, so that the grantee will have to invoke the statutory powers conferred by the Settled Land Acts 1882 – 1890 (or any replacement of them – see Chapter 5). That will involve using the machinery of those Acts (under the 1882 – 1890 Acts the capital money must be paid to trustees of the settlement and a receipt by them acknowledging that payment is a vital part of the title deed). Solicitors acting for the initial purchaser and subsequent purchasers of the land must watch out for these matters when investigating title. An obvious question which should be addressed is whether the holder of a modified fee should be subjected to such complications when conveying the land. To some extent the answer to this may depend on how far such estates would be regarded as uncommercial (i.e. not freely marketable) on their own, without some mechanism which enables the holder to convey not just the modified fee held under the grant, but a fee simple absolute which overreaches any interests like a possibility of reverter, right of re-entry or power of revocation.

- 3.19 In considering the questions posed in the previous paragraph, it may be important to note that modified fees are probably comparatively rare nowadays and that it is most unlikely that new ones will be created in the future. Furthermore, many modified fees will have become fees simple absolute under the Perpetuities Act (Northern Ireland) 1966 (section 13) because the possibility of reverter or the right of re-entry has ceased to be operable or exercisable once the perpetuity period has expired. A later Chapter (Chapter 4) moots abolition of the rule against perpetuities, but it is envisaged that there would be a saving for the effect of section 13 or some other conversion provision to render modified fees a fee simple absolute (see para. 3.24(5) below).
- 3.20 The Commission takes the view that the one thing which new legislation must do is to make the position of modified fees absolutely clear. The current law is far from clear. The only point which is obvious is that under the Settled Land Act 1882 (section 58(1)(ii)), a fee simple “with an executory limitation, gift, or disposition over, on failure of ... issue, or in any other event” involves a settlement and so a conveyance by the holder must be carried out under the statutory powers. The existence of such a limitation “over” was obviously thought to involve a “succession” of interests which is a key concept in the Act. What remains unclear is what the position is with respect to a modified fee which lacks a “succession” in this sense, such as a determinable fee (where the grantor has a possibility of reverter) or a fee simple subject to a right of re-entry again retained by the grantor (rather than being conferred on a third party) (see Wylie *ILL* paras. 8.021 – 8.023 and para. 3.14 above).
- 3.21 The previous reports in Northern Ireland contained different recommendations. The **1971 Survey** recommended that fees subject to a limitation over should not be regarded as a fee simple absolute and, as under the Settled Land Acts 1882 – 1890, should be regarded as a settlement of the land (attracting its recommended replacement scheme) (para. 28). Modified fees “standing on their own” should, on the other hand, not be regarded as giving rise to a succession of interests. The **1990**

Final Report recommended that only a fee simple liable to be divested by virtue of a statutory provision, (many determinable fees are of this kind, e.g., where land was conveyed under statutory provisions to a railway company to lay lines on it) or subject to fee farm rents or rentcharges or a rent service, should be regarded as a fee simple absolute. All other non-statutory determinable fees, fees subject to a condition and revocable fees, even though standing on their own, were recommended to be subject to settlements legislation (see Volume 2, draft Property Order, Article 5).

3.22 The position in England and Wales under the 1925 legislation is not entirely clear. Under the Law of Property Act 1925 (c. 20), it appeared that only statutory determinable fees were included in the definition of a fee simple absolute (section 7), but an amendment was quickly made by the Law of Property (Amendment) Act 1926 (c. 11) to meet what were perceived as difficulties concerning fees simple subject to a rentcharge. However, the amendment was so widely drafted that it appears to cover all fees simple subject to a condition subsequent (see Megarry and Wade para. 6-014), unless there is an executory gift over (see Megarry and Wade Appendix paras. A032 – A037).

3.23 In the Republic of Ireland, a much simpler position is proposed to be adopted in section 11(2) of the Land and Conveyancing Law Reform Bill 2006. In effect, all modified fees are included within the concept of a fee simple in possession (which under the Bill is the only freehold estate which confers legal title to land). It is specified that this includes: –

“(a) a determinable fee,

(b) a fee simple subject to a right of entry or re-entry,

(c) a fee simple subject only to –

(i) a power of revocation,

- (ii) an annuity or other payment of capital or income for the advancement, maintenance or other benefit of any person, or
- (iii) a right of residence which is not an exclusive right over the whole land.”

3.24 It seems to the Commission that the main options for dealing with modified fees are as follows:

- (1) Treat them all as a fee simple absolute conferring legal title on the holder, which the holder is free to convey (subject, of course, to the modification attaching to the fee simple in question) without having to comply with settlements legislation (or any legislation replacing that). This is what is proposed in the Republic of Ireland’s Bill. It has the merit of simplicity and arguably this is the approach which should be adopted with respect to what must be very rare types of estate nowadays. However, it might mean that a few holders of a fee simple estate would find it difficult to dispose of, because the modification attaching to it may be regarded as rendering the estate unattractive to the marketplace.
- (2) Treat them all as not coming within the concept of a fee simple absolute, so that the holder of any modified fee would have no legal title by virtue of the grant and the statutory powers relating to settlements of land would have to be invoked in order to carry out a conveyance. The recommendations in the **1990 Final Report** come close to this. It again has the merit of simplicity, but it may be questioned whether it is either necessary or desirable to impose on holders of all modified fees the complications necessarily involved in using statutory provisions relating to settlements every time a transaction like a sale is being carried out.
- (3) Treat some modified fees as conferring legal title and the others as involving a settlement. Such a

“compromise” was recommended by the **1971 Survey**, where the essential distinction drawn was between a modified fee “standing on its own” and one involving a “succession of interests” (because there is a limitation or gift over on determination of the fee simple). The position under the English legislation also seems to accord with this approach. Such a compromise, which necessitates conveyancers having to decide which category they are dealing with, does make for complicated law and thus runs counter to one of the major objectives of law reform. On the other hand, it does recognise a fundamental feature of settlements legislation, that it is concerned with dispositions of land which create a succession of interests.

- (4) In addition to the options stated above, add interests like a possibility of reverter and right of entry or re-entry attached to modified fees to the list of “impediments” contained in section 3 of the Property (Northern Ireland) Order 1978 (No. 459 N.I. 4). This would enable holders of existing modified fees to apply to the Lands Tribunal for Northern Ireland for orders under Part II of that Order modifying or extinguishing such impediments. It would facilitate development of land for purposes which would cause a reverter or re-entry provision to come into play, in cases where it is difficult to determine who is entitled to enforce that provision. It was to overcome such difficulties in the title to modified fees that the English Reverter of Sites Act 1987 (c. 15) was enacted. The Law Commission of England and Wales had drawn attention to cases where land had been conveyed under 19th century legislation (such as the School Sites Act 1841 (c. 38), Literary and Scientific Institutions Act 1854 (c. 112) and Places of Worship Sites Act 1873 (c. 50)), but had since ceased to be used for such purposes, triggering a reverter in favour of some unknown or untraceable successor to the original grantors (see *Property Law – Rights of Reverter* (1978) Law Com No. 111 (Cmnd 8410)). The 1987 Act enables the holder of a modified fee to apply to the Charity

Commissioners to have the reverter rights extinguished. Although only the 1854 Act applied to Ireland, the Commission is aware that private grants of a similar nature have been made here (see, e.g., *Walsh v Wightman* [1927] NI 1 – grant for building of manse for particular Presbyterian congregation subject to right of re-entry by grantor if that congregation ceased to be connected with the General Assembly of the Presbyterian Church or became united with another congregation or ceased to exist or be independent). For that reason, conferring jurisdiction for modification or extinguishment on the Lands Tribunal under the tried and tested provisions of the 1978 Order might prove to be very useful.

In passing, the Commission notes that other parallel 19th century legislation was enacted for Ireland to encourage landowners to convey land for various public purposes, but this generally made provision for the granting of leases (see e.g., the Leasing Powers for Religious Worship (Ireland) Act 1855 (c. 39), the Leasing Powers Amendment Act for Religious Worship (Ireland) Act 1875 (c. 11), the School Sites (Ireland) Act 1810 (c. 33) and Leases for Schools (Ireland) Act 1881 (c. 65); amended by the School Sites Act (Northern Ireland) 1928 (c. 8). The Irish Parliament also passed similar legislation in the 18th century to promote manufacture of material like linen and cotton: see Wylie *ILL* para. 8.008). The Commission has been told that, again development of land held under such leases, which is no longer used for the original purposes, is often impeded because of title problems related to the difficulties in tracing the current owner of the lessor's title. The need to trace that owner arises from the fact that, under the terms of section 5 of the 1881 Act, there is an implied covenant not to use the premises for purposes other than those expressed in the lease and there is a condition that if the premises cease to be used for three or more years for such purposes the lessor or his/her successors have a right

of re-entry. It should be noted that the provisions of section 13 of the Perpetuities Act (Northern Ireland) 1966 (rendering a right of re-entry attached to a fee simple unenforceable after the perpetuity period) do not apply to a right of re-entry attached to a lease. The Commission takes the view that any extension of the Lands Tribunal's jurisdiction should apply also to such leasehold cases.

- (5) The most radical option, which does not seem to have been considered in previous reports, would be to prohibit the creation of any further modified fees and to convert existing ones into a fee simple absolute. This is obviously the most simple solution from the conveyancing point of view, but the question remains whether it can be justified.

It is easier to justify prohibition of future creation of such estates because it is highly unlikely that landowners would wish nowadays to create such modified fees as a determinable fee or fee simple subject to a condition subsequent, at least not in respect of the legal title to the land. It seems to the Commission that a prohibition would create no substantial restriction on landowners' freedom to dispose of land, especially since it would remain possible to create modified fees in respect of the beneficial ownership under a trust (see Chapter 6). The advantages of simplification of the system of land ownership which a prohibition would bring would seem to outweigh other considerations such as freedom of contract.

On the other hand, conversion of existing modified fees so as to remove the modifications, even if they are probably very rare nowadays (partly as a result of the operation of the Perpetuities Act (Northern Ireland) 1966: see para. 3.19 above), raises more difficult issues. Deprivation of existing rights, such as a possibility of reverter or right of re-entry, without

compensation, would raise the issue of a possible infringement of the European Convention on Human Rights. Assessment of the value of such ephemeral interests is likely to be very difficult and so provision for compensation may be impractical, however desirable.

Convention rights are not absolute and the proportionality principle applied by the European Court of Human Rights recognises that a State is entitled to infringe individuals' rights in furtherance of a specific public interest. The issue comes down to whether a State has drawn a fair balance between competing interests. (See the decision of the ECHR Grand Chamber in *J A Pye (Oxford) Ltd. v United Kingdom* (Application No 44302/02), 15 November 2007). It may be argued that a fair balance could be drawn by providing, for example, that any existing modified fee would be automatically converted into an absolute fee simple (or full legal ownership) unless any claimant to an interest such as a possibility of reverter or right of re-entry registers it in the Registry of Deeds or Land Registry within, say, three years of commencement of new legislation. Given the rareness of such interests and the fact that they will disappear increasingly over time as the perpetuity period expires, it is likely that very few claimants will come forward to register. However, the Commission has a concern that such a scheme may operate unfairly on the holder of a possibility of reverter or right of re-entry who, perhaps due to absence overseas, is unaware of the need for registration. Furthermore, if some holders do come forward to protect their interests for registration, such rights will continue to survive and the desired simplification of titles will not be achieved.

- 3.25 **Question 6:** *On balance, the Commission is inclined to recommend a combination of option (1) (para 3.24(1)) and option (4) (3.24(4)), on the basis that the combination of the effect of section 13 of the Perpetuities Act (Northern Ireland) 1966 and such a jurisdiction given to the Lands Tribunal of*

Northern Ireland to deal with possibilities of reverter and rights of re-entry which survive, will result in modified fees ceasing to be a problem in the near future. Any holder of a modified fee who experiences difficulties in dealing with it would be able to invoke the Lands Tribunal's jurisdiction. This combination also avoids any doubts about unfair treatment of existing holders of such rights. DO CONSULTEES AGREE? IF NOT, WHAT OTHER OPTION SHOULD BE ADOPTED?

A minor's interest

- 3.26 There is one other aspect of the fee simple estate which should be mentioned. It remains the case in Northern Ireland that a minor can hold legal title to land (including a fee simple absolute in possession). However, under the common law any conveyance by a minor is vulnerable because it is voidable at his or her discretion when the majority is attained or within a reasonable time after that date (see Wylie *ILL* para. 25.06). This problem, from the point of view of a purchaser buying from a minor, was overcome by the Settled Land Acts 1882 – 1890 treating land held by a minor as a settlement within those Acts, even though there is no succession of interests, which is usually required. The statutory powers of dealing with the land are conferred on trustees of the settlement (1882 Act sections 59 & 60).
- 3.27 No doubt in recognition of the effect of the Settled Land Acts the English Law of Property Act 1925 provided that a minor would no longer hold legal title to land (section 1(6)) and conveyances would continue to be carried out by using the settlements machinery. The **1971 Survey** recommended following this approach (para. 82), as did the **1990 Final Report** (Volume 2, draft Property Order, Article 10). It has also been followed in the Republic of Ireland's 2006 Bill (section 18(1) (c) & (8)). **Question 7:** *In substance, this would mean that, in future, a minor's interest in land would be equitable only and the legal title would be vested in trustees who would be able to deal with it on behalf of the minor. In view of such unanimity, the Commission takes the view that such a provision should be implemented. DO CONSULTEES AGREE?*

Fee tail

- 3.28 This lesser freehold estate is, unlike the fee simple, the creature of statute, Statute of Westminster the Second 1285 (*De Donis Conditionalibus*) (13 Edw. I) (c. 1). It was designed to ensure that grants of feudal land, intended to guarantee that the land would pass down through successive generations of the same family, would take effect as intended. In subsequent centuries, the fee tail estate formed the cornerstone of family settlements of land because a fundamental feature, which survives in Northern Ireland, was that the holder of an entailed estate could not alter succession to it by any disposition under a will. However, over time, various methods of “barring” the entail through “inter vivos” action by the tenant in tail (i.e. while he or she was still alive) were developed, culminating in the statutory right to execute a “disentailing assurance” (Fines and Recoveries (Ireland) Act 1834 (c. 92)). In most instances, this will convert the fee tail into a fee simple and eliminate the interests of both successors to the fee tail and of any other persons entitled under the original grant by way of reversion or remainder on determination of the fee tail. Sometimes such an assurance needs the consent of a “protector”, such as a person specified as such in the original grant or a person entitled to a prior estate (such as a life estate), where the tenant in tail has a remainder interest at the date of the assurance. A failure to obtain such consent will result in creation of a “base fee”, under which only the successors to the entail are barred, but not persons entitled by way of reversion or remainder. A “voidable” base fee may also arise where there is a more technical flaw, such as a failure to enrol the disentailing assurance in the High Court within six months of its execution (1834 Act section 39). Such a base fee is determinable (voidable) by entry by the successors to the fee tail (see generally Pearce and Mee pp 63 – 66; Wylie *ILL* paras. 4.112 – 4.142). Apart from this, it is clear that creation of a fee tail necessarily involves a settlement of land within the Settled Land Acts 1882 – 1890 and so a tenant in tail in possession has the statutory powers of selling the fee simple and of leasing and mortgaging the land conferred on limited owners (like the holder of a life estate).

- 3.29 The fee tail estate belongs to a different era when land was the main source of wealth for private individuals and there was an overriding desire to keep it “in the family”. Nowadays it is extremely unlikely that such an estate would be created, not least because any settlement or will which is designed to make land pass from one generation to another generation of the same family is likely to incur crippling capital taxation (such as inheritance tax). It is not surprising, therefore, that its continued existence has been queried.
- 3.30 The **1971 Survey** (following provisions in the New Zealand Property Law Act 1952 (No. 51), recently replaced by the Property Law Act 2007 (No. 91)) recommended prohibition of the future creation of a fee tail and conversion of most existing ones into a fee simple (paras. 44 – 47). The **1990 Final Report** confirmed these recommendations (Volume 1 paras. 2.1.28). Abolition of the estate has been carried out in other jurisdictions, notably England and Wales (not by the 1925 legislation, which gave it a new lease of life, but rather belatedly by the Trusts of Land and Appointment of Trustees Act 1996 (c. 47), Schedule, para. 5)) and Scotland (Entail (Scotland) Act 1914 (c. 43) and Abolition of Feudal Tenure (Scotland) Act 2000 (asp 5)) and has been proposed in the Republic of Ireland’s 2006 Bill (section 13).
- 3.31 **Question 8:** *In view of the unanimity of recommendations and steps taken in neighbouring jurisdictions, the Commission takes the view that the recommendations in the **1990 Final Report** should be implemented now i.e. that the future creation of a fee tail should be prohibited. DO CONSULTEES AGREE?*
- 3.32 The one issue which seems to require some consideration is the extent of the conversion provisions relating to existing fees tail. Both the **1990 Final Report’s** recommendations and the Republic of Ireland’s 2006 Bill make it clear that base fees would be automatically converted, but not the estate of a tenant in tail after possibility of issue extinct. In the latter case, because there is no possibility of issue succeeding the tenant in tail (a specified spouse may have died without having any children) the tenant has, in effect, a life estate only and cannot

bar the entail (Fines and Recoveries (Ireland) Act 1834 section 15). In such cases, the persons entitled in reversion or remainder already have a vested interest which is no longer liable to be divested by a disentailing assurance. It seems inappropriate to allow the conversion provisions to effect such a divestment and such conversion might fall foul of the European Convention on Human Rights. The Republic of Ireland's 2006 Bill also adds the qualification that conversion of a fee tail or base fee does not occur automatically unless any protectorship has ended. The principle at play here is that conversion should only take place automatically at a time when the tenant in tail could bar the entail on his or her own, i.e. without the need to obtain the consent of a protector. Thus conversion would take place automatically whenever there was no protectorship or no longer any protectorship, because none ever existed or the protector has died (e.g. where the prior life estate owner dies and the fee tail remainder falls into possession). It may be argued that an alternative approach would be that mooted earlier in respect of modified fees simple, whereby they would all be converted into fees simple absolute unless claimants to an interest, like a possibility of reverter or right of re-entry, registered that interest within a set time-limit (see para. 3.24(5) above). The Commission is not convinced that this would be appropriate, on the ground that a vested reversionary or remainder interest created to take effect after a fee tail interest, should be regarded as more substantial than a mere possibility of an interest arising on occurrence of some event which may be very remote. The ending of a fee tail (consequent on the current holder's failure to have children) will usually be regarded as not as remote an occurrence and so the reversionary or remainder interest may be regarded as more substantial. On the other hand, the Commission is mindful of the primary objective to simplify titles and of the fact that such reversionary or remainder interests linked to a fee tail estate are probably extremely rare nowadays. Nevertheless, just as the Commission had concerns about the earlier proposal for registration in respect of modified fees, it is equally, if not more, concerned about the potential for unfairness on owners of vested reversionary or remainder interests.

- 3.33 **Question 9:** *On balance, the Commission is inclined to recommend provisions similar to those contained in the Republic of Ireland's 2006 Bill, i.e. automatic conversion into fees simple all fees tail (including base fees) where there is no protectorship or any protectorship has ceased to exist. There would be no automatic conversion where a reversionary or remainder interest has already vested and could not be divested by a disentailing assurance (such as where the possibility of issue is extinct). DO CONSULTEES AGREE?*

Life estate

- 3.34 Both the **1971 Survey** (para. 17) and the **1990 Final Report** (Volume 1 paras. 2.1.13 – 2.1.14) recommended that the third freehold estate developed under the feudal system, the life estate (including an estate *pur autre vie* (for the life of another)), should be retained, but as an equitable interest only. This estate was also a fundamental feature of family settlements of land. Converting it into an equitable interest recognised that the holder of a life estate was also given statutory power to convey the fee simple by the Settled Land Acts 1882 – 1890. This recognition had already occurred in the Law of Property Act 1925 (section 1). Thus the life estate ceased to have any significance as regards legal title to the land and, upon a conveyance of that title, was overreached. Its significance then was that it indicated entitlement to the income from investment of the capital proceeds of sale raised by the conveyance. Such conversion of a life estate into an equitable interest only is also proposed by section 11(6) of the Republic of Ireland's 2006 Bill. **Question 10:** *In view of the unanimity on this matter, the Commission takes the view that the recommendation in the 1990 Final Report should be implemented and the life estate should be retained, but as an equitable estate only. DO CONSULTEES AGREE?*

- 3.35 In passing, it should be noted that there is no need to deal with a former common feature of Irish land law involving freehold life estates, the lease for lives renewable for ever (and other perpetually renewable leases) and leases for lives combined with a term of years. The recommendations in the previous reports for prohibiting future creation of these and converting

existing ones into fee farm grants or leases for determinable 90-year terms were implemented by Articles 36, 37 & Schedule 3 of the Property (Northern Ireland) Order 1997 (see para. 3.46 below).

OVERREACHING OF EQUITABLE INTERESTS

- 3.36 As was mentioned earlier, the corollary of the reduction in the number of freehold estates recognised as conferring legal title to land is the principle that those estates which are equitable only and other equitable interests are “overreached” on a conveyance of the legal title to a purchaser. This principle had already been implemented by the Settled Land Acts 1882 – 1890 with respect to conveyances executed under statutory powers conferred by those Acts. However, the previous reports recommended far more extensive provisions, which the following paragraphs outline.
- 3.37 The **1971 Survey** recommended provisions along the lines of those in the English Law of Property Act 1925 (paras. 30 – 36). In essence, these would provide for overreaching where legal title is conveyed by at least two trustees (or a trust corporation) or by a mortgagee or personal representative exercising statutory powers or under a court order. “Overreaching” in this context means that the purchaser (which includes other persons acquiring legal title for consideration, such as lessees and mortgagees) obtains a clean title to the land (no longer subject to the equitable interests) and the equitable interests are transferred to the capital money coming into the hands of the vendor (or lessor or mortgagor). This is an illustration of the “curtain” principle enshrined in the 1925 Birkenhead legislation and referred to in the **1967 Lowry Report** as quoted earlier (see para. 3.5).

There would be no overreaching in one of the most common examples of an equitable interest nowadays – where a single legal owner is deemed to hold the legal title subject to an equitable interest to which someone else is entitled under a resulting or constructive trust. This frequently arises where a spouse or cohabitee contributes to the purchase or improvement of the house jointly occupied with the spouse or

cohabitee who is the legal owner of the house (see the discussion of this difficult area of the law as it applies in different jurisdictions, including Ireland, in Mee, *The Property Rights of Cohabitees* (1999) Hart Publishing; also Fox, *Conceptualising Home: Theories, Laws and Policies* (2006) Hart Publishing). A conveyance, on a sale, mortgage or other transaction involving the legal title, by such a single legal owner, who is in effect holding that title on trust for himself or herself and the contributing cohabitee, would not automatically overreach the equitable interest. The reason is, of course, because overreaching under the system being discussed, and as proposed by the **1971 Survey**, occurs only where the conveyance of the legal title is made by at least *two* trustees. Instead, often the person taking the conveyance will take subject to the equitable interest because he or she will be deemed to have notice of it in the case of unregistered land or, in the case of registered land, it has not been protected by registration of a notice or caution. Furthermore, in the case of registered land, often the equitable interest will be a burden which affects the land without registration, because the holder of the equitable interest is also in “actual occupation”, such as a case where the family home is registered in the husband’s name, but the wife has an equitable claim by virtue of making a financial contribution to its purchase (see Land Registration Act (Northern Ireland) 1970 Schedule 5 Part I paragraph 15; *Ulster Bank Ltd. v Shanks* [1982] NI 143; Wallace, *Land Registry Practice in Northern Ireland* 2nd ed. (1987) SLS Legal Publications (Northern Ireland) pp 16 – 24).

This creates obvious difficulties for purchasers and mortgagees of land and their solicitors have to engage in numerous searches and enquiries to see if such “hidden” equitable interests may exist. This was the position in England and Wales (compare the two leading House of Lords cases: *Williams & Glyn’s Bank Ltd. v Boland* [1981] AC 487 (mortgage by *single* legal owner and so equitable interest by person in occupation held to be overriding with no overreaching); *City of London Building Society v Flegg* [1988] AC 54 (overreaching because mortgage executed by *two* trustees and so no overriding interest despite occupation by equitable claimants)),

but an important adjustment in respect of registered land was made by the Land Registration Act 2002 (see para. 3.45(1) below). It is also the position in Northern Ireland. Thus a standard pre-contract enquiry contained in the Law Society of Northern Ireland's Vendor's Replies to Pre-Contract Enquiries (2008 edition) states:

"8. Occupants (other than the Vendor)

8.1 Is anyone (other than the Vendor), over the age of 17 in occupation of the Property? [If, yes, persons over the age of 17 in occupation of the Property are to be listed]

8.2 If the answer to Question 8.1 is "Yes", will those persons consent to the proposed sale?"

- 3.38 The Law Commission of England and Wales proposed in its 1989 Report (*Overreaching: Beneficiaries in Occupation* (1989) Law Com No. 188) that the protection of occupying cohabitants should be increased. In essence, its proposal was that a conveyance of legal title to land should not overreach the equitable interest of any person of full age and capacity who was entitled to occupy the land and was in occupation at the date of the conveyance, unless that person consented, expressly or by implication. This proposal was criticised as increasing the burden of enquiries which would have to be made by purchasers (see Harpum "Overreaching Trustees' Powers and the Reform of the 1925 Legislation" [1990] CLJ 277 at 328) and the Westminster Government eventually decided not to implement it (Megarry and Wade para. 8-167). The Republic of Ireland's scheme requiring a non-owning spouse to give consent to a contract or conveyance relating to the family home (under its Family Home Protection Act 1976 No. 27) has often been criticised on the same ground (see Wylie "An Irish Perspective on Protecting a Non-owning Spouse in the Home" in Meisel and Cook, (eds.) *Property and Protection: Essays in Honour of Brian W. Harvey* (2000) Hart Publishing Chapter 6; Wylie and Woods *ICL* paras. 16.48 – 16.59).

3.39 The **1990 Final Report** called for a review of this subject in the context of general family law (Volume 1 paras. 2.2.38 – 2.2.41), but its draft Property (Northern Ireland) Order contained a radical provision designed to deal with the conveyancing problems outlined above (Volume 2, Article 2). In essence, this would have required the holder of an equitable interest in land whose legal title is held by a single owner to protect it by registration in the Registry of Deeds or Land Registry, as appropriate, otherwise it would be void against a purchaser, mortgagee or other person acquiring legal title. Unlike the proposal suggested by the Law Commission of England and Wales in its 1989 Report, which was aimed at increasing the protection of holders of equitable interests, at the cost of extra burdens on purchasers, the **1990 Final Report's** proposal was firmly in favour of facilitating conveyancing by reducing the enquiries purchasers and mortgagees would have to make. This solution to the conveyancing problems has since been proposed in the Republic of Ireland (see 2006 Bill section 21). The Commission notes that there are important exceptions to such universal overreaching (unless the equitable interest is protected by registration) contained in the Republic of Ireland's Bill, such as where the conveyance is made for fraudulent purposes of which the purchaser has actual knowledge or to which the purchaser is a party. Other exceptions are where the conveyance is expressly made subject to the equitable interest or it is protected by deposit of title documents relating to the legal title. The Commission understands that the Land Registry in the Republic of Ireland subsequently made strong representations to retain the protection afforded to equitable owners in "actual occupation" (see para. 3.37 above). As a consequence, the 2006 Bill was amended in Committee to provide that no overreaching will occur on a conveyance by a sole legal owner in respect of an equitable interest held by a person in actual occupation (whether in respect of registered or unregistered land) (see section 21(3)(b)(iii)).

3.40 The Commission has not reached a conclusion on this difficult issue. There are obvious attractions in the provision recommended by the **1990 Final Report**. It has the great merit from the conveyancing point of view of simplifying the enquiries

that have to be made by solicitors acting for purchasers and mortgagees of land. In effect, it largely displaces the doctrine of notice and solicitors would no longer need to worry about “hidden” equitable interests. All that would be needed would be a search in the Registry of Deeds or Land Registry – if that was clear the purchaser or mortgagee would obtain a good title. It is also important to emphasise that “overreaching” is not the same as complete loss of claims or rights. The equitable interest merely ceases to attach to the land and instead attaches to any capital money coming into the hands of the conveying legal owner. That legal owner would remain personally liable in equity to satisfy the claim of the equitable owner, like any other trustee. If the equitable owner wishes to prevent a sale or other transaction taking place without his or her participation, the remedy is in his or her own hands, that is, he or she should protect the equitable interest by registration.

- 3.41 Notwithstanding the attractiveness of the extensive overreaching scheme from the conveyancing point of view, the Commission has major concerns that such a scheme will involve some considerable “loss” in the eyes of holders of an equitable interest, especially where the property is their home. It has come to be recognised increasingly in modern times that a person’s home involves value in terms of psychological, social and emotional attachments which outweigh purely financial interest (for judicial recognition see the Court of Appeal in *State Bank of India v Sood* [1997] Ch 276 and see the discussion generally in Fox, *Conceptualising the Home: Theories, Laws and Politics* (2007) Hart Publishing). Although the House of Lords has ruled that the protection afforded to a person’s “home” by Article 8 of the European Convention on Human Rights does not mean that the rights of the occupier necessarily override those of creditors or third parties such as landlords or purchasers (see *London Borough of Harrow v Qazi* [2003] UKHL 43; *Kay & Anor. v (1) London Borough of Lambeth (2) Leeds City Council v Price & Others* [2006] 2 AC 465), the Commission notes that more recently the European Court has reaffirmed the protection accorded to a person’s home by Article 8. In *McCann v United Kingdom* (Application No. 19009/04, 13 May 2008), the Court ruled that possession

proceedings against one joint council tenant, based upon a notice to quit signed by the other joint tenant only, was a disproportionate interference with the right to respect for the non-signing joint tenant's home. In passing, the Commission notes that in the Republic of Ireland, it has been enacted in respect of residential property that a notice to quit served by one joint tenant does not terminate the joint tenancy: see Residential Tenancies Act 2004 (No. 27) section 73(3). The Irish Law Reform Commission has recommended extending this rule generally to all classes of tenancy: see section 5(2) of the draft Landlord and Tenant Bill appended to its *Report on the Law of Landlord and Tenant* (LRC 85-2007). This subject relates to landlord and tenant law which is outside the scope of this Consultation Paper.

- 3.42 It must also be recognised that the “conveyancing” solution does create risks for holders of equitable interests. Often the person entitled to such an interest under a resulting or constructive trust will be unaware of his or her claim. If the person entitled is unaware of it, it will not be protected by registration and so will remain at risk of overreaching. On such overreaching, the legal owner receiving any capital money from the conveyance of the legal title (purchase money or loan money arising from a mortgage) may dissipate it before the equitable owner asserts any claim. When a claim is asserted it will be a personal one against the legal owner which he or she may not have the assets to satisfy. It is difficult to assess the extent of such risks and it may be that some of them would be met by publicity accompanying a new requirement to protect claims by registration. Such risks also have to be balanced against the conveyancing problems created by the current law. It may also be argued that the approach adopted in the **1990 Final Report** was influenced by the difficulties faced by lending institutions in the years following the *Boland* case (see para. 3.37 above). As pointed out earlier, solicitors acting for purchasers and lending institutions have learned to live with the possibility of hidden equitable interests held by persons in occupation of the land, by adapting the system of standard enquiries. The “problem” may, therefore, not be as serious as it was once thought. It has been suggested to us that purchasers

and lending institutions could be required to serve a statutory notice on persons in occupation requiring them to declare any interest or, perhaps, even to take steps to protect the interest, such as by registration. This, however, like the proposals mentioned earlier by the Law Commission of England and Wales (see para. 3.38 above), would again increase the burden on purchasers and mortgagees.

3.43 It may also be objected that a requirement to register claims would create difficulties for some people, because the very act of registration might be regarded by many as a “hostile” act against a spouse or partner. However, it is important to remember that such a registration requirement has been operating with respect to matrimonial homes for decades. Under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 (No. 1071 N.I. 6) (replacing provisions in Part II of the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 (No. 1984 N.I. 14)) a non-owning spouse must protect matrimonial home rights (such as the right to remain in occupation) by registration (thereby creating a charge on the home) (see Wylie, “An Irish Perspective on Protecting a Non-owning Spouse in the Home” in Meisel and Cook, (eds.) *Property and Protection: Essays in Honour of Brian W. Harvey* (2000) Hart Publishing Chapter 6). Arguably, the scheme proposed in the **1990 Final Report** is but an extension of this principle to holders of all “hidden” equitable interests and is justifiable in the interests of simplification of conveyancing. However, it would appear that this legislation has been rarely invoked and that very few spouses have exercised the right to register a matrimonial charge. Furthermore, the extension proposed by the **1990 Final Report** does involve overreaching substantive interests in land (an equitable interest) whereas the 1998 Order relates simply to protection of occupation by a non-owner.

3.44 It may be argued that the current law’s way of protecting spouses, cohabitees and other persons who may have an equitable claim to land is unnecessarily complicated and the wrong way of approaching the issues. Instead of relying upon principles which complicate conveyancing, it might be better to

confer on those deemed to need protection statutory rights which are clear and easily identifiable when a conveyancing transaction occurs. The Law Reform Advisory Committee has already suggested a scheme for joint beneficial ownership of residences and other household property (see Report No. 10 *Matrimonial Property* (LRAC No. 8, 2000), which departed from the position taken in earlier Law Commission reports relating to England and Wales; see, however, the 2007 Report *Cohabitation: the Financial Consequences of Relationship Breakdown* Law Com No. 307 (Cm 7182). This is clearly connected with the law of concurrent interests and so we return to this issue in the later Chapter dealing with that subject (Chapter 7). However, it must be emphasised that the Law Reform Advisory Committee's proposals are concerned with the *acquisition* of beneficial interests rather than their post-acquisition *enforceability* against third parties.

3.45 **Question 11:** There would appear to be a number of options for legislation relating to operation of the principle of overreaching as it applies to conveyancing transactions. These may be summarised as follows:

- (1) Adopt the English 1925 provisions, as recommended by the **1971 Survey** (see para. 3.37 above). These would not involve overreaching on a conveyance by a single legal owner and purchasers and mortgagees would continue to have to guard against equitable interests held by persons in occupation of the land. The Commission notes that an adjustment was made to the law in England and Wales as regards registered land by the Land Registration Act 2002 (c. 9). Under Schedule 3 para. 2(c) (which replaces section 70(1)(g) of the Land Registration Act 1925 (c. 21) which was under consideration in the *Boland* and *Flegg* cases: (see para. 3.37 above) the interest of a person in actual occupation is not one which overrides registered dispositions unless it is an interest –

“(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and (ii) of which the person to whom the disposition is made does not have actual knowledge at that time;”

This involves a limitation on the previous law by shifting the test from the doctrine of constructive notice of the interest to discoverability of the interest holder's occupation. In other words, a purchaser will not be bound by a hidden equitable interest if the owner's occupation would not have been obvious from a reasonable inspection of the land (unless the purchaser otherwise has actual knowledge of the interest). *Given, as mentioned earlier (para. 3.42), that conveyancers have learned to live with making enquiries as to persons in occupation, the Commission is inclined to recommend adoption of the 1971 Survey's approach, as modified by the 2002 Act. It is further inclined to apply that modification to unregistered land. DO CONSULTEES AGREE?*

- (2) Adopt the proposals made by the Law Commission of England and Wales in its 1989 Report for amendment of the 1925 provisions, so as to confer additional protection on equitable claimants in occupation of the land (see para. 3.38 above). *The Commission takes the view that, in the light of the criticisms made of these proposals and the Government's decision not to implement them, these proposals should not be adopted. DO CONSULTEES AGREE?*
- (3) Extend the principle of overreaching to cover conveyances by a single legal owner as recommended by the **1990 Final Report** (see para. 3.39 above). *The Commission can see the obvious attractions of this approach in terms of simplifying conveyancing, which is one of the fundamental objectives of the current reform*

Project. It is, however, concerned about the hardship and potential injustice which may be caused to individual claimants if such an approach is adopted.

DO CONSULTEES SHARE THOSE CONCERNS?

- (4) Couple introduction of an extended principle of overreaching such as referred to in option (3) with reform of the law of cohabittees. However, as pointed out earlier (para. 3.4) such reform would have to address the issue of enforceability of interests against third parties like purchasers and mortgagees. The Law Reform Advisory Committee's proposals would confer a statutory beneficial or equitable interest only on cohabittees. This would not resolve the problems associated with a conveyance by a sole legal owner – even a statutory equitable interest would still be overreached under the **1990 Final Report's** scheme. A cohabitee would only be protected if the statute conferred joint *legal* ownership. *This seems to the Commission to raise substantial issues which will go well beyond the present Project and so it doubts whether this option can be pursued at this stage.* **DO CONSULTEES AGREE?**

LEASEHOLD ESTATES

- 3.46 Although the Commission regards the general law of landlord and tenant as outside the scope of the present Project, the Project is concerned with the law of estates in the context of reform of land law and conveyancing. This necessarily requires some consideration of leasehold estates as one of the two main forms of land ownership. The previous reports relating to reform of the law of Northern Ireland proposed a number of changes to the law relating to leasehold estates. The **1971 Survey** recommended various provisions to deal with leases which were once a common feature of Irish land law, namely, leases for lives renewable for ever (and other perpetually renewable leases) and leases for lives combined with a term of years (paras. 61 – 74). The **1990 Final Report** largely endorsed these proposals, subject to some modifications (Volume 1, paras. 1.6.6 – 1.6.12) and its recommendations

were implemented by Articles 36 & 37 of the Property (Northern Ireland) Order 1997. In essence, these prohibited the future creation of such leases combining freehold and leasehold interests and converted existing leases into either fee farm grants or fixed terms of 90 years determinable on the happening of the uncertain event specified (such as the dropping of a life) (see Schedules 2 & 3 to the 1997 Order). Nothing further need be said about these provisions.

- 3.47 Apart from the above recommendations, both the **1971 Survey** and the **1990 Final Report** recommended adoption of the provision in the Law of Property Act 1925 (section 1) whereby a leasehold estate (referred to as a “term of years absolute”) should be the other estate conferring legal title. The **1971 Survey** was unhappy at the use of the epithet “absolute” in this context, especially as the 1925 Act made it clear that it covered the vast majority of leasehold estates recognised at common law, including a periodic tenancy (tenancy from year to year; month to month or other recurring period) (see the definition in section 205(1) of the 1925 Act). The **1990 Final Report** recommended using instead the expression “leasehold estate” (Volume 1 para. 2.1.12) and its definition followed very closely that in the 1925 Act (draft Property (Northern Ireland) Order, Volume 2, Article 7). Although that definition does not say so expressly, it would not seem to include either a tenancy at will (which arises where a landowner allows someone else to occupy the land on the basis that the tenancy can be ended at any time) or a tenancy at sufferance (where a tenant whose tenancy has ended continues in occupation without either assent or dissent of the landlord, at most only on his or her sufferance). The better view is probably that neither of these creates an estate in the land held as a tenant (see Megarry and Wade paras. 17-075 – 17.084; Wylie *ILT* paras. 4.21 & 4.39). This point is made explicit in the Republic of Ireland’s 2006 Bill (section 11(3) and definition of “tenancy” in section 3(1)).
- Question 12:** *The Commission takes the view that the recommendations in the previous Reports should be implemented, together with the modification which would be made by the Republic of Ireland’s 2006 Bill. The Leasehold estate should also be an estate in land which confers legal title,*

but that such an estate would not include a tenancy at will or tenancy at sufferance. DO CONSULTEES AGREE?

3.48 The Commission is aware that there are several other issues relating to leasehold estates which have proved to be controversial in recent times. One is how far the English principle against a lease for a single period of uncertain duration (see the House of Lords decision in *Prudential Assurance Co Ltd. v London Residuary Body* [1992] 2 AC 386; Bright, “Uncertainty in Leases – Is it a Vice?” (1993) LS 38; Sparkes, “Certainty of Leasehold Terms” (1993) 109 LQR 93) applies to Ireland, especially in view of Deasy’s Act 1860 (see Wylie *ILT* para. 2.23). Another is the effect of a lease for a discontinuous period, such as a “time-share” lease relating to holiday accommodation, where the English and Irish courts seem to have taken different views (see *Cottage Holiday Associates Ltd. v Customs and Excise Commissioners* [1983] QB 735; *Re O’Sullivan’s Application* (RI High Court 24 March 1983); Wylie *ILT* para. 4.04). Perhaps most controversial was the House of Lords’ ruling in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 that a body holding a licence only to use land could, despite not holding a tenancy and so no estate in the land, grant a tenancy to someone else. The precise nature of such a “non-proprietary” lease has yet to be worked out by the courts (see Bright, “Leases, Exclusive Possession and Estates” (2000) 116 LQR 7; Dixon, “The Non-proprietary Lease: The Rise of the Feudal Phoenix” [2000] CLJ 25; Hinojosa, “On Property Licences, Horses and Carts: Revisiting *Bruton v London & Quadrant Housing Trust*” [2005] Conv 114; Pawlowski, “Occupational Rights in Leasehold Law: Time for Rationalisation” [2002] Conv 550; Routle, “Tenancies and Estoppel – After *Bruton v London & Quadrant Housing Trust*” (2000) MLR 424).

3.49 **Question 13:** *Notwithstanding the connection such issues have with the law of estates, the Commission takes the view that they raise matters of a wider scope, especially in relation to the general law of landlord and tenant. It has concluded that such issues should be considered as part of a review of that law and so should not form part of the present Project. DO CONSULTEES AGREE?*

CHAPTER 4. EASEMENTS AND OTHER RIGHTS OVER LAND

INTRODUCTION

- 4.1 In this Chapter we are concerned with other interests or rights which can be owned in respect of land – interests which fall short of the “estates” with which the previous chapter was concerned. Such estates confer rights such as the right to possess or occupy the land and to enjoy the benefits possession or occupation brings (such as use of the land as a home or for the purposes of running a business). The “other interests” with which this Chapter is concerned fall short of “estates” because they do not confer such benefits or rights. Generally such interests, as explained below, confer on the holder limited rights in respect of or over someone else’s land. Our land law system has come to recognise a wide range of such interests. The main categories of such interests which have come to be recognised under our land law system are: various so-called “incorporeal hereditaments”; freehold covenants; licences and similar interests; agistment and conacre rights.

Incorporeal hereditaments

- 4.2 One major category comprises “incorporeal hereditaments” (see Pearce and Mee Chapter 16; Wylie *ILL* Chapter 6), so called because they do not confer the right to possess or occupy the land (the *corpus*) to which they relate. Rather they confer limited rights in respect of that land, such as enabling the owner of the rights to do something on or take or receive something from the land which is subject to the rights or entitling the owner of the rights to control what the owner of that land does on it or how it is used. The common law recognised a wide range of incorporeal hereditaments, but many are no longer of any relevance.

(i) Easements

- 4.3 Far and away the most common incorporeal hereditaments and the ones operating extensively nowadays are easements and profits *à prendre* (see Wylie *ILL* paras. 6.022 – 6.119). Easements are rights which one landowner (the “dominant owner”) can exercise over a neighbouring landowner’s (the “servient owner”) land (the “servient land”). The rights attach to the dominant owner’s land as such (the “dominant land”) and are a classic example of what are referred to as “appurtenant” rights. Examples of easements are “positive” rights entitling the dominant owner to do things on the servient land (such as a right of way) and “negative” rights entitling the dominant owner to prevent the servient owner doing things on the servient land which may damage or inconvenience the dominant owner (such as a right of light (which may prevent putting up a building on the servient land which cuts off light coming to the windows of a building on the dominant land) or right of support (which may prevent excavation or other work on the servient land which removes support for a building on the dominant land)).

(ii) Profits *à prendre*

- 4.4 Profits *à prendre* comprise rights to go on to land and to take something from it which belongs to it naturally, such as timber, grass, turf, minerals and wild game and fish. Many profits are also appurtenant in that the fishing, mining, quarrying etc. rights belong to a neighbouring owner, but unlike easements, profits can also be held “in gross”, i.e., owned by someone who is not a neighbouring landowner or, indeed, not the owner of any land other than the profit itself.
- 4.5 Not surprisingly given their surviving prominence in our land law system, easements and profits were the subject of comprehensive proposals for reform in both the **1971 Survey** and **1990 Final Report**. However, before turning to a consideration of these, it is necessary to mention categories of other incorporeal hereditaments and interests in land which our system recognises.

(iii) Periodic Rents

- 4.6 One major category of incorporeal hereditaments was the variety of periodic rents that used to issue out of land in Ireland. Some derived from the feudal system and Crown resettlements of Irish land, such as Crown and quit rents (see Wylie *ILL* paras. 6.008 – 6.012). Most of these disappeared as a consequence of the Land Purchase Acts and the Commission has been informed by the Crown Estate Commissioners that the few which survived (see **1971 Survey** para. 459) are no longer collected. Tithe rentcharges, which derived from the 19th century legislation dealing with redemption of tithes (whereby the church and other bodies and persons were entitled to one-tenth of the produce of land), have also become rare. Most have been redeemed following disestablishment of the Church of Ireland by the Irish Church Act 1869 (c. 42) under provision made by that Act and later legislation, such as the Land Purchase Acts and, in more recent times, the Property (Northern Ireland) Order 1997 (No. 1179 N.I. 8) (Article 27(1)(b) included such rentcharges within the definition of “periodic payments”; see the definition of “ground rent” in section 28 of the Ground Rents Act (Northern Ireland) 2001 (c. 5)). The Commission will return to the issue of what further provision should be made for getting rid of these archaic payments in a supplementary Consultation Paper.
- 4.7 Other examples of periodic rents payable out of land include fee farm rents, rentcharges and, of course, leasehold rents. The last we are not concerned with in this Consultation Paper. Fee farm rents are redeemable under the Ground Rents Act (Northern Ireland) 2001 and will be discussed further in the supplementary Consultation Paper. The creation of new fee farm grants was prohibited by Article 28 of the Property (Northern Ireland) Order 1997. Rentcharges can take various forms (see Wylie *ILL* paras. 6.015 & 6.131 – 6.145), but subject to some exceptions, the creation of new ones was prohibited by Article 29 of the 1997 Order. The exceptions are annuities, indemnity rentcharges created on subdivision of land and those arising under statute or a court order.

4.8 **Question 14:** *In view of the provisions of the 1997 Order and 2001 Act, the Commission has concluded that there is no need for further legislation relating to these various forms of periodic rent, apart from a review of the operation of the 2001 Act's redemption scheme (which will be dealt with in a supplementary Consultation Paper).* **DO CONSULTEES AGREE?**

(iv) Advowsons

4.9 An advowson was the right of the patron of a church to nominate the rector or vicar, but it is of no concern now because the Irish Church Act 1869 (which disestablished the Church of Ireland) abolished this category of incorporeal hereditament (see Wylie *ILL* paras. 6.018 – 6.019).

(v) Franchises

4.10 A franchise is a right or privilege granted by the Crown to a subject, such as the right to hold fairs and markets and to run ferries. Such Crown franchises, which will usually have been granted centuries ago, should not be confused with modern private commercial franchise arrangements, such as relate to well-known, often international, food, café, restaurant and retail operations. Such modern commercial arrangements may take the form of a licence and are usually connected with complex commercial leasing transactions (see Wylie *ILT* paras. 3.38 – 3.45; also para. 4.14 below). As such they are outside the scope of this Consultation Paper. Other examples of ancient Crown franchises were the right to wrecks and treasure trove, but these tend to have been the subject of modern legislation (such as the Treasure Act 1996 (c.24) see Wylie *ILL* para. 6.020). It is likely that some franchise rights, such as those relating to markets and fairs, survive in Northern Ireland (such a right was recently the subject of litigation in the Republic of Ireland: *Listowel Livestock Mart Ltd. v William Bird & Sons Ltd.* [2007] IEHC 360 – right granted by letters patent by James I (1612) and James II (1688)). **Question 15:** *The Commission takes the view that there is no need to deal with rights such as franchises in new legislation, other than to recognise their existence.* **DO CONSULTEES AGREE?**

(vi) Titles and Offices

- 4.11 Titles of honour, such as peerages and offices (e.g. keeper of a park), were by tradition classified as incorporeal hereditaments, but this has been a matter of some controversy (see Wylie *ILL* para. 6.021). In so far as the conferment of such a title or honour was accompanied with a grant of land, that grant would involve the grant of an estate in the land governed by the law discussed in the previous Chapter. **Question 16:** *The Commission again takes the view that there is no need for any new proposed legislation to deal with titles and offices divorced from ownership of an estate or interest in land (connected with, but separate from the title or office).* **DO CONSULTEES AGREE?**

Freehold covenants

- 4.12 One of the later developments in our land law system was the recognition in the 19th century that covenants attaching to freehold land could constitute interests in their own right, which could pass to successors in title (see Pearce and Mee Chapter 17; Wylie *ILL* Chapter 19). This development concerned covenants entered into by neighbouring landowners and usually applied when a landowner sold off part of his or her land. In order to control use of the part sold off, the vendor would often insist upon the purchaser entering into various covenants (such as a covenant restricting the purchased part to private residential use) for the benefit of the land retained by the vendor. Like an easement, such a covenant creates an appurtenant right. Such freehold covenants are to be distinguished from leasehold covenants which have been the subject of legislation for centuries (see Wylie *ILT* Chapters 21 & 22). Leasehold covenants are outside the scope of this Consultation Paper.
- 4.13 It had long been recognised that the development of the law relating to freehold covenants had been unsatisfactory. In particular, the rule in *Tulk v Moxhay* (1848) 2 Ph 774 imposed severe limitations, such as the principle that the burden of a negative covenant only could pass to successors in title. Both the **1971 Survey** and **1990 Final Report** contained

recommendations for a radical overhaul of this area of the law. The latter's recommendations were part of a comprehensive scheme of legislation relating to "interests in the land of another" (Volume 1, Chapter 2.7) and "development schemes" (Chapter 2.8). That comprehensive scheme was not implemented and instead the Property (Northern Ireland) Order 1997 contained a provision confined to the enforceability of freehold covenants (Article 34). The implementation of reform in this piecemeal fashion obviously calls into question whether it is appropriate now to consider implementation of the comprehensive scheme proposed by the **1990 Final Report**. We return to this issue later (see para. 4.21 below).

Licences and similar interests

- 4.14 A comparatively modern development in our land law system has been the judicial recognition of licence arrangements as having at least some of the attributes of an interest in land (see Pearce and Mee Chapter 15; Wylie *ILL* Chapter 20). Indeed, many such arrangements have attributes more akin to estates, in that they often entitle the licensee to possess or occupy the land. For this reason one of the most litigated issues in modern times has been whether in a particular case the arrangement made between the owner of the land and the occupier has created a tenancy or a licence. The answer is often fundamental to determining whether the occupier has statutory rights (e.g. to renewal of the arrangement). In so far as the subject has a close connection with the law of landlord and tenant it is outside the scope of this Consultation Paper.
- 4.15 As regards the more general law of licences, most of the case law of recent decades concerns the remedies for enforcement of licence arrangements and the application of equitable principles like the doctrine of estoppel (see Pearce and Mee pp 215 – 217; Wylie *ILL* paras. 20.07 – 20.12). **Question 17:** *The Commission takes the view that it would not be appropriate to interfere with the development by the courts of the general law of licences, especially where this involves the application of equitable principles. DO CONSULTEES AGREE?*

Rights of residence

- 4.16 Another particular form of an occupation arrangement which has been relatively common in both parts of Ireland is a “right of residence”. Frequently a male farmer’s will provides that the farm is left to one of his children subject to a right of the widow to reside on the farm or in the farmhouse “for the rest of her day”. Sometimes the right of residence will be accompanied by a right of maintenance as a charge on the farm. It is clear from the extensive case law on the subject that a right of residence may be construed as creating quite different rights (see Wylie *ILL* paras. 20.13 – 20.24; Harvey, “Irish Rights of Residence – The Anatomy of a Hermaphrodite” (1970) 21 NILQ 389). It may create an estate in the land, such as a life estate, or some much lesser interest such as a lien or charge. It may even be construed as another form of licence (see the judgments of Girvan J, as he then was, in *Jones v Jones* [2001] NI 244 and *Re Walker’s Application for Judicial Review* [1999] NI 84). Such distinctions are reflected in legislation. Thus the Limitation (Northern Ireland) Order 1989 (No. 1339 N.I. 11) distinguishes between a right which is “an *exclusive* right of residence in or on a *specified part* of the land” (emphasis added) and other rights of residence. Other rights are regarded as creating only a “right in the nature of a lien for money or money’s worth in or over land”. This reflects distinctions made in the case law which tended, somewhat controversially, to treat an exclusive right of residence in or on a specified part of the land as, in essence, a life estate (see *National Bank v Keegan* [1931] IR 344, but note the criticisms of this by Girvan J, as he then was, in *Re Walker’s Application for Judicial Review*, above). The latter would, of course create a settlement of the land and confer the powers of a tenant for life under the Settled Land Acts 1882 – 1890 to sell, lease and mortgage the land. Section 47 of the Land Registration Act (Northern Ireland) 1970 (c.18) recognises that this result would usually not have been intended by the person creating the right. For example, the deceased farmer would not have expected that the widow, given an exclusive right to reside in the farmhouse, should be able to sell it over the head of a son to whom the farm had been left (see Wallace *Land Registry Practice in Northern Ireland* (2nd ed. 1987 SLS Legal Publications) pp 91 – 92). Section 47 provides that a general

right of residence or exclusive right of residence in or on part of the land (or right to use a specified part of the land in conjunction with such a right of residence) is deemed to be personal to the holder and does not confer any right of ownership. The burden of such a right is, however, registrable under Schedule 6 of the Act, so that it will bind successors to the land subject to the right. Furthermore, since the holder of such a right of residence will also usually be in “actual occupation”, he or she will have the protection discussed in the previous chapter (paras. 3.37, 3.42 & 3.45 (i)).

- 4.17 **Question 18:** *The Commission has come to the view that, although the 1970 Act clarifies the position of the holder of a right of residence in relation to registered land, the position in relation to unregistered land remains very uncertain. It considers that there may be merit in further clarification through legislation, probably adopting the position set out in the 1970 Act. There would seem to be no good reason why the position should be different in relation to unregistered land. The Commission takes the view that the position of the holder of a right of residence in relation to unregistered land should be clarified along the lines of section 47 of the Land Registration Act (Northern Ireland) 1970, so that in relation to unregistered land, a right would be protected by the person being in occupation and would be registrable. DO CONSULTEES AGREE?*

Agistment and conacre

- 4.18 Agistment and conacre “lettings” have long been a feature of agriculture in Ireland (see Wylie *ILL* paras. 20.25 – 20.27). Agistment is the right to graze livestock on someone else’s land and conacre is the right to enter someone else’s land in order to till it, sow crops in it and in due course harvest the crops. By tradition such “lettings” or “contracts” did not create the relationship of landlord and tenant (the object was often to avoid restrictions on subletting land) and, indeed, possession of the land was said to remain in the landowner. In that sense such arrangements bear similarities to profits *à prendre* (indeed, agistment is a well-established example of a profit) and to licence arrangements confined to granting use of land, but not

necessarily possession. However, it has been questioned whether this traditional view holds good in modern times, where conacre arrangements are often used by commercial companies engaged in large-scale, long-term operations (see the discussion by Gibson LJ in *Maurice E Taylor (Merchants) Ltd. v Commissioner of Valuation* [1981] NI 236; note also the recent decision by the Northern Ireland Court of Appeal confirming the decision of a Special Commissioner that a grazing letting was a business consisting wholly or mainly of the making of investments and so was not a “relevant business property” for the purposes of exempting the value of the land from inheritance tax: *McCall and Keenan as Personal Representatives of Eileen McClean v HMRC* [2009] NICA 12 (*the McClean case*)). As these modern cases illustrate, the agistment and conacre arrangements remain a substantial feature of the agricultural system; indeed, the Commission understands that some 30 – 35% of agricultural land in Northern Ireland is subject to them.

- 4.19 The conacre system in particular has been severely criticised over the years from the point of view of agricultural practice. The **1971 Survey** quoted evidence it had received (see para. 287) and suggested that a new scheme to deal with agricultural tenancies should be considered. The **1990 Final Report** also recommended that consideration should be given to reform of the law relating to agricultural tenancies, such as extension to them of the business tenancies legislation. Quite apart from the context of landlord and tenant law, conacre and agistment lettings raise important issues to do with operation of the agriculture industry, including the application of funding and grant schemes and taxation. **Question 19:** *The Commission recognises that the system of agistment and conacre lettings should be reviewed; however, the Commission considers that it raises issues which are outside the scope of this Consultation Paper.* **DO CONSULTEES AGREE?**

REFORM

- 4.20 The Commission has concluded from the above discussion that the one area of the law with which this Consultation Paper should deal is that relating to easements and profits. However,

a preliminary issue arises as to whether this should be carried out as part of a wider reform of the law relating to “other interests”.

Land Obligations

- 4.21 The **1971 Survey** recommended a comprehensive scheme to deal with “land obligations”, to encompass the law relating to easements, profits, restrictive covenants and positive covenants (Chapter 16). This was based on a scheme proposed by the Law Commission of England and Wales in a 1971 Consultation Paper (*Transfer of Land: Appurtenant Rights* No. 36). The Law Commission’s proposals were criticised and it subsequently resiled from its earlier scheme (see the Report on the *Transfer of land: Law of Positive and Restrictive Covenants* (1984 Law Com No. 127) para. 1.6). However, in its recent Consultation Paper (*Easements, Covenants and Profits à Prendre* 2008 No. 186) the Law Commission of England and Wales has resurrected the concept of a “land obligation,” but only in relation to positive and restrictive covenants. The distinction between easements, profits and covenants is proposed to be retained (para. 2.12 & Part 15). The **1990 Final Report** also criticised the land obligation scheme as “too inflexible” (Volume 1 para. 2.7.3) and recommended that it should not be implemented (para. 2.7.5). Instead it recommended reforms to specific easements like rights of support, provisions relating to works on or adjacent to boundaries, overhaul of the law relating to acquisition of easements by implication and prescription and their abandonment and provisions concerning rights of access to neighbouring land and neighbour obligations (Chapter 2.7). It also recommended special provisions for “development schemes” (such as housing estates (Chapter 2.8)). Many of these proposals were based on the Law Commission’s 1984 Report on positive and restrictive covenants referred to above. The **1990 Final Report** also contained separate proposals for freehold ownership of flats and other independent buildings, based on the English Commonhold scheme (Volume 1, Part 3).
- 4.22 The Commission would make two points about these earlier recommendations. First, the Law Commission of England and Wales’s 1971 “land obligations” scheme no longer seems to be

worth pursuing. It was criticised by the **1990 Final Report** and some of what the scheme would have covered has already been dealt with in Northern Ireland. The law relating to freehold covenants was comprehensively overhauled by Article 34 of the Property (Northern Ireland) Order 1997, which includes provisions for reciprocal covenants in development schemes. It should also be noted that the earlier Property (Northern Ireland) Order 1978 (No. 459 N.I. 4) implemented recommendations in the **1971 Survey** for introduction of provision for modification or extinguishment of obsolete covenants and other “impediments” to the enjoyment of land (similar to that introduced in England and Wales by section 84 of the Law of Property Act 1925 (c. 20)). Part II of the 1978 Order confers a very wide jurisdiction on the Lands Tribunal for Northern Ireland covering not only covenants but also easements and profits. **Question 20:** *The Commission has concluded that further reform of the law concerning obligations relating to land should concentrate not on a scheme for covenants, but on other areas of the law, such as that relating to easements and profits à prendre.* **DO CONSULTEES AGREE?**

Flats and Other Multi-unit Developments

- 4.23 The second point the Commission wishes to make relates to flats and other multi-unit developments. The English Commonhold scheme was introduced by the Commonhold and Leasehold Reform Act 2002 (c. 15) (the relevant provisions came into force on 27 September 2004 – Commonhold and Leasehold Reform Act 2002 (Commencement No. 4) Order 2004, SI/1832). It has not been greeted with much enthusiasm and it is understood that very few schemes have been devised by developers (see Clarke “The Enactment of Commonhold – Problems, Principles and Perspectives” [2002] Conv 349; Fetherstonhaugh “Slow on the Uptake” (2005) 35 EG 104; Jack “Commonhold: the Fatal Flaw” (2003) NLJ 1907; Roberts “Two Cheers for Commonhold” (2002) NLJ 338; Wong “Potential Pitfalls in the Commonhold Community Statement and the Corporate Mechanisms of the Commonhold Association” [2006] Conv 4). The Commission notes that the Republic of Ireland’s Law Reform Commission has recently doubted whether it would

be appropriate to introduce such a scheme there (see *Consultation Paper on Multi-unit Developments* (LRC CP 42-2006) Chapter 10), although it did suggest that there is scope for legislative reforms to deal with various practical problems which are emerging there (its subsequent *Report on Multi-unit Developments* (LRC 90-2008) adheres to this view). The Commission does recognise that as more and more developments of this kind, of ever increasing complexity, are built in the next decade or so in Northern Ireland, this has become a subject worth reviewing but this is outside the scope of the present Consultation Paper. The Commission has included this topic in the list of project proposals set out in its *Consultation Paper on First Programme of Law Reform* (August 2008) (See List of reports and consultations papers).

Easements and Profits

- 4.24 The law of easements and profits has long been recognised as unsatisfactory in several respects. In particular, the law relating to prescription, whereby a person may acquire an easement or profit over someone else's land by long "user", is extremely complicated (see Pearce and Mee pp 236 – 242; Wylie *ILL* paras. 6.073 – 6.101). Also complicated and uncertain is the law relating to acquisition by implication.

(i) Prescription

(a) Abolition?

- 4.25 As long ago as 1966 the English Law Reform Committee (forerunner of the Law Commission) recommended unanimously that acquisition of profits by prescription should be abolished and, by a majority of eight to six, also such acquisition of easements (*Acquisition of Easements and Profits by Prescription* 14th Report Cmnd 3100). Subsequently some Canadian Provinces also recommended abolition, such as Ontario (*Report on Limitation of Actions* 1969), British Columbia (*Report on Limitations: Part I – Abolition of Prescription* 1970) and Manitoba (*Report on Prescriptive Easements and Profits à Prendre* 1982). Like the doctrine of adverse possession as it operates under the law of limitation of actions (this subject will

be dealt with by a supplementary Consultation Paper), prescription enables a person to acquire rights over another person's land without obtaining any express grant of them and without any payment for them or compensation for the landowner. Nevertheless these are doctrines which are long-established and are designed to make title to land reflect what has happened "on the ground" over a long time. The **1971 Survey** concluded that the doctrine of prescription should be retained for positive easements and for profits only (para. 382). Such easements (like a right of way) and profits involve the claimant doing something on the servient land which should be obvious to the servient owner and which that owner could have stopped by taking appropriate action. On the other hand, a negative easement (like a right of light) does not involve such action and may be enjoyed without the servient owner realising it. It will eventually result in the servient owner being prevented from doing something on his or her own land which he or she would otherwise be entitled to do. Arguably that should be achieved only by an express agreement or grant between the neighbouring landowners.

- 4.26 The **1990 Final Report** took the view that acquisition of profits by prescription should be abolished. Profits involve the holder being able to take something from the servient land and again arguably this should be acquired by express agreement or grant only. On the other hand, it concluded that prescription should continue to apply to both positive easements and some negative easements (easements of light and of support, but not the flow of air or water through an artificial channel) (Volume 1 paras. 2.7.32 – 2.7.41).
- 4.27 In 2002 the Republic of Ireland's Law Reform Commission recommended that prescription should be retained for both easements and profits without distinction (*Report on the Acquisition of Easements and Profits à Prendre by Prescription* LRC 66-2002) and this is reflected in the Land and Conveyancing Law Reform Bill 2006 (Part 8 Chapter 1). When the Law Commission of England and Wales turned to the subject in the context of modernising the land registration system, it proposed, as an interim measure pending full review

of this area of the law, that in future a claim to an easement or profit should be made under the Prescription Act 1832 (c. 71) only (see Law Com No. 254 *Land Registration for the Twenty-first Century* (1998) paras. 10.79 – 10.94). This was stated to be a “free-standing” recommendation (para. 10.112) and it has not been implemented yet. However, the Law Commission of England and Wales in its 2008 Consultation Paper (No. 186) has suggested that prescription should be retained, but replaced by a single new statutory scheme (paras. 4.174 & 4.183).

- 4.28 **Question 21:** *In the light of the above discussion, the Commission inclines to the view that the doctrine of prescription can still serve a useful function and should not be abolished altogether. DO CONSULTEES AGREE?*

(b) Restriction?

- 4.29 The question then arises as to whether the operation of the doctrine should be restricted in some way. **Question 22:** *In view of the recommendation in the 1990 Final Report, the Commission inclines to the view that it should no longer apply to profits à prendre. The Law Commission of England and Wales has proposed the same in its 2008 Consultation Paper (para. 6.30). DO CONSULTEES AGREE?*
- 4.30 As regards easements, both the **1971 Survey** and **1990 Final Report** agreed that the doctrine should continue to apply to positive easements, but as indicated above (paras. 4.24 – 4.25), disagreed as to negative easements. The Commission recognises that, in practice, much reliance is placed on the doctrine of prescription for the acquisition of positive easements, such as rights of way which provide access to land. **Question 23:** *The Commission agrees, therefore, that prescription should be retained for positive easements. DO CONSULTEES AGREE?*
- 4.31 As regards negative easements, the point about easements like the right of support or right of light is that they entitle the “claimant” landowner to restrict the “servient” landowner in carrying out building or other works on the servient land. It can

be argued that since such works will usually be subject to planning control and other public regulation, the dominant owner should not be able to acquire further control by prescription rather than by express grant (following open negotiation with the servient owner). Furthermore, the dominant owner may have protection from damage caused by works on the servient land through the law of tort (on the basis of negligence or nuisance). The Commission notes that the Law Commission of England and Wales has also queried whether negative easements should continue to be capable of acquisition by prescription in its 2008 Consultation Paper (para. 4.184 & Part 5). However, the Commission is not convinced that the arguments against acquisition of negative easements by prescription are overwhelming. Reliance upon planning and other public regulation to govern relations between neighbours is notoriously uncertain (public and private interests rarely coincide). Seeking redress in respect of building operations through a tort action can be equally uncertain, as well as time-consuming and expensive. **Question 24:** *On balance the Commission is inclined to retain prescription for negative as well as positive easements.* **DO CONSULTEES AGREE?**

(c) Reform?

- 4.32 Not surprisingly, in view of the complexity of the current law, there has been unanimity on the view that the law should be considerably simplified. Both the **1971 Survey** (para. 381) and the **1990 Final Report** (Volume 1, para. 2.7.36) recommended that the traditional methods of acquisition at common law and under the doctrine of lost modern grant should be abolished. They also agreed that the Prescription Act 1832 (applied to Ireland by the Prescription (Ireland) Act 1858 (c. 42)), which is notoriously difficult to interpret, should be repealed and replaced by a much simpler statutory scheme. Such provisions would be implemented in the Republic of Ireland's 2006 Bill (Part 8 Chapter 1). The Law Commission of England and Wales has proposed the same in its 2008 Consultation Paper (para. 4.221). **Question 25:** *The Commission takes the view that similar provisions should be implemented in Northern Ireland.* **DO CONSULTEES AGREE?**

4.33 As regards the details of a new statutory scheme to replace the 1832 Act, the Commission is inclined to support most of the recommendations in the **1990 Final Report** (Volume 1 para. 2.7.37). The Commission notes that the Law Commission of England and Wales proposes similar measures in its 2008 Consultation Paper, except that, instead of assimilating the prescription period with the limitation period, it proposes a prescription period of 20 years (see para. 4.212). The Commission is inclined to adopt the same view on this point. There is a strong argument for requiring a longer period of user for easements. Adverse possession requires exclusive occupation of the land in question which should be obvious to the landowner. Prescriptive user does not involve occupation of the land and instead comprises what is often regular, but not necessarily very often, minor use of the land, such as walking over a path or track. This may not be so obvious to the landowner, especially in rural areas where the landowner may own a large estate or farm on which there are numerous paths and tracks. In such cases there is a clear case for requiring the requisite user to persist for a longer period than the 12 years required for adverse possession. **Question 26: The 1990 Final Report proposed:**

- (1) *The prescription period should be 12 years, for uniformity with the limitation period under the Limitation (Northern Ireland) Order 1989 (the Commission has indicated above its view that this particular recommendation should not be followed and that the prescription period should be 20 years);*
- (2) *The right claimed should be one that is capable of subsisting as an easement – in effect, a right which could be regarded as an easement at common law;*
- (3) *The right should be enjoyed openly and peaceably to such a degree, and where the enjoyment is intermittent with such frequency and regularity, as would be justified only by the existence of an easement confirming that right;*

- (4) *The running of the prescriptive period should be terminated by interruption of enjoyment of the right claimed for a continuous period of 12 months, or by registration of a notice by the owner of the servient land;*
- (5) *The prescriptive easement should be commensurate in extent with the right enjoyed during the prescriptive period provided that any increase in the intensity of its use during that period must not, where judged in the light of the circumstances obtaining at the time of the increase, have been such as to increase seriously the injurious effect on the servient owner's enjoyment of his or her land. Thus an increase in the use of a right of way for the passage of motor vehicles for use by cars to use by mini-buses may be acceptable; use by coaches or heavy goods vehicles or heavy machinery may not be.*

SUBJECT TO THE QUALIFICATION NOTED IN (1) THAT THE PRESCRIPTION PERIOD SHOULD BE 20 YEARS, DO THE CONSULTEES AGREE?

- 4.34 The **1990 Final Report** also contained provisions to cover cases where the dominant or servient owner is a tenant or beneficiary of a trust or suffers from some incapacity (Volume 1 para. 2.7.39). There were also provisions to govern interference by third parties, enabling the servient owner to interrupt enjoyment by the dominant owner by registration of a notice in the Statutory Charges Register (extending the provisions of the Rights of Light Act (Northern Ireland) 1961 (c. 18) to all easements) and abandonment as a result of 12 years' non-user (Volume 1 paras. 2.7.43 – 2.7.48). **Question 27:** *The Commission is inclined to recommend implementation of such provisions, subject to changing the period to 20 years, to conform with the Commission's view as to the appropriate prescriptive period (see para. 4.33 above).* **DO CONSULTEES AGREE?**

4.35 There is one further point in this context which the Commission wishes to raise. The scheme proposed in the **1990 Final Report** would effect an automatic vesting of the easement in the dominant owner on expiry of the new user period (see Volume 2 Property Order Article 154). On the other hand, the Republic of Ireland's 2006 Bill follows the scheme which operates under the Prescription Act 1832. That Act "aids the litigant only". In other words, in order to acquire an easement under it the dominant owner must seek a court order confirming the acquisition. The Republic of Ireland's 2006 Bill takes this a step further by providing that legal title to the easement (or profit also under its Act) is not acquired until the court order is registered in the Registry of Deeds or Land Registry, as appropriate. It may also be noted that the scheme proposed by the Law Commission of England and Wales in its 2008 Consultation Paper would provide that no easement would come into existence until it was registered in the Land Registry (paras. 4.222 – 4.232). However, there would be no requirement to obtain a prior court order – the claimant could make a direct application to the Land Registry. This makes sense because in England and Wales, unlike the Republic of Ireland, all land is subject to compulsory registration, as it is in Northern Ireland. This registration requirement obviously fits in with a policy of encouraging registration of title and limiting the number of unregistered rights which can affect the title. Currently easements and profits acquired by prescription here are burdens which affect registered land without registration (Land Registration Act (Northern Ireland) 1970 Schedule 5 Part 1 para. 9). There is much to be said for the view that the Land Registry Folio should, so far as is practicable, reflect the position on the ground, by noting both benefits and burdens attaching to the land.

4.36 The requirement to obtain a court order may also be regarded as reflecting the practicalities of most cases under current law. Even under the **1990 Final Report** scheme, if a party claimed to have acquired an easement by 12-years' user, but the servient owner disputed it, the reality might be that the only way of resolving the matter would be to go to court. The one difference from the Republic of Ireland's scheme, however,

would be that the court order would, if the applicant was successful, confirm that legal title vested on completion of the user period. Under the Republic of Ireland's scheme legal title would not vest until the court order is registered. This distinction may be of significance. On occasion a solicitor acting for a purchaser of land, or counsel whose opinion is sought, will be asked to advise as to whether the purchaser should proceed on the basis that an easement alleged to exist over neighbouring land actually exists. It may be easier for advice to be given that a "good holding title" exists where there is an automatic vesting as the **1990 Final Report** recommended. The advice could, of course, be put no stronger than this and would have to be qualified by pointing out that if a challenge were mounted by the servient owner, court proceedings to resolve the matter might have to be instituted. Under the Republic of Ireland's scheme the advice would have to be that there is definitely no legal title to any easement and that court proceedings would have to be taken to secure this. On the other hand, under the scheme proposed by the Law Commission of England and Wales in its 2008 Consultation Paper, the advice would be that the easement should be registered to perfect the title. A purchaser would have to be advised that the right so to register would be an overriding interest binding the servient land (paras. 4.236 & 4.237).

4.37 It seems to the Commission that there are three ways in which a new, much simplified scheme of prescription might operate –

- (1) Adopt the scheme proposed by the **1990 Final Report** whereby, upon completion of the requisite prescriptive period and satisfaction of other conditions, the easement would automatically vest in the dominant owner (see para. 4.35 above). This may have the attraction for practitioners of being closest to the existing law with which they are familiar. It clearly favours dominant owners, but it must be recognised that it does not resolve the conveyancing uncertainty that it may not be apparent to a purchaser of the servient land that a neighbouring landowner has acquired an easement over the servient land. If the

matter is disputed the only way of resolving it may be by litigation. That is, of course, the position under current law as the large number of cases involving claims to easements coming before the courts testifies. However, it is doubtless the case that many more claims are recognised without the need for litigation as part of the usual deduction and investigation of title which occurs in the conveyancing process and results in a purchaser “taking a view” as to the existence of an easement acquired by prescription.

- (2) Adopt the scheme contained in the Republic of Ireland’s 2006 Bill which would require the dominant owner to obtain a court order confirming the prescriptive claim and the registration of that order (in the Registry of Deeds or Land Registry according to whether the land is unregistered or registered) (see para. 4.35 above). This has the obvious merit of introducing certainty as to the existence or not of prescriptive easements and clearly greatly simplifies the conveyancing process. Purchasers of land and their conveyancers would no longer need to worry about whether a neighbouring owner might have an easement by prescription – if the search in the Registry of Deeds or Land Registry in respect of the servient land did not reveal a registered court order, no prescriptive easement would exist. In order to acquire the easement the dominant owner would have to continue user against the purchaser (new owner) of the servient land and to apply for a court order based on continuous user up to the date of application. There may be a concern, however, that such a scheme weights the balance too much in favour of servient owners and purchasers from them. It again runs the risk that dominant owners will lose out unfairly owing to ignorance of the need to apply for a court order and obtain its registration. This will also involve inevitable expense. As against that, it must be remembered that prescription involves the acquisition of rights over a neighbour’s land without that neighbour’s agreement and without any payment. It also may

involve acquisition which may not be very apparent to the servient owner (especially if prescription is retained for negative easements: see para. 4.31 above). In this sense it is the servient owner who may lose out through ignorance or inadvertence.

- (3) Adopt the scheme proposed by the Law Commission of England and Wales, whereby the dominant owner can apply directly (without a court order) for registration of the prescriptive easement, with the right to register being an overriding interest (or, under the registration system in Northern Ireland, a burden affecting the land without registration) binding a purchaser (who may suffer registration subsequently if the user continues against the servient land) (see para. 4.36 above). This scheme is clearly based on the registration system introduced for England and Wales by the Land Registration Act 2002, which includes provision for adjudication of disputes. Under the Northern Ireland system, as in the Republic of Ireland, disputes would have to be referred to the court. The Commission is also not sure how such a scheme would operate in respect of unregistered land. The acquisition of an easement by prescription is not in itself a “triggering event” requiring registration of title under compulsory registration. A requirement to register the easement would not arise until a sale or other triggering event occurred with respect to either the dominant or servient land. Even then, it is still not clear how a registration requirement would work because of the need to distinguish the dominant land (in respect of which the benefit of the easement might be registered) and the servient land (in respect of which the burden might be registered). Triggering events in respect of both dominant and servient land are very unlikely to occur at the same time. This suggests that some provision would have to be made for registration of some document in the Registry of Deeds to warn subsequent purchasers of the servient land of the existence of the

easement claimed to be acquired by prescription, where that land is unregistered.

- 4.38 **Question 28:** *The Commission is at this stage undecided as to which option to recommend. It takes the view that further discussion should take place with Land Registers for Northern Ireland in order to work out how registration requirements might operate and consider all the implications. In the meantime, it would be interested to receive the views of consultees on the various options. WHICH OPTION DO CONSULTEES PREFER? IS THERE SOME OTHER OPTION WHICH IS PREFERABLE?*

(ii) Implied Rights

- 4.39 The law relating to acquisition of easements and profits by implication is also somewhat complicated (see Pearce and Mee pp 232 – 236; Wylie *ILL* paras. 6.060 – 6.072). In particular, the so-called rule in *Wheeldon v Burrows* (1879) 12 ChD 31, under which on the sale of part of the land the purchaser may acquire an easement over the part retained by the vendor, is of uncertain application. What will pass to the purchaser as easements are rights (quasi-easements) which were “continuous and apparent” or “necessary to the reasonable enjoyment” of the land conveyed and exercised by the vendor when he or she owned the entire land before it was subdivided. The scope of these conditions is subject to much debate, including the question whether the two phrases in quotation marks are alternative or cumulative. The **1971 Survey** (see paras. 376 – 379) recommended replacing that rule (and, so far as it relates to creation of new easements and profits, section 6 of the Conveyancing Act 1881 (c. 41): see further para. 4.40 below) with new statutory provisions governing acquisition of rights by implication on the subdivision of land. The **1990 Final Report** adopted these provisions with a few modifications (see Volume 1 paras. 2.7.23 – 2.7.25). It recommended a single provision for the “reciprocal rights and obligations which continue or accrue when land is divided into parcels for sale”. Continuing rights should, it suggested, relate to those facilities which were previously available to the vendor in respect of one part of the land as against another and were actually enjoyed by

the vendor immediately before the sale as regularly as their nature permitted and which, in all the circumstances, it is reasonable should continue to be available. Accruing rights should be any new facilities which are necessary for the enjoyment of the parcel by its owner or occupier or which, in all the circumstances, it is reasonable to contemplate as having been intended by the parties to be available. The facilities in question should be easements and should not include profits. The **1990 Final Report** suggested that they should be (a) rights of way, (b) rights for the passage and repair of services, (c) rights of entry for the purpose of enjoying profits expressly granted, (d) rights incidental to the enjoyment of other facilities conducive to the reasonable enjoyment of land and (e) rights of support and shelter for contiguous buildings (see Volume 1 para. 2.7.26). The Republic of Ireland's 2006 Bill would also replace the rule in *Wheeldon v Burrows* with a provision based on the doctrine of non-derogation from grant (section 40). The Commission also notes that the Law Commission of England and Wales in its 2008 Consultation Paper (although it takes the view that the non-derogation doctrine is of extremely limited practical effect and rarely, if ever, is the sole basis for implication of an easement: see para. 4.105) has mooted replacing acquisition by implication with a statutory provision based on the presumed intention of the parties or the necessity for reasonable use of the land (para. 4.149). **Question 29:** *In relation to the acquisition of implied rights by prescription, the Commission takes the view that the recommendations in the 1990 Final Report should be implemented and that there should be a new statutory scheme to replace the rule in Wheeldon v Burrows. There should be a single provision for the reciprocal rights and obligations which continue or accrue when land is divided into parcels for sale.* **DO CONSULTEES AGREE?**

- 4.40 The Commission notes that the Republic of Ireland's 2006 Bill would address specifically a controversial point relating to the operation of section 6 of the 1881 Act. That section is the "word saving" provision which passes with a conveyance of land all rights "appertaining" to the land. The equivalent in England and Wales (section 62 of the Law of Property Act 1925) has been

interpreted widely as having the effect of “upgrading” what was previously an informal arrangement (such as a licence) revocable at any time into a full legal easement (which if attached to the freehold becomes, in effect, permanent and irrevocable). For example, if the landlord, as an act of kindness or good-neighbourliness, allows his or her tenant leasing neighbouring land to take a short-cut through adjacent land owned and occupied by the landlord and later conveys the freehold of the neighbouring leased land to the tenant, that conveyance may be held to have created a freehold right of way over the landlord’s adjacent land (see *Wright v Macadam* [1949] 2 KB 744; *Goldberg v Edwards* [1950] Ch 247; *Graham v Philcox* [1984] QB 747). To say the least, this seems to be a surprising interpretation of what section 6 or section 62 was designed to achieve – this was surely the passing of *existing* rights, not the creation of *new* and *more extensive* rights (see Tee “Metamorphoses and Section 62 of the Law of Property Act 1925” [1998] Conv 115). The Republic of Ireland’s 2006 Bill’s replacement of section 6 would specifically rule out the interpretation adopted by the courts in England and Wales (see section 70(3)(a) and provides that the replacement section “does not on a conveyance of land (whether or not it has houses or other buildings on it) – (i) create any new interest or right or convert any quasi-interest or right existing prior to the conveyance into a full interest or right, or (ii) extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance”). The Law Commission of England and Wales has also proposed in its 2008 Consultation Paper that section 62 should no longer transform “precarious benefits” into legal easements (para. 4.104). **Question 30:** *The Commission takes the view that a provision should be introduced to replace section 6 of the Conveyancing Act 1881 to ensure that only existing rights pass with a conveyance of land and that any precarious rights would not be upgraded or transformed into more extensive rights. DO CONSULTEES AGREE?*

- 4.41 The Republic of Ireland’s 2006 Bill deals with another controversial point about the operation of section 6 of the 1881 Act (and section 62 of the Law of Property Act 1925). This is

whether the section applies on an initial division of land – the typical situation to which the rule in *Wheeldon v Burrows* applies (para. 4.39 above). If the correct interpretation of the section is that it applies to rights which already exist at the time of the conveyance, it should not apply on the initial division of land because prior to that the land is in sole ownership and the owner cannot have rights like easements against himself or herself. The need for diversity of ownership or occupation as a prerequisite to application of the section seemed to be accepted by some members of the House of Lords in *Sovmots Investments Ltd. v Secretary of State for the Environment* [1979] AC 144, but the point is not settled (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). The Republic of Ireland’s 2006 Bill again would resolve this point as suggested by members of the House of Lords - the replacement of section 6 (section 70 of the 2006 Bill) provides that it does not on a conveyance of land “create any new interest or right or convert any quasi-interest or right existing prior to the conveyance with a full interest or right... .” The Commission is wary about interfering with the development of case law, but in this instance inclines to the view that a doubt has arisen which should be cleared up. There is a danger that the origin of the statutory provision, especially its strictly limited function as a purely “word-saving” provision, has been forgotten. It should not be used for purposes outside its intended scope. **Question 31:** *On this basis, the Commission takes the view that a provision similar to that in the Republic of Ireland’s 2006 Bill should be adopted and that a replacement of section 6 of the Conveyancing Act 1881 should make clear that on a conveyance of land, it does not create any new interest or right or convert any quasi-interest or right existing prior to the conveyance, to a full interest or right.* **DO CONSULTEES AGREE?**

(iii) Categories of Easements and Profits

4.42 Before leaving the subject of easements and profits, it may be worth raising a point which was not dealt with by either the **1971 Survey** or the **1990 Final Report**. This is an issue which has proved to be a difficult one in recent times, namely the criteria for what constitutes an easement. In particular the issue has arisen as to whether rights like the right to park vehicles on land can constitute an easement. The point is that such a right, particularly if it involves parking for extensive periods and, therefore, effectively deprives the servient owner of use or enjoyment of the land parked on, looks more like a “corporeal” rather than an “incorporeal” hereditament (see para. 4.2 above). The **1971 Survey** probably did not address this issue partly because it has become more controversial since its publication and partly because it proposed replacing the concept of easements and profits with a new concept of statutory “land obligations”. The **1990 Final Report** was drafted as a response to the **1971 Survey**.

4.43 **Question 32:** *The Commission takes the view that the issue of what constitutes an easement or profit has always been a matter for the courts, which have made it clear that they will adopt a flexible approach – “the categories are not closed”. The courts should be left to develop the concepts and to adapt them to changing conditions in society. The recent cases involving parking rights are a good example of this (see London & Blenheim Estates Ltd. v Ladbroke Retail Parks Ltd. [1992] 1 WLR 1278; Batchelor v Marlow [2003] 1 WLR 764; Moncrieff v Jamieson [2007] 1 WLR 2620). The Commission notes that the Commission of England and Wales did not propose in its 2008 Consultation Paper (Part 3) interfering substantially with the characteristics of easements. DO CONSULTEES AGREE?*

Party Structures

4.44 The **1971 Survey** drew attention to the problems which can arise for adjoining landowners where building work may affect a party wall (or “structure” – what separates adjoining lands need not be a “wall” as such) separating their properties. It recommended legislation to deal with disputes which may arise

in this situation along the lines of the London Buildings Acts (Amendment) Act 1939 (c. xcvi) (since replaced by a national scheme for England and Wales introduced by the Party Wall etc. Act 1996 (c. 40)) (para. 370). The **1990 Final Report** questioned the need for such a scheme but recommended that the Department of the Environment should keep the matter under consideration (Volume 1 paras. 2.7.16 – 2.7.22).

- 4.45 The Commission notes that provisions covering this matter (and access to neighbouring land) have been included in the Republic of Ireland's 2006 Bill (Part 8 Chapter 3). These provide a very broad definition of party structures and facilitate the carrying out of a wide range of works to such structures, if necessary by means of a works order obtained from the District Court, where the neighbouring owner refuses to co-operate or to facilitate the works. There are provisions for compensation and other protection of any neighbouring owner affected by such works. If such provisions were to be introduced here the Commission considers that the Lands Tribunal for Northern Ireland would be the appropriate body to deal with such disputes. However, that raises the issue whether there is a need for such legislation. Notwithstanding the view taken in earlier reports, the Commission is not aware that problems relating to party structures have arisen in Northern Ireland and would be interested to receive any evidence on the subject which consultees may have on the matter. **Question 33:** *At this stage the Commission is not inclined to recommend legislation on party structures.* **DO CONSULTEES AGREE?**

Access to Neighbouring Land

- 4.46 The **1990 Final Report** drew attention to the Law Commission of England and Wales' 1985 *Report on Rights of Access to Neighbouring Land* (Law Com No. 151). This dealt with the problems which can arise where a building has been built so close to the boundary with adjoining land that the only way it can be inspected, maintained or repaired is by entering that neighbouring land. Unless the building owner has a right of entry, the neighbour may prevent him or her from carrying out essential work. The **1990 Final Report** endorsed the Law Commission's recommendations which were implemented by

the Access to Neighbouring Land Act 1992 (c. 23). This enables a landowner to obtain an access order from the court to facilitate a wide range of works that can only be carried out by gaining access to a neighbour's land, thereby circumventing an obstructive or uncooperative neighbour. The Commission recognises that such provisions may be more controversial and that it can be argued that a neighbour should not be "bullied" in this way because of the way a neighbouring property was built. The argument may be made that the builder or developer should have anticipated the need for access in the future and contracted for this with the neighbouring landowner before completing the building and disposing of it. It may be further argued that a purchaser of the building takes it with this "flaw". However, the Commission takes the view that these points will often have been overlooked and that it may be many years before the problem of access comes to light, during which time both the building and neighbouring land may have changed hands several times. Meanwhile the builder or developer will have long since disappeared! It is in no party's interest that a building should be allowed to deteriorate because the owner cannot get to the part needing repair. The disrepair (e.g. a leaking or missing gutter) may even be damaging the neighbouring land. It is important to emphasise that the English legislation and the Republic of Ireland's proposed provisions for access are strictly limited, with various provisions protecting the neighbouring owner, both procedurally and in terms of compensation. Nevertheless the Commission is concerned about the danger that such provisions may be used by developers who have acquired land to force neighbouring landowners to agree to works under the threat of an application for an access order. Again the Commission is unaware that this matter has been a problem in Northern Ireland and would be interested to receive any evidence consultees may have.

Question 34: *At this stage the Commission is not inclined to recommend legislation on access to neighbouring land. DO CONSULTEES AGREE?*

- 4.47 The Commission wishes to emphasise that at this stage it is preserving an open mind on the subject of party structures and access to neighbouring land. What view it comes to ultimately

will depend very much on the response from consultees. In that context there is one further point to be made. The Commission is aware that it is not entirely clear how the two English Acts (the Access to Neighbouring Land Act 1992 and Party Wall etc. Act 1996) fit together, as there is some overlap between them (see Megarry and Wade paras. 30-035 – 30-045). It notes that the matters covered by the two Acts are dealt with in one rather more simple set of provisions in the Republic of Ireland's 2006 Bill (Part 8 Chapter 3). Under these, "works orders" obtainable from the District Court can relate both the party structures and buildings which are not such structures, but are so close to the boundary with neighbouring land that work on them could only be carried out by access from that land. Thus, under the Republic of Ireland's scheme, the District Court's order can deal with neighbour disputes involving both party structures and access to carry out works to buildings which may not be party structures. **Question 35:** *The Commission takes the view that, if ultimately the conclusion is made that such legislation relating to the provision of access to neighbouring land should be introduced in Northern Ireland, the Republic of Ireland's approach should be adopted, with jurisdiction being conferred on the Lands Tribunal to deal with neighbour disputes involving both party structures and access to carry out works to buildings which may not be party structures.* **DO CONSULTEES AGREE?**

CHAPTER 5. FUTURE INTERESTS

INTRODUCTION

- 5.1 The law relating to future interests in property (much of this law applies to both land and personal property) is one of the most complex and most difficult to understand and apply (Pearce and Mee Chapter 8; Wylie *ILL* Chapter 5). This law is concerned primarily with interests in property which will vest in a person or body at some time in the future, but the myriad of rules cover other matters, such as where property cannot be disposed of immediately and is tied up in various ways. It reflects the conflict which the law has had to address over the centuries, between the right of an individual to determine the future destination of his or her property and the public policy of rendering property freely alienable and available to the market. It may be useful to begin with an outline of the various rules, explaining their context and applicability in Northern Ireland.

Common law contingent remainder rules

- 5.2 These rules are a throwback to the feudal system of land tenure and are bound up with the concept of “seisin”. The feudal system was concerned that there would always be someone “seised” of the land who would be responsible for performance of feudal services. The contingent remainder rules were designed to invalidate any settlement of land which created an “abeyance of seisin” (where there was a “gap” in the seisin and so no-one responsible for feudal services) or an arbitrary “shifting of seisin” (from one person to another, which might cause doubt in a superior owner as to who was responsible for services) (see Wylie *ILL* paras. 5.012 – 5.017). These rules could be avoided by creating equitable interests and using the Statute of Uses (Ireland) 1634 (c. 1). That led to development of further rules, such as the rule in *Purefoy v Rogers* ((1671) 2 Wms Saund 380), and later legislation, such as the Contingent Remainders Act 1877 (c. 33) (Wylie *ILL* paras. 5.018 – 5.030).

5.3 This is extremely arcane law which bears little relevance to 21st century life. The **1971 Survey** recommended abolition of legal remainder interests, repeal of the Statute of Uses and turning most future interests in land into equitable interests. The exception would be leasehold reversions and rights like a possibility of reverter. This reflects the reforms to freehold estates discussed in Chapter 3 of this Consultation Paper. Under these only a fee simple absolute in possession (i.e. a present as opposed to a future interest) would confer legal title to land – other estates such as a life estate or future interests like a fee simple in remainder or reversion would become equitable interests only (see paras. 3.5 – 3.35 above). The **1990 Final Report** did not address the issue directly but its recommendations included repeal of the 1634 Statute and provisions governing settlements which would render future interests equitable only (see Chapter 6 below). Such reforms were implemented in England and Wales by the Law of Property Act 1925 (c. 20) and would be in the Republic of Ireland under the Land and Conveyancing Law Reform Bill 2006 (sections 16 & 17). **Question 36:** *The Commission takes the view that legal remainder interests should be abolished, that the Statute of Uses (Ireland) Act 1634 should be repealed and that most future interests in land should be converted into equitable interests.* **DO CONSULTEES AGREE?**

Rules against remoteness

- 5.4 These are rules which are concerned with dispositions or settlements which postpone the vesting of property in a person or body until sometime in the future. One was the so-called rule in *Whitby v Mitchell* (1890) 44 ChD 85. This needs no further mention because it was abolished by section 15 of the Perpetuities Act (Northern Ireland) 1966 (c. 2).
- 5.5 The other main rule against remoteness, which is of much more significance, is the rule against perpetuities, which governs the vesting of future interests in both land and personalty, including equitable interests. As developed by the courts it was riddled with absurdities and complexities, the former of which were largely dealt with by the major changes introduced by the 1966 Act (see Wylie *ILL* paras. 5.056 – 5.149). The 1966 Act, which

was modelled closely on the English Perpetuities and Accumulations Act 1964 (c. 55), did not remove the complexities of the rule – indeed, arguably it has made the rule even more complex. Furthermore, it is arguable that the rule continues to apply to transactions or dispositions which it should never have been applied to. We return to this subject below (para. 5.13). But first we turn to two other rules still of some significance, the rule against accumulations and the rule against inalienability.

Rule against accumulations

- 5.6 This is a rule designed to prevent a disposition or settlement of property tying up the income for too long a time, i.e., requiring it to be accumulated rather than spent. At common law this was governed by the perpetuity period, although in this context the rule was more a rule against inalienability (which is concerned with the disposition of capital or income of property i.e. keeping it freely disposable: see para. 5.8 below) than a rule against perpetuities (which is concerned with the initial vesting of an interest rather than the disposition or spending of an interest which has already vested).
- 5.7 However, as a result of the notorious case in England of *Thelluson v Woodford* ((1799) 4 Ves 227, (1805) 11 Ves 112) legislation was enacted there to introduce specific accumulation restrictions (Accumulations Act 1800 (c.98)). This Act did not apply to Ireland, but by virtue of some parliamentary fumbling at Westminster, a later amending Act, the Accumulations Act 1892 (c. 58) did apply (see Wylie *ILL* paras. 5.150 – 5.153)! The **1971 Survey** recommended removal of this anomaly by repeal of the 1892 Act (in England and Wales the 1800 and 1892 Acts were replaced by sections 164 – 166 of the Law of Property Act 1925 and amended by section 13 of the Perpetuities and Accumulations Act 1964). The **1990 Final Report** endorsed this recommendation and confirmed that no special accumulations rule should be enacted here (Volume 1 para. 2.12.18). It should also be noted that the Law Commission of England and Wales recommended that the rule should also be abolished in England and Wales except in relation to charitable trusts (*The Rules against Perpetuities and Excessive*

Accumulations (1998) Law Com No. 251, Part X: see para. 5.13 below). **Question 37:** *The Commission has concluded that it too should endorse the 1971 Survey's recommendation: that no special accumulation rule should be enacted and the Accumulations Act 1892 should be repealed. Further, the Commission is not convinced of any need for a special rule for charities. DO CONSULTEES AGREE?*

Rule against inalienability

- 5.8 This is a rule which seeks to restrict dispositions or settlements of property which unduly tie up the land or the capital or income of property (see Wylie *ILL* paras. 5.033 – 5.041). As such it has a quite different purpose from that of the rule against perpetuities strictly so-called. The latter is concerned with the “too remote” initial vesting of property in a person or body. The rule against inalienability is concerned with a person or body in whom or in which the property has already vested not being able to “alienate” it, i.e., dispose of the land to someone else or spend the capital of a fund or income produced by a fund. Confusion arises because the restriction imposed by the courts on such tying-up has been linked to the perpetuity period (in this instance, the courts have used a period of 21 years only, because “lives in being” are not relevant). The confusion is then often added to because on occasion the courts refer to applying in such cases the rule against perpetuities, when it is clear that they do not mean that rule in its strict sense, but rather the rule against inalienability. In such cases the courts are not dealing with the initial vesting of an interest in property (which is what the rule against perpetuities is concerned with), but rather the disposition of income or capital relating to an interest which has already vested (i.e. whether it is freely alienable).
- 5.9 So far as dispositions or settlements of land are concerned, the rule against inalienability had its origin in the early feudal Statutes of Westminster the Third 1289 – 1290 (*Quia Emptores*) (18 Edw. I) (cc. 1, 2, 3). That statute prohibited any provision designed to prevent the holder of a fee simple estate from alienating his or her interest in the land – hence the epithet “freehold”. It did not apply, however, to *leasehold* land (see

Wylie *ILL* paras. 2.46 & 5.034). The rule has been invoked in recent times with respect to freehold land (see the decision in the Republic of Ireland *Re Dunne's Estate* [1988] IR 155: a condition attached to property left by a will specifying that the donees or their successors should not sell or otherwise convey or transfer it to any member of named families in a particular locality was held void). **Question 38:** *The Commission takes the view that this is one feature of the feudal system which remains of practical relevance. It illustrates one of the key features of "freehold" land and distinguishes it from "leasehold" property. That distinction would remain relevant even if the change mooted in Chapter 2, Question 2 (of converting freehold land into allodial ownership) were adopted. DO CONSULTEES AGREE?*

- 5.10 The position with respect to personal property and property (land or personal property) held under a trust is rather more complicated (see Wylie *ILL* paras. 5.035 – 5.041). First, the rule against inalienability does not apply to a gift or trust of property in favour of a charity. (Until now, a gift which included both charitable and non-charitable purposes could be saved from the rule by treating it as exclusively charitable in accordance with section 24 of the Charities Act (Northern Ireland) 1964 (c. 33). However this section seems to have been rarely used and has not been replicated in the Charities Act (Northern Ireland) 2008 (c. 12)). It should also be noted that statutory provision is made for restrictions on alienation under the "protective trusts" regime introduced by section 34 of the Trustee Act (Northern Ireland) 1958 (c. 23).
- 5.11 Apart from that there is no doubt that considerable problems can arise as a consequence of the rule against inalienability with respect to gifts or trusts for *non-charitable* purposes (in this context, apart from confusing references to the rule against perpetuities (see para. 5.8 above), the rule is sometimes referred to as the rule against "perpetual trusts"). A typical and very common example is where property is given to an unincorporated body, like a club or society, and there are doubts about whether it can dispose of it at any time (see Wylie

ILL paras. 5.039 – 5.040). We return to this subject later (see para. 5.24 below).

REFORM

- 5.12 **Question 39:** *The above discussion leads the Commission to conclude that, apart from accumulations, there are two areas of the law relating to future interests which require review with respect to reform. These are the rule against perpetuities (in its strict sense) and the rule against inalienability as it applies to gifts or trusts for non-charitable purposes or in favour of non-charitable bodies. This is in addition to the recommendation that no vestiges of the rule against accumulations should remain (see para. 5.7 above).* **DO CONSULTEES AGREE?**

Rule against perpetuities

- 5.13 The starting point of any consideration of reform of the rule against perpetuities must be to note that the common law rule was reformed substantially by the Perpetuities Act (Northern Ireland) 1966. This was based very closely on the English Perpetuities and Accumulations Act 1964, which served as a model for reform in many other common law jurisdictions. Why then consider further reform? There are two main reasons. One is that it has come to be recognised that the statutory reforms are not entirely satisfactory and probably did not go far enough. Both the **1971 Survey** (Chapter 12) and the **1990 Final Report** (Volume 1 Chapter 2.12) drew attention to this. The Law Commission of England and Wales carried out an extensive review of the operation of the 1964 Act and issued a Report in 1998 recommending various changes (*The Rules against Perpetuities and Excessive Accumulations* Law Com No. 251) which would be implemented by the Perpetuities and Accumulations Bill introduced to the House of Lords on 1 April 2009 (HL Bill 35) (see para. 5.22 below). The other reason is that there has been an increasing movement in other parts of the world to abolish the rule altogether rather than amend its operation.

(i) Abolition?

- 5.14 The issue of whether the rule should be abolished altogether or simply reformed has been debated in many other jurisdictions. Two recent extensive reviews of the issue were carried out in the Republic of Ireland (see Irish Law Reform Commission *Report on the Rule against Perpetuities and Cognate Rules* LRC 62-2000) and the Australian State of Victoria (Scrutiny of the Acts and Regulations Committee *Report concerning the Maintenance Act 1965, Marriage Act 1958 and the Perpetuities and Accumulations Act 1968* (2004)). It is an indication of the difficulty of the issue and of how finely balanced the arguments for and against abolition are that these reviews reached different conclusions. The Republic of Ireland's review came down in favour of abolition and this would be implemented by the Land and Conveyancing Law Reform Bill 2006 (sections 16 & 17). It may be significant that the Republic of Ireland's approach has met with some criticism: see Mee, "From Here to Eternity? Perpetuities Reform in Ireland" (2000) 22 DULJ 91. The Victoria review, on the other hand, came down in favour of reform rather than abolition (see para. 5.17 below).
- 5.15 As regards the case for abolition, this was put forward several years ago by the Manitoba Law Reform Commission (*Report on the Rules against Accumulation and Perpetuities* (1982) pp 35 – 43) on five grounds:
- (1) The Canadian family structure is different from the structure that existed when the rule was formulated and property dispositions have also changed;
 - (2) All the modern rule does is trap the unwary and invalidate interests that would not have troubled those who created the rule;
 - (3) Even if there is a continuing danger of creating perpetuities, the limits on remoteness of vesting imposed by the rule is not the most desirable response;
 - (4) The tax system currently has a very deterrent effect on those thinking of creating perpetuities;

- (5) The balancing role has been overtaken by the law of trusts.

The Commission takes the view that each of these grounds could be applied to Northern Ireland. The Commission would add that the current law, which involves a mixture of the common law rule and statutory provisions introduced by the 1966 Act, has become even more complex. The question has to be asked whether it is necessary to impose on settlors and testators and their legal advisers such a complex system in order to restrain the odd settler or testator who, probably most unwisely and against advice as to the tax implications, is minded to tie up ownership of property well into the future. The Republic of Ireland's Law Reform Commission thought this was not necessary, but coupled its recommendation for abolition with a recommendation for introduction of variation of trusts provisions. The point about variation provisions is that they enable beneficiaries to amend the terms of their trust by seeking a court order sanctioning the amendments on behalf of beneficiaries who cannot agree to them on their own behalf (because, e.g., they are not yet born or are subject to some incapacity). This recommendation was accepted by the Irish Government and variation provisions were included in the 2006 Bill (Part 5). Such provisions have, of course, long been a feature of the law of Northern Ireland (Trustee Act (Northern Ireland) 1958 (c.23) section 57).

- 5.16 The Manitoba proposals for abolition of the rule were implemented (Perpetuities and Accumulations Act CSSM c. P33) and abolition has since been carried out in many of the States of the United States of America (see Sitkoff and Schanzenbach "Jurisdictional Competition for Trust Funds : An Empirical Analysis of Perpetuities and Taxes" 115 Yale LJ 356 (2005); Dobris "The Death of the Rule against Perpetuities, or the RAP has No Friends – An Essay" 35 Real Property, Probate and Trusts Journal 601 (2000)).
- 5.17 On the other hand, the Law Commission of England and Wales in its 1998 Report (see para. 5.13 above) rejected abolition on the ground that the "dead hand" function of the rule (i.e.

preventing testators dictating devolution of property in the future) remained “an important one” and concluded that no other rule was “either sufficient to or as effective in achieving it” (para. 2.25). This was based on the majority of responses to an earlier Consultation Paper (*The Law of Trusts: The Rules against Perpetuities and Excessive Accumulations* No. 133 (1993)), the minority of which did, however, favour abolition. As indicated earlier, the recent Victoria review differed from the conclusion of the Republic of Ireland’s Law Reform Commission and like the Law Commission of England and Wales concluded that policy objectives like the “dead hand” one remained valid. It was noted that only South Australia in that continent had opted for abolition as opposed to reform.

- 5.18 The **1990 Final Report**, while accepting the strength of the case for abolition (including the argument that the tax system is an effective controlling mechanism), in the end concluded that a “totally incontrovertible case would have to be made for the abolition of a rule of law which has endured through the centuries and was substantially amended as recently as 1966, and that such a case cannot be made” (Volume 1 para. 2.12.10). The Commission is not convinced that this is a satisfactory stance to take now, particularly in the context of a law reform project which has amongst its primary aims the removal of outdated law and simplification of the law. That stance must also be called into question in the light of the movement towards abolition in other jurisdictions, in particular in the Republic of Ireland and North America, following extensive reviews of the law.
- 5.19 One argument for retaining the rule against perpetuities is that it prevents settlors or testators who might wish to tie up their property indefinitely from doing so. There are other deterrents, primarily the ability of the trustees and beneficiaries to vary trusts and the taxation system. The Commission suggests that abolition should be implemented and that adjustments to either of those methods of control could be made later if evidence of “abuse” of abolition emerges. (Although South Australia has abolished the rule, 80 years after the date of a disposition parties may apply to the court for a variation to ensure that

remaining unvested interests vest immediately: Law of Property Act 1936 section 62). This would mean that the law here would be out of line with that in England and Wales, but that has long been the position with respect to the related subject of accumulations (see para. 5.7 above). This difference in the law between the two jurisdictions has been noted judicially: see the House of Lords decision in *Vestey v IRC (Nos. 1 and 2)* [1979] 3 WLR 915, especially Lord Wilberforce at p 920, drawing attention to the resultant encouragement of investment in and transfer of funds to Northern Ireland. Furthermore, it may be noted that Scottish law did not adopt the common law rule against perpetuities and perpetual trusts are possible there (see Burgess, "Perpetuities in Scots Law" 1979 31 *Stair Society* 18). Nevertheless, the evidence of the Scottish position in practice obtained by the Law Commission of England and Wales led it to conclude; "The mere fact that the law allows the creation of perpetual trusts does not lead settlors to create them. In Scotland few do. Other factors, such as taxation, or the risk of the disposition eventually failing for uncertainty, tend to encourage trusts to be set up for a comparatively short duration." (Law Com No. 251, para. 2.37; the Scottish evidence was also that most perpetual trusts related to public purposes, with very few private trusts of this kind being created). The Commission considers it likely that this too would be the experience here if the rule were abolished. **Question 40:** *The Commission is inclined to the view that the case for abolition should prevail in the interests of simplification of the law and on the basis that there should be less complicated methods of deterring settlors or testators tempted to control future devolution of property.* **DO CONSULTEES AGREE?**

(ii) Reform?

- 5.20 The Commission recognises that, for all the reasons outlined above, abolition of the rule against perpetuities may prove to be controversial and that, in the light of responses to this Consultation Paper, the Commission may conclude that it would be more appropriate to retain the rule. That then raises the question as to whether some reforms to a retained rule should be made.

- 5.21 Attention was drawn earlier to the review of the rule carried out by the Law Commission of England and Wales in the 1990s and culminating in its Report in 1998 (para. 5.13 above). That Report is of particular significance here for two reasons. One is that it was based on a review which postdated the **1971 Survey** and **1990 Final Report**. The other is that it involved a review of the operation of the Perpetuities and Accumulations Act 1964, which the Perpetuities Act (Northern Ireland) 1966 closely followed.
- 5.22 So far as the rule against perpetuities is concerned (the recommendation with respect to the rule against accumulations was noted above: para. 5.7) the Law Commission of England and Wales made two principal recommendations (para. 1.15):
- (1) The rule should be restricted in its application to successive estates and interests in property and to powers of appointment, thereby restoring it to its original function. It would cease to apply to rights over property such as options, rights of pre-emption; and future easements. The existing exclusion from the rule of some pension schemes would be widened to include virtually all such schemes.
 - (2) There should be a single perpetuity period of 125 years and the principle of “wait and see” should apply for this period.

The Commission regards these as eminently sensible proposals as did the Scrutiny Committee which reviewed the Victoria Perpetuities and Accumulations Act 1968 (see para. 5.14 above). The Law Commission’s proposals are now reflected in the Perpetuities and Accumulations Bill introduced to the House of Lords on 1 April 2009 (HL Bill 35). **Question 41:** *If the conclusion is ultimately reached that the rule against perpetuities should be retained rather than abolished altogether, the Commission takes the view that it should be reformed as recommended by the Law Commission of England and Wales in the 1998 Report, and implemented by the 2009 Bill: that the rule should be restricted in its application to successive estates*

and interests in property and to powers of appointment and there should be a single perpetuity period of 125 years. DO CONSULTEES AGREE?

Rule against inalienability

- 5.23 In this context it is important to distinguish the rule against inalienability as it applies to freehold land and as it applies to gifts or trusts for non-charitable purposes or in favour of non-charitable bodies (such as unincorporated bodies like clubs and societies) (see paras. 5.8 – 5.11 above). The rule as it applies to freehold land relates to a fundamental feature of such land (as distinct from leasehold land) and the Commission indicated earlier its view that this aspect of the rule should be retained. It notes that the Republic of Ireland’s 2006 Bill, which would abolish feudal tenure, would also retain this aspect (see section 9(3)(c)).
- 5.24 As regards the rule’s application to non-charitable gifts or trusts (when it is sometimes referred to the “rule against perpetual trusts”), it was pointed out that the rule performs a different function from the rule against perpetuities in its strict sense. The latter is concerned with the remoteness of vesting of a future interest in a person or body whereas the rule against inalienability is concerned with the holder of an interest in property, whether capital or income, which has already vested not being able to dispose of it or spend it within a period which is taken to be the 21-year period associated with the perpetuity period. There is no doubt that this rule has caused particular difficulties for unincorporated bodies like clubs and societies and that the courts have over the years struggled to develop consistent principles. In particular, this area of the law is bound up with a very controversial aspect of the law of trusts, namely, how far the law should recognise as valid a trust for a non-charitable purpose (see Wylie *ILL* paras. 9.114 – 9.126).
- 5.25 It could be argued that the application of the rule against inalienability or perpetual trusts should be reviewed as part of a review of the law of trusts or the law relating to unincorporated associations, rather than as part of a project which is aimed primarily at land law and conveyancing reform. The Law

Commission of England and Wales took this view in its review of the rule against perpetuities and accumulations (Law Com No 251 para. 1.14) (Clause 18 of the Perpetuities and Accumulations Bill 2009 makes it clear that it does not affect the period permitted for the duration of non-charitable purpose trusts). The same view was taken by the Republic of Ireland's Law Reform Commission (LRC 62-2000 paras. 5.08 – 5.16). On the other hand, as pointed out earlier, Scottish law (operating in a "perpetuities-free world") has long allowed perpetual trusts to operate without apparent problems (see para. 5.19 above). Furthermore, many of the States in the United States of America which have abolished the rule against perpetuities have also abolished the rule against perpetual trusts (see para. 5.16 above). That suggests that there may be some merit in abolishing both rules, if the option of abolishing the rule against perpetuities is adopted (see para. 5.19 above).

Question 42: *The Commission is inclined to recommend abolition of the rule against perpetual trusts if the rule against perpetuities is also abolished. If the latter rule is retained, the Commission would be inclined to retain the rule against perpetual trusts with appropriate modification (such as adoption of a new perpetuity period).* **DO CONSULTEES AGREE?**

CHAPTER 6. SETTLEMENTS AND TRUSTS

INTRODUCTION

- 6.1 This Chapter is concerned with dispositions of land which create a succession of interests (see Pearce and Mee Chapter 14; Wylie *ILL* Chapter 8). It is concerned primarily with freehold land in respect of which the owner can make use of the various different types of estate discussed earlier (see Chapter 3) in order to create interests in the land to be enjoyed by different people in succession to each other. Those people are usually present and future generations of the owner's family. A traditional form of such a settlement or trust would be a disposition – “To A for life, then to B in fee tail, then to C in fee simple.” Such a disposition, whether an *inter vivos* one or one made by will, may operate by way of a trust or create the succession by disposing of the land directly to the persons without the interposition of a trust. If a trust is used, it may take the form of a “holding” trust (where the trustees have, at most, a *power* to sell the land, but *no obligation* to do so) or of a trust for sale (where the trustees have a clear *obligation* to sell the land and invest the proceeds to be held for the beneficiaries entitled in succession). If no trust is used the disposition is usually referred to as a “strict settlement”. Dispositions creating a succession of interests in land to be enjoyed by a number of people should be distinguished from dispositions creating interests in a number of people to be enjoyed, not in succession to each other, but rather together at the same time. Such dispositions create concurrent ownership which is dealt with in the next Chapter.
- 6.2 The law relating to settlements and trusts of land was the subject of major legislative reform in the 19th century (see Harvey *Settlements of Land* Sweet and Maxwell (1973)). The primary concern was that more and more land, which at the time was a major source of wealth and substantial contributor to the economy, was being tied up in family settlements and trusts.

Such settlements usually ensured that the person holding the interest in possession (as opposed to by way of remainder), and currently entitled to occupy the land and to enjoy its benefits, had a limited estate only, such as a life estate. Such an estate, which was liable to end at any time (on the death of the holder), was totally uncommercial. It could not be sold or leased because no one would purchase or take a lease granted out of such a precarious estate. Furthermore its precarious nature meant that it could not be used as security for a loan (by way of a mortgage). The result was that many areas of the country became rundown because, in the absence of independent funds, the current owners had no effective means of raising finance for development, improvements or even repairs and maintenance.

- 6.3 The revolution in the law introduced by the Westminster Parliament during the 19th century was to give limited owners (whether holding the land directly by way of a strict settlement or under a trust) various statutory powers to deal with the land as if they owned it outright (in effect, as if the fee simple, rather than a limited interest like a life estate, was vested in them). Initially, a series of statutes in the 18th century (including some enacted by the pre-Union Irish Parliament) conferred powers to lease the land for various public purposes, such as building schools and hospitals, or promotion of specified commercial activities, such as linen and cotton manufacture, mining and tree planting. The 19th century saw the introduction of more general powers conferred on limited owners and these culminated in the Settled Land Acts 1882 – 1890 (see List of Statutes). These Acts remain in force in Northern Ireland.

REFORM

- 6.4 The legislative provisions contained in the Settled Land Acts 1882 – 1890 proved to be very effective, but it came to be recognised that they were somewhat complex and suffered from some fundamental flaws. In particular, as a result of some parliamentary uncertainty, the treatment of different forms of settlements and trusts, with trusts for sale being treated differently from strict settlements and holding trusts, was

confusing. The **1967 Lowry Report** drew attention to this confusion (see para. 141(c) of the report and para. 6.5 below).

- 6.5 The 1882 – 1890 Acts were replaced in England and Wales by the Settled Land Act 1925 (c. 18), but the confusion relating to trusts for sale was exacerbated by putting separate and different provisions for such trusts in the Law of Property Act 1925 (c. 20). The **1967 Lowry Report** commented (para. 141(c)):

“We do not think that the elaborate dual system of settlements, viz the settlement within the Settled Land Act 1925, and the trust for sale under the Law of Property Act 1925, is suitable for Northern Ireland. We incline to the view that there should only be one kind of settlement which might be declared to exist whenever ‘land is held in trust for persons in succession or subject to family charges or for the benefit of an infant or of two or more persons beneficially as joint tenants or tenants in common.’”

The last sentence refers to the fact that the trust for sale mechanism was also applied by the Law of Property Act 1925 to concurrent ownership situations. This is a controversial issue which is addressed in the next Chapter (see para. 7.8). For the moment we are concerned only with settlements and trusts creating a succession of interests.

- 6.6 The **1971 Survey** agreed with the criticisms of the 1925 provisions and proposed a radical new approach to the subject of settlements and trusts (note, however, that its scheme also covered concurrent ownership: see para. 7.8 below). Its scheme did indeed involve a creation of a single concept of “statutory trusts” to cover all future cases of settlements and trusts of land. Under this the land would always be held on a holding trust (unless the settlor expressly created a trust for sale). The most radical departure from the 1882 – 1890 and 1925 schemes was that the powers of dealing with the land would always be vested in trustees. Furthermore, it reversed

the approach in the earlier legislation. That had conferred various powers, often limited and subject to all sorts of restrictions, on limited owners or trustees. The new scheme proceeded on the basis that full legal title to the land was vested in the trustees and so they would have the full powers of dealing with it that an absolute owner had. There was, therefore, no need for lengthy and complicated provisions relating to their powers. Of course, as trustees the exercise of the powers of an absolute owner could not be for their own benefit, but would have to be for the benefit of the beneficiaries entitled in succession. That is simply an application of the general law of trusts. Various provisions relating to delegation of the trustees' powers and consultation with beneficiaries were included.

6.7 The **1990 Final Report** largely endorsed the **1971 Survey's** scheme (Volume 1 Chapters 2.3 and 2.4). Although the scheme has never been implemented here, the irony is that the Law Commission of England and Wales devised a similar scheme shortly before the **1990 Final Report** was published (see Report: *Trusts of Land* (1989) Law Com No. 181; this was based on proposals made in its earlier Consultation Paper: *Trusts of Land* (1985) Law Commission Consultation Paper No. 94). This resulted in the enactment of the Trusts of Land and Appointment of Trustees Act 1996 (c. 47). As its name indicates this Act covers a range of matters, but a key feature is the new scheme for "trusts of land". This concept now covers all trusts relating to land, including implied and constructive trusts, bare trusts and trusts for sale (see Megarry and Wade Chapters 10 & 12). The essential feature of this scheme is that legal title in all such cases is vested in the trustees and, subject to any express provisions made by a settlor, they have the power to deal with the land which an absolute owner has. This is of course subject to their duty under the general law of trusts to act as trustees in exercising such powers, i.e. they must act in the interests of the beneficiaries and not their own interests.

6.8 The Republic of Ireland's Land and Conveyancing Law Reform Bill 2006 has also adopted a unitary "trusts of land" scheme (Part 4). Its provisions are considerably simpler than those

contained in the 1996 Act, the drafting of which have been criticised (see, e.g., the annotations to the Act contained in *Current Law Statutes 1996* (Sweet and Maxwell) Volume 2).

- 6.9 **Question 43:** *The Commission has concluded that a unitary trusts of land scheme, as originally proposed by the 1971 Survey, and similar to those introduced in England and Wales and the Republic of Ireland should be implemented in Northern Ireland. DO CONSULTEES AGREE?*

CHAPTER 7. CONCURRENT OWNERSHIP OF LAND

INTRODUCTION

- 7.1 Like the previous Chapter, this Chapter is concerned with the situation where several persons own estates or interests in the same land. The previous Chapter dealt with where those persons do not own the estates or interests at the same time, but rather in succession to each other. This Chapter deals with where they own the estates or interests together at the same time. They have concurrent interests or, to use the traditional terminology, they enjoy co-ownership of the land (see Conway, *Co-ownership of Land* Butterworths (2000)).
- 7.2 Our law developed several forms of concurrent ownership, but some of them have ceased to have practical significance. One form, known as a “tenancy by the entirety”, derived from the common law’s view of the position of a husband and wife, whereby they were treated as a single person. That position was changed by the Married Women’s Property Act 1882 (c. 75), which created the concept of the wife’s separate estate (see Wylie *ILL* paras. 7.47 – 7.52). It has long been accepted that a tenancy by the entirety has not been created since 1882 (see Palley, “Husbands, Wives and Creditors” (1969) 20 *NILQ* 132 at 139). Another form was a “co-parcenary” which related to the old law of inheritance which governed succession to land when the owner died intestate. If there was no male heir who could succeed under the rule of “primogeniture”, the nearest female relatives (such as daughters) succeeded as co-parcens. This law of inheritance on intestacy was abolished prospectively by the Administration of Estates Act (Northern Ireland) 1955 (c. 24) (section 1) (see Leitch, *A Handbook on the Administration of Estates Act (Northern Ireland) 1955* (1956 *ILSNI*) Chapter 1). As a result a co-parcenary could arise nowadays only in the extremely rare case where succession to a fee tail estate involves ascertainment of the deceased fee tail owner’s “heir”. **Question 44:** *In view of the rarity of such cases*

and the Commission's earlier proposals for abolition of fees tail and conversion of existing ones (see paras. 3.28 – 3.33), the Commission takes the view that there is no point in considering reform of the law of co-parcenary. **DO CONSULTEES AGREE?**

7.3 The two forms of concurrent ownership which remain of day-to-day practical significance are a “joint tenancy” and a “tenancy in common” (see Pearce and Mee Chapter 9; Wylie *ILL* Chapter 7). The essential difference between the two is that joint tenants are subject to the right of survivorship which cannot be abrogated by any will made by a joint tenant. On the death of a joint tenant his or her estate or interest held jointly with another or others is succeeded to by the surviving joint tenant or tenants. On the other hand, tenants in common are regarded as holding separate shares (albeit undivided shares so long as the tenancy in common lasts), so that on death a tenant in common's share will pass to his or her testate or intestate successors.

7.4 A simple example will illustrate this distinction. If land was conveyed to A, B and C as joint tenants in fee simple and A died (while the joint tenancy remained in existence – we deal later with matters like “severance” of a joint tenancy: see para. 7.12), B and C would hold the fee simple as joint tenants and A's successors would have no claim to that estate in the land. If B then died, C would become sole owner of the fee simple and the joint tenancy would cease to exist. If, on the other hand, land was conveyed to A, B and C as tenants in common in fee simple and A died, A's share (one-third, if the conveyance was to A, B and C equally, but note that the conveyance could specify unequal shares) would go to his successors (e.g., his children D and E in equal shares). The result would be that B and C (holding one-third shares each if the original conveyance had been to A, B and C equally) and D and E (holding one-sixth shares each, i.e. half of A's one-third share) would now be the tenants in common. This fragmentation of the title to the land (splitting it up amongst an ever-increasing number of concurrent owners) is a particular feature of a tenancy in common, as is discussed below (para. 7.6).

7.5 It has become clear over the decades that the law relating to concurrent ownership suffers from a number of defects. Apart from those which might be described as technical points relating to joint tenancies and tenancies in common, there are other issues which relate to concurrent ownership. Some concern the law of “*commorientes*”, which governs succession to property where two or more persons die in a common disaster (e.g. a plane crash) and there is uncertainty as to the order of the deaths (see para. 7.22 below). Some concern “common land” in rural areas, where large tracts of land may be used by a number of farmers on a shared basis (e.g., using mountain land for grazing purposes) (see paras. 7.11 & 7.24 below). Finally, there is the issue of whether cohabitants (or cohabitees), who may have no legal title to land (such as the family home), should have statutory rights to supplement or replace the equitable rights they may be able to claim (this issue was raised earlier in the context of “overreaching”, see paras. 3.36 – 3.45 and see para. 7.30 below). These issues are all addressed below.

REFORM

Legal tenancies in common

7.6 All the previous reports on the law here took the view that a fundamental change made in England and Wales by the 1925 Birkenhead Legislation should be followed. This change was aimed at alleged conveyancing difficulties caused by having the legal title to land vested in tenants in common. As explained earlier (paras. 7.3 – 7.4), this may result in the title becoming fragmented amongst a large number of people, as tenants in common dispose of their shares while still alive or on death by their wills. On occasion it may become necessary to trace several people in order to carry out what would otherwise be a simple transaction, such as a sale, lease or mortgage of the land. As legal owners all the tenants in common must sign the documentation necessary to give effect to the transaction.

7.7 The solution in England and Wales was to prohibit legal tenancies in common. Instead, after 1925, the legal title to concurrently owned land has to be held on a joint tenancy, with

no more than four joint tenants. Thus if land is conveyed to A, B, C, D, E and F as tenants in common, the first four named in the conveyance (A, B, C and D) hold the legal title as joint tenants on trust for themselves and the other named tenants in common (E and F). The result is that at any one time the legal title is held by no more than four people (and sometimes it may be less as a result of the right of survivorship applying to joint tenancies, until a replacement trustee is appointed) and they are the people entitled to enter into transactions with respect to the land. The beneficial ownership is, of course, held on the intended tenancy in common and the shares in this may be disposed of and left by will in the usual way. But this fragmentation of the beneficial or equitable interests does not affect the legal title (see Megarry and Wade Chapter 13).

7.8 The **1967 Lowry Report** commented that the English scheme “basically is the proper solution” (paragraph 142(b)), but queried the imposition of a *trust for sale* on the joint tenants holding the legal title. The **1971 Survey** (Chapter 4) and **1990 Final Report** (Volume 1 Chapter 2.2) agreed. Interestingly, the English scheme was modified by the Trusts of Land and Appointment of Trustees Act 1996 (c. 47), so as to remove the statutory trust for sale and, instead, to impose the trust of land scheme developed also for settlements (see para. 6.7 above). The point here is that a trust for sale (which necessarily involves an obligation to sell the land at the earliest opportunity) will often be the opposite of what the parties will have intended in many, if not most, of the situations where concurrent ownership arises (e.g. acquisition of the family home by spouses).

7.9 In view of such unanimity of approaches to reform in the interests of facilitating conveyancing it might seem appropriate to endorse the previous recommendations. However, the Commission notes that this particular reform of the law would not be implemented by the Republic of Ireland’s Land and Conveyancing Law Reform Bill 2006. The Republic of Ireland’s Law Reform Commission resolved not to recommend such a change for a number of reasons (see *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34–2004) para. 6.03). It stated:

“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 considerable interference with the freedom of parties to devise their method of holding land. This is a point of 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 invested in a limited number of them only.”

7.10 Preliminary soundings amongst practitioners here suggest that the view taken in the Republic of Ireland would now be echoed here. It may be that the use of tenancies in common in commercial investments is a comparatively modern development which the **1971 Survey** would not have had in mind. It would seem that the conveyancing problems which influenced the earlier reports have been overemphasised and that the solution suggested creates its own problems. The splitting of the legal and beneficial interests may be regarded as introducing other complications. **Question 45:** *The Commission is inclined not to follow the scheme recommended by the previous Reports and to split the legal and beneficial ownership. The Commission is inclined to adopt instead the approach recently taken in the Republic of Ireland and not to interfere, which allows both joint tenancies and tenancies in common to exist in law. DO CONSULTEES AGREE?*

7.11 Before leaving this subject, the Commission notes that the **1990 Final Report** recommended that there should be two exceptions to the proposed scheme prohibiting legal tenancies in common (which, as indicated above, the Commission is not inclined to adopt). One related to the custom in certain rural areas whereby undivided grazing land is held in common (see para. 7.5 above). We return to this sort of common land or “commonages” below (para. 7.24). The other related to the

common parts of flat developments (such as entrances, passages, stairs and lifts) which may be held in common by the flat owners as an adjunct to the ownership of their individual flats. Both these matters were linked by the **1990 Final Report** to situations where each share is registered in the Land Registry in the same folio as other registered land (see Volume 1 paras. 2.2.3 – 2.2.7). **Question 46:** *At this stage the Commission is inclined simply to note these matters for consideration at a later stage. The subject of flat developments is outside the scope of this Project and, as is explained later (para. 7.29), it is unlikely that recommendations in relation to this Project should be made concerning common land.* **DO CONSULTEES AGREE?**

Severance of a joint tenancy

- 7.12 Under the common law a joint tenancy can be “severed” so as to convert the concurrent ownership into a tenancy in common (see Wylie *ILL* paras. 7.22 – 7.32). A number of points arise in respect of this subject.
- 7.13 First, if contrary to the Commission’s current inclination, a scheme prohibiting the creation of legal tenancies in common were adopted (see paras. 7.8 – 7.10 above), such severance would not be permitted with respect to the legal title to the land. That would defeat the object of the provision, because severance would run the risk of fragmentation of the title which the scheme is designed to avoid. However, if the beneficial or equitable ownership is also held in a joint tenancy, it would remain possible to sever this, while leaving the legal title in a joint tenancy. Thus what became equitable interests in a tenancy in common would not be subject to the right of survivorship and could be disposed of by will to successors. This is the position in England and Wales (see Megarry and Wade paras. 13-036 – 13-050). **Question 47:** *The Commission takes the view that if, contrary to its current inclination, a scheme prohibiting legal tenancies in common were adopted, severance of a legal joint tenancy should also be prohibited, but allowed in equity only.* **DO CONSULTEES AGREE?**

7.14 The **1971 Survey** recommended adaptation of English provisions relating to the methods of severance (see section 36 of the Law of Property Act 1925 (c. 20)) and enabling a sole surviving joint tenant to make title without having to prove that no prior severance had occurred (see Law of Property (Joint Tenants) Act 1964 (c. 63) (see paras. 148 & 149 of the **1971 Survey**). The **1990 Final Report** adapted these provisions (Volume 2 Property (Northern Ireland) Order Articles 24 & 26). The point is that a purchaser of what appears from the title documentation to be land held originally by joint tenants, only one of whom now survives, may not be correct in assuming that the survivor is now the sole legal and beneficial owner of the land. This was an important point because of the 1925 scheme requiring a conveyance of land held in co-ownership to be made by at least two trustees in order to overreach equitable interests. There may have been a previous severance agreed by the joint tenants when some or all of them were still alive which was not documented by execution of a deed or an endorsement on the deed which originally created the joint tenancy. Under the English scheme, the result of that severance would be that the sole legal joint tenant would hold the land on trust for himself or herself and whoever succeeded to the deceased joint tenant's severed share in equity. That risk caused some purchasers' solicitors to insist on appointment of another trustee to join in the conveyance by the surviving joint tenant, so as to secure overreaching. **Question 48:** *The Commission takes the view that the conveyancing problem requiring a surviving joint tenant to prove that the joint tenancy has not been severed could not arise in Northern Ireland. The need for the 1964 Act stems from the 1925 scheme imposing a trust in cases involving a tenancy in common. Since the Commission is inclined not to recommend that scheme (see para. 7.10 above), it takes the view that there would be no need for a similar provision here (provided that recommendation is adhered to).* **DO CONSULTEES AGREE?**

7.15 Apart from the 1964 Act, the Commission accepts that statutory provisions relating to the methods of severance, such as that in section 36 of the Law of Property Act 1925, should be considered. **Question 49:** *In particular, a provision for service*

of a simple notice in writing (with statutory rules as to what constitutes “service”) on the other joint tenant or tenants might be useful. DO CONSULTEES AGREE?

- 7.16 A somewhat more controversial issue has arisen since those earlier reports were published. This is whether it should remain possible for a joint tenant to sever the joint tenancy without the consent or the knowledge of the other joint tenant or tenants. Such severance does, of course, have a major impact on the other joint tenants because by converting the joint tenancy into a tenancy in common the hope or, where there is a considerable age discrepancy, the likely expectation that one of them may have of succeeding to the entire property under the right of survivorship is destroyed. Instead, each will become entitled to a share in the property, its size being governed by the number of joint tenants at the time of severance. Other jurisdictions have taken different approaches to this matter (the law of England and Wales has not been altered in this respect). (See the recent survey and discussion in Conway, “Leaving Nothing to Chance?": Joint Tenancies, the ‘Right’ of Survivorship and Unilateral Severance” (2008) OUC LJ 45).
- 7.17 The Republic of Ireland’s 2006 Bill, following recommendations of its Law Reform Commission (see *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70-2003) Chapter 5), would prohibit such “unilateral” severance without the consent of the other joint tenant or tenants (section 30). The court would be able to dispense with such consent if it is being “unreasonably withheld” (section 31(2)(d)). This provision has proved to be controversial (see Mee, “The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions – Part II” (2006) 11(4) CPLJ 91 at 15 – 97; compare Woods, “Unilateral Severance of Joint Tenancies – The Case for Abolition” (2007) 12(2) CPLJ 47). Few other jurisdictions have gone this far. In Canada, (see Saskatchewan’s Land Titles Acts 1965 (section 40) and 2000 (section 156) and Alberta’s Land Titles Act 2000 (section 65)) an instrument which would otherwise have the effect of severing a joint tenancy must be registered and cannot be

registered unless consented to by the other joint tenants. Most other jurisdictions which have considered the matter have taken the view that the unilateral right of severance should be preserved subject to some protection against unfairness or fraud (see Conway's article referred to above). It has been suggested that such protection is sufficiently achievable by a requirement to give notice to the other joint tenants. In the case of registered land, the requirement might be that a declaration of severance is lodged in the Land Registry for noting on the folio, with the Registry notifying the other registered tenants of this step. In the case of unregistered land, there might be an obligation to register in the Registry of Deeds a declaration of severance, with a further obligation on the severing joint tenant to notify the other joint tenants. Such provisions would both alert the other joint tenants to the severance and record it in such a way that purchasers and mortgagees can easily discover it.

- 7.18 The Commission recognises that the complete freedom currently enjoyed by a joint tenant to sever the joint tenancy unilaterally may work an unfairness or create an injustice as regards the other joint tenant or tenants. In view of the different approaches taken in other jurisdictions, it inclines to the view that this problem would be sufficiently addressed by a provision rendering unilateral severance invalid unless notice is given. **Question 50:** *In view of the main aim of this Project to facilitate conveyancing and in order to preserve the current freedom of a joint tenant to sever unilaterally because of a change of circumstances affecting the joint tenancy, the Commission takes the view that unilateral severance should not take effect until a notice or declaration of severance, in the prescribed form, is registered in the Land Registry or Registry of Deeds as appropriate and the other joint tenants have been served with a notice of the severance. DO CONSULTEES AGREE?*

Partition

- 7.19 One of the more difficult aspects of concurrent ownership is the law of partition. Partition is a method of bringing concurrent ownership to an end, by dividing up the property amongst the co-owners. Frequently the nature of the property (such as a

house with one kitchen and one bathroom) renders such partition impracticable and so a sale and division of the proceeds may be a better option. However, the development of the jurisdiction of the courts to deal with disputes over such matters has been a somewhat tortuous one and the statutory provisions of the Partition Acts 1868 (c. 40) and 1876 (c. 17) are far from clear (see Conway, *Co-ownership of Land* Butterworths (2000)). In essence the Partition Acts gave the courts power to order a sale of property which could not easily be partitioned physically. Instead the proceeds of sale are divided amongst the concurrent owners. However, entitlement to an order for sale is not automatic and there are complicated provisions distinguishing between the interests of different applicants. Doubts were raised as to whether a chargee of a concurrent interest was a “person interested” capable of applying for a sale order and this was only recently resolved by Article 48 of the Property (Northern Ireland) Order 1997 (No. 1179 N.I. 8). The Law Reform Advisory Committee in its 2000 *Report on Matrimonial Property* recommended that these Acts should be reviewed (LRAC No. 8, Recommendation 11).

7.20 The **1971 Survey** recommended adapting the English scheme whereby, in so far as concurrent land would often be held on a trust (see para. 7.8 above), the trustees would have a wide power to partition with the consent of the beneficial co-owners and the court would have a discretion to deal with disputes (para. 150). The **1990 Final Report** adopted this proposal (Volume 2 Property (Northern Ireland) Order, Articles 25 & 62). A review of other jurisdictions suggests a movement towards giving the courts as wide a jurisdiction as possible to make the appropriate order or even to decide not to intervene if that is more appropriate, to resolve a dispute as between concurrent owners in relation to the property in question (see Conway’s article referred to above, Chapter 7). The Law Reform Advisory Committee took a similar view in relation to spouses and mortgagees or chargees of the matrimonial home (*Report on Matrimonial Property* (LRAC No 8, 2000 para. 5.36)).

7.21 Replacing the Partition Acts with a broad discretion given to the courts has now been implemented in New Zealand (see

Property Law Act 2007 sections 339 – 343) and is proposed in the Republic of Ireland (see 2006 Bill section 31). By way of illustration of the sort of discretionary jurisdiction which might be introduced, section 31 of the Republic of Ireland's 2006 Bill provides:

- “ (1) Any person having an estate or interest in land which is co-owned whether at law or in equity may apply to the court for an order under this section.”

- (2) An order under this section includes –
 - (a) an order for partition of the land amongst the co-owners,
 - (b) an order for sale of the land and distribution of the proceeds of sale as the court directs,
 - (c) an order directing that accounting adjustments be made as between the co-owners,
 - (d) an order dispensing with consent to severance of a joint tenancy as required by *section 30* where such consent is being unreasonably withheld,
 - (e) such other order relating to the land as appears to the court to be just and equitable in the circumstances of the case.

- (3) In dealing with an application for an order under *subsection (1)* the court may -
 - (a) make an order with or without conditions or other requirements attached to it, or
 - (b) dismiss the application without making any order, or
 - (c) combine more than one order under this section.

- (4) In this section –
- (a) “person having an estate or interest in land” includes a mortgagee or other secured creditor, a judgment mortgagee or a trustee,
 - (b) “accounting adjustments” include –
 - (i) payment of an occupation rent by a co-owner who has enjoyed, or is continuing to enjoy, occupation of the land to the exclusion of any other co-owner,
 - (ii) compensation to be paid by a co-owner to any other co-owner who has incurred disproportionate expenditure in respect of the land (including its repair or improvement),
 - (iii) contributions by a co-owner to disproportionate payments made by any other co-owner in respect of the land (including payments in respect of charges, rates, rents, taxes and other outgoings payable in respect of it),
 - (iv) redistribution of rents and profits received by a co-owner disproportionate to his or her interest in the land, and
 - (v) any other adjustment necessary to achieve fairness between the co-owners.
- (5) Nothing in this section affects the jurisdiction of the court under the Act of 1976, the Act of 1995 and the Act of 1996.
- (6) The equitable jurisdiction of the court to make an order for partition of land which is co-owned whether at law or in equity is abolished.”

However, the Commission is concerned that the Republic of Ireland’s provision does not provide sufficient guidance to the

court as to the factors which it should take into account in exercising its jurisdiction. It notes that, in the context of co-owners interested in land held on trust, section 15 of the English Trusts of Land and Appointment of Trustees Act 1996 requires the court dealing with a dispute to consider such matters as the purpose for which the property is held, the welfare of minors occupying it and the interests of secured creditors (see Megarry and Wade paras. 13-064 – 13-070). A good illustration of the sort of considerations which the court should take into account, including the impact of the European Conventions on Human Rights, is the recent decision of Weir J in *Re Rooney* [2008] NICh 22 (applications by the Official Receiver under the Partition Acts in respect of jointly owned homes, where the husbands had been declared bankrupt). **Question 51:** *The Commission takes the view that a provision similar to the Republic of Ireland's one should be introduced in Northern Ireland. The Partition Acts 1868 & 1876 should be replaced with a broad discretion given to the courts to make the appropriate order; not to intervene if that is appropriate or to resolve a dispute as between concurrent owners in relation to the property in question (supplemented by guidance as to how the court should exercise its discretion).* **DO CONSULTEES AGREE?**

Comments

- 7.22 Mention was made earlier of the problems which can arise with respect to succession to property where two or more people die together in some disaster, but it is uncertain which died first (paragraph 7.5 above). These problems concern wider issues than those relating to concurrent ownership, but they do have relevance to such ownership, e.g., where the right of survivorship should operate because the deceased persons were joint tenants of the same property. Problems arise because under the common law, which still applies in Northern Ireland, there is a presumption of simultaneous deaths in cases of uncertainty and the burden of proving survivorship in such disaster cases will usually be impossible for claimants by way of succession to discharge (see Grattan, *Succession Law in*

Northern Ireland (1996 SLS Legal Publication (Northern Ireland)) paras. 7.36 – 7.37; Wylie *ILL* paras. 14.32 – 14.33).

- 7.23 The **1971 Survey** recommended introduction of the English provision (Law of Property Act 1925, section 184) imposing a statutory presumption in such cases that, subject to any court order, the younger of the persons dying should be deemed to survive the elder (paras. 406 – 407). The **1990 Final Report**, however, preferred retention of the common law presumption of simultaneous deaths, but subject to two exceptions. One relating to provisions of a will concerning substitution of an executor in the event of the one designated dying before or at the same time as the testator (in such cases the event contemplated is deemed to have occurred) was implemented by Article 30 of the Wills and Administration Proceedings (Northern Ireland) Order 1994 (No. 1899 N.I. 13). The other exception suggested was that there should be a presumption of death in the order of the ages of the persons dying where they held property jointly, such as on a joint tenancy. In such cases it was felt that “the parties can reasonably be taken to have anticipated that the elder will predecease the younger” (Volume 1, para. 2.14.5). The Commission is not convinced that this is the right approach to the problem. It notes the Republic of Ireland’s Law Reform Commission’s proposal some years ago that *commorientes* should instead be treated as an event which severs a joint tenancy, so that the deceased persons would be treated as holding their jointly owned land as tenants in common (see *Report on Land Law and Conveyancing Law: (7) Positive Covenants and Other Proposals* (LRC 70-2003), paras. 3.05 – 3.06). Thus the deceaseds’ respective successors would inherit their shares in the land. To quote from the Republic of Ireland’s Report: “This solution has two major advantages. First, no automatic right of survivorship will operate as between the various successors of the deceased parties, thereby avoiding the inconvenience of a joint tenancy. Secondly, the respective successors will continue to take equal shares in the estate, thereby avoiding the imbalance inherent in the English approach.” This recommendation was implemented by section 68 of the Republic’s Civil Law (Miscellaneous Provisions) Act 2008 (amending section 5 of the Irish

Succession Act 1965 (No. 27)). **Question 52:** *The Commission is inclined to adopt the provision made in the Republic of Ireland whereby commorientes is treated as an event which severs a joint tenancy, so that the deceased persons would be treated as holding their jointly owned land as tenants in common. DO CONSULTEES AGREE?*

Common land

- 7.24 Rights of neighbouring farmers or tenants to share the use of “common land” (usually to graze livestock) have long ceased to play any major role in the Irish agricultural scene. Any such rights which existed in Ireland would largely have disappeared as a result of the 19th and 20th centuries’ land purchase scheme (see Wylie *ILL* paras. 6.103 & 6.113).
- 7.25 Notwithstanding the operation of the land purchase scheme, it is clear that some rights involving shared ownership of land survive in rural parts of Northern Ireland. The **1990 Final Report** referred to the custom whereby farmers in a locality share grazing rights on mountain land (Volume 1 paras. 2.2.3 – 2.2.5). It appears that sometimes when the title to a farm vested by the Land Commission was registered in the Land Registry such common grazing rights were noted on the folio, sometimes as a fractional share in the common land. The Report mentioned this subject in the context of prohibiting the legal title to land in future being held on a tenancy in common. The Commission has already indicated its inclination not to adopt this approach (see para. 7.10 above), but if, in the end, it were decided to adopt it, it is recommended that such common rights noted on the folios of neighbouring farms should be excepted from that proposed prohibition of legal tenancies in common. **Question 53:** *If the general prohibition of legal tenancies is implemented, contrary to the Commission’s inclination, the Commission recommends that any common rights noted on the folios of neighbouring farms should be excepted from the proposed prohibition of legal tenancies in common. DO CONSULTEES AGREE?*
- 7.26 It has also been drawn to the attention of the Commission that under one of the old Land Purchase Acts (the Irish Land Act

1903 (c. 37)) the Land Commission was empowered to approve the purchase of land by trustees to be held on terms and conditions approved by the Lord Lieutenant of Ireland (section 20). Such land could be used for “turbary, pasturage, raising of sand and gravel, cutting and gathering of seaweed, planting of trees or preservation of game, fish, woods or plantations” (section 4). Such schemes were used to provide shared use of the land for numerous inhabitants or farmers in the locality. The Lord Lieutenant’s responsibilities passed to the Governor of Northern Ireland in 1922 and following the winding up of the land purchase scheme under the Land Purchase (Winding-up) Act (Northern Ireland) 1935 (c. 21) they passed to the Ministry of Finance. Responsibility for such trusts now resides with the Department of Agriculture and Rural Development (Ministries of Northern Ireland (Transfer of Functions) Regulations 1968 (SR & O No. 88); Departments (Northern Ireland) Order 1982 (SR 1999 No. 481)).

- 7.27 It appears that similar trusts of common land were set up under other legislation, such as that relating to land owned by the Church of Ireland prior to its disestablishment by the Irish Church Act 1869 (c. 42). And some were established without any statutory basis, often based on long-established custom and practice. It has been estimated to the Commission that over 300 such trusts may exist in Northern Ireland, but that very little documentation about this is available.
- 7.28 A review of trusts established under the 1903 Act carried out for the Department of Agriculture and Rural Development in 2004 revealed that there are several problems relating to management, operation and supervision of such trusts. Other problems relate to changes in EU grants relating to agricultural land. Under the Single Farm Payment scheme such grants are no longer based on the number of animals farmed but on the amount of land farmed by the claimant. This creates obvious difficulties where a farmer shares grazing and other rights over common land with neighbouring farmers.
- 7.29 **Question 54:** *While recognising that these are matters which may require urgent investigation and reform (which may require*

new legislation), the Commission is inclined to the view that they are too divorced from the land law and conveyancing matters which are the subject of the present Project to justify their inclusion within it. DO CONSULTEES AGREE?

Cohabitants

- 7.30 In an earlier Chapter, in the context of a discussion of overreaching of equitable interests, reference was made to the problems which arise from “hidden” concurrent ownership (paras. 3.36 – 3.45). Those problems stem from the fact that a person who appears to be the sole legal owner of land may, in fact, be holding the legal title on trust partly for some other person. That other person may be able to establish an equitable claim to the land by invoking doctrines relating to resulting and constructive trusts and proprietary estoppel. For example, a spouse may have contributed to the purchase price of a house which has been conveyed in the other spouse’s name alone. That other spouse will be the sole legal owner but will be regarded in equity as holding the legal title on a resulting trust for the contributing spouse, but only to the extent of an interest or share commensurate with the contribution. Neither spouse may be aware of this and it may only come to light at a much later stage as a result of a dispute between the spouses, such as arises on separation or divorce. Meanwhile the possibility of such a claim or interest lies hidden.
- 7.31 There are two particular difficulties with respect to the current law. One is that the possibility that such “hidden” equitable interests may exist causes problems for conveyancers, especially if the claimant is in actual occupation of the land. If the potential claimant is in actual occupation a purchaser may be deemed to have (constructive) notice of the claim or interest. If the land in question is registered land the right of a person in actual occupation is a burden which affects the land without registration (unless an enquiry is made of the person and it is not disclosed) (see Land Registration Act (Northern Ireland) 1970 Schedule 5 Part I para. 15; Wallace, *Land Registry Practice in Northern Ireland* (2nd edition 1987 SLS Legal Publications (Northern Ireland)) pp 16 - 24). The **1990 Final Report** proposed that the only effective way of dealing with this

from the conveyancing point of view was to adopt a wide overreaching provision (along the lines of one included in the Republic of Ireland's Land 2006 Bill: see paras. 3.36 – 3.45 above). However, the **1990 Final Report** did (Volume 1 paras. 2.2.38 – 2.2.41) also suggest that its scheme should be coupled with reform of the law relating to cohabitants (see paras. 3.43 & 3.44 above). The point here is that any perceived unfairness or injustice which might be regarded as the consequence of a wide overreaching provision might be assuaged by conferring statutory rights on cohabitants which would protect them from the effect of overreaching. That leads to the second particular difficulty about the current law.

- 7.32 This area of the law has been the subject of major review recently by the Scottish Law Commission (*Report on the Effects of Cohabitation in Private Law* (Scot Law Com No. 86 1990)), the Law Commission of England and Wales (see *Sharing Homes: A Discussion Paper* (Law Com No. 278 2002); *Cohabitation: The Financial Consequences of Relationship Breakdown: A Consultation Paper* (No. 179 2007)), the Republic of Ireland's Law Reform Commission (*Consultation Paper on Rights and Duties of Cohabitees* (LRC CP 32-2004)) and the Law Reform Advisory Committee for Northern Ireland (Discussion Paper No. 5 *Matrimonial Property* (1999); Report No. 10 *Matrimonial Property* (LRAC No. 8, 2000)). What these various studies reveal is the difficulty in discerning precisely the scope of the equitable principles developed by the courts in the different jurisdictions and in applying them to particular cases. This is also brought out by the extensive academic study of the case law (see e.g. Mee, *The Property Rights of Cohabitees* Hart Publishing (1999); Fox "Property Rights of Cohabitees: The Limits of Legislative Reform" (2005) *IJFL* 2; Woods "Property Disputes between Co-owning Cohabitees – Ireland and England Compared" (2006) 35 *CLWR* 297). This has led to proposals to confer on certain cohabitants (or cohabitees) statutory rights in respect of land, thereby avoiding the need to invoke equitable principles of uncertain scope and application.
- 7.33 The studies referred to in the previous paragraphs have resulted in similar approaches to reform. These approaches are based on the principle of conferring rights on "qualified"

- cohabitants (or cohabitees). Such cohabitants are usually taken to mean persons who live together in a “marriage like” relationship (including both same-sex and opposite-sex couples) for a minimum period (two to three years), which may vary according to whether or not there is a child of the relationship.
- 7.34 The approach taken in most studies is to recommend that qualified cohabitants be given the right to apply to the court for financial relief on the breakdown of the relationship. Thus the Republic of Ireland’s Law Reform Commission recommended the right to apply for property adjustment orders by analogy with the legislation governing separating and divorcing spouses (LRC CP 32-2004). The Law Commission of England and Wales in its latest Consultation Paper (No. 179 2007) has also recommended that qualified cohabitants should be able to apply for financial relief on separation. In Scotland such a provision is now contained in section 28 of the Family Law (Scotland) Act 2006. In March 2008 the Ministry of Justice, in a response to the Law Commission’s Consultation Paper, announced that it would wait for research on how the Scottish Act operated before considering changes to the law of England and Wales. It is important to appreciate that this approach to reform of the law, by postponing rights to breakdown of the relationship, would not protect cohabitants from overreaching of equitable claims where land is sold before the relationship breaks down.
- 7.35 The Commission indicated earlier that it was not inclined to recommend the wide overreaching scheme suggested by the **1990 Final Report** (para. 3.45(3) above). It also indicated that it considered that a review of the law relating to cohabitation was outside the scope of the present Project (para. 3.45(4)). Furthermore, it seems to the Commission that the recommendations in the Law Reform Advisory Committee’s 2000 Report on *Matrimonial Property*, mentioned above, may have to be reconsidered in the light of the recent developments elsewhere in the UK, referred to above. **Question 55:** *In any event, such a reconsideration, like any more general review, raises much wider issues involving other areas of the law, in particular family law, and so should be regarded as outside the scope of this Project.* **DO CONSULTEES AGREE?**

CHAPTER 8. MORTGAGES

INTRODUCTION

- 8.1 The law of mortgages so far as it relates to land is a complex mixture of principles developed over the centuries by the courts (exercising equitable jurisdiction) and statute law (see Pearce and Mee Chapter 18); Wylie *ILL* Chapters 12 & 13). In essence, a mortgage comprises a secured loan, i.e., the method of giving the lender security for a loan used to purchase or acquire some other interest in land. If the borrower defaults, the lender is not confined to suing for the personal debt owed by the borrower but, in addition, may exercise various rights over the mortgaged land, such as the right to sell it and recoup out of the proceeds of sale the outstanding debt. For the most part, this law has not been updated in Northern Ireland, though most of the “consumer protection” legislation enacted in recent times in England and Wales applies here as well. This includes the Consumer Credit Act 1974 (c. 39), as amended by the Consumer Credit Act 2006 (c. 14), and the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (which implement the European Unfair Terms Directive 1993 (93/13)). This legislation is designed to prevent lending institutions taking unfair advantage of borrowers, such as charging exorbitant rates of interest or imposing other extortionate terms. Lending institutions operating here are also subject to the extensive regulatory scheme introduced by the Financial Services and Markets Act 2000 (c. 8). **Question 56:** *The Commission takes the view that such consumer and regulatory matters are outside the scope of the present Project, which is primarily concerned with reform of technical land law and conveyancing matters.*

DO CONSULTEES AGREE?

- 8.2 Both the **1971 Survey** and **1990 Final Report** contained recommendations for wide-ranging reforms of the law, largely based on those made in England and Wales by the Law of Property Act 1925 (c. 20) (Part III: see Megarry and Wade Chapter 24). These related to such matters as the methods of

creating mortgages (see para. 8.5 below), mortgagees' remedies (see para. 8.9 below), consolidation of statutory provisions relating to mortgagors' and mortgagees' rights and duties and reforming the law relating to particular doctrines such as consolidation and tacking (see para. 8.24 below). What they did not deal with was the myriad of rules developed by the courts relating to doctrines like the principles against "clogs" on the equity of redemption and "collateral advantages" (see Pearce and Mee pp 277 – 278; Wylie *ILL* paras. 13.089 – 13.099). These principles are an example of the courts' use of equitable jurisdiction to protect mortgagors from unfair advantage being taken by mortgagees and other unconscionable behaviour. The **1971 Survey** stated: "These matters can best continue to be worked out by the courts in the light of the circumstances of particular cases" (para. 202).

- 8.3 The Commission notes that, notwithstanding the view expressed by the **1971 Survey**, the old equitable doctrines have since come in for some criticism. In a recent English case (*Jones v Morgan* [2001] Lloyd's Rep Bank 323) Lord Phillips MR commented that "the doctrine of a clog on the equity of redemption is, so it seems to me, an appendix to our law which no longer serves a useful purpose and would be better excised." The Law Commission of England and Wales carried out a wide-ranging review of the law in the 1980s (*Land Mortgages* (1986) Law Commission Consultation Paper No. 99) and in a report published in 1991 (*Transfer of Land – Land Mortgages* (1991) Law Com No. 204) recommended rationalisation of the courts' jurisdiction to interfere with mortgage terms on the basis of the traditional equitable jurisdiction (invoking doctrines like that against clogs on the equity of redemption) and statutory jurisdiction such as that conferred by the Consumer Credit Act. It proposed replacing such dual jurisdiction with a single new statutory jurisdiction (applicable to all mortgages of land) giving the court a discretion to alter or vary any term which gives the mortgagee rights in the mortgaged property greater than or different from those necessary to make the property available as security or is otherwise unconscionable (para. 8.4). That Report has never been implemented.

- 8.4 It is interesting to note that the Law Commission of England and Wales made it clear that its proposed introduction of a single statutory jurisdiction was not intended to replace other equitable jurisdiction to set aside mortgages, such as on the grounds of fraud, mistake, rectification, estoppel and undue influence. The last doctrine has been frequently invoked in recent times in cases where a joint owner of the property has alleged that a mortgage is not enforceable against him or her owing to undue influence by the other owner of which the mortgagee should be deemed to have notice. Much confusion reigned over this application of a long-established equitable principle until the House of Lords imposed some order in a number of appeals heard together (*Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773). **Question 57:** *The Commission takes the view that, given that the Consumer Credit Act 1974 was recently amended for both England and Wales and Northern Ireland, it is probably not appropriate to recommend a new jurisdiction designed partly to replace the jurisdiction conferred by that Act. The 1971 Survey view that the equitable jurisdiction should be left to be developed by the courts should be adhered to at this stage and the Commission's proposals for reforms should concentrate on other matters. DO CONSULTEES AGREE?*

REFORM

Creation of mortgages

- 8.5 Both the **1971 Survey** and **1990 Final Report** recommended that the various methods of creating a legal mortgage of land should be greatly simplified, building on changes which had been made in England and Wales by the Law of Property Act 1925. That Act got rid of the standard method hitherto of creating a mortgage, namely, by conveying the mortgagor's title (freehold or leasehold) to the mortgagee, subject to the right of redemption. Such a conveyance (or assignment in the case of a leasehold title) is unnecessary in order to give the mortgagee security over the property. It also causes confusion because the mortgagee should only be interested in the property as security for its loan, not in becoming the owner of it (which is what a conveyance or assignment achieves) – hence Maitland's famous criticism of the traditional mortgage deed as one long

“*suppressio veri* (suppression of the truth) and *suggestio falsi* (suggestion of falsehood)” (*Equity* revised ed. by Brunyate Cambridge UP (1936) p 182). The 1925 Act prohibited this method of creating legal mortgages and substituted a charge “by way of legal mortgage”. The method of creation by way of a charge only has always been the method which has applied to registered land (see Land Registration Act (Northern Ireland) 1970 (c.18) section 41).

- 8.6 Somewhat controversially (because many consider that the charge system can cover all cases, as it does in the case of registered land), the 1925 Act retained the other main method of creating a legal mortgage, namely, by demise or subdemise (i.e., granting the mortgagee a lease out of the mortgagor’s freehold title or a sublease out of a leasehold title). Such mortgages by demise are commonly used in Ireland where the land is held under a fee farm grant (thereby avoiding liability on the part of the mortgagee to pay the fee farm rent) or a lease (avoiding liability to pay the head-rent) (see Wylie *ILL* paras. 12.34 – 12.38). No rent will be reserved in the mortgage demise and the mortgagee will need a power of attorney over the mortgagor’s retained freehold or head leasehold title (or it will have to be held on trust for the mortgagee) if it is going to be able to realise fully its security in the event of a default by the mortgagor. Such a system is necessarily very complicated.
- 8.7 The **1971 Survey** (para. 204) and **1990 Final Report** (Volume 1 paras. 2.6.1 – 2.6.3) agreed that mortgages by conveyance or assignment should be abolished and, in relation to unregistered land, the appropriate reform should be to substitute the charge system used for registered land. However, they could see no advantages in retaining the alternative methods of mortgages by demise or subdemise (which are not available for registered land). These methods, although in theory still available in England and Wales, are very rarely used there now and the Law Commission recommended their abolition in its 1991 Report: *Land Mortgages* (Law Com No. 204 Parts II and III). As with registered land, a charge is all that the mortgagee needs for security so long as the legislation makes it clear that it confers on the mortgagee adequate remedies for realisation of

that security (such as a power to sell the mortgagor's title). This approach would also be implemented by the Republic of Ireland's Land and Conveyancing Law Reform Bill 2006 (Part 10). **Question 58:** *The Commission takes the view that the charge system used for registered land should be applied to unregistered land and that mortgages by conveyance or assignment should be abolished. DO CONSULTEES AGREE?*

- 8.8 As regards equitable mortgages, the **1971 Survey** and **1990 Final Report** did not propose interfering with the informal methods by which such mortgages are frequently created. Equitable mortgages created by mere deposit of title deeds used to be very common in Ireland and that system applied also to registered land (by deposit of the land or charge certificate) (see Wylie *ILL* paras. 12.29 & 12.43 – 12.46). The Commission recognises that mortgages by deposit seem to have been declining in recent times – lending institutions dislike having to store and look after physical documents, especially in the computer age. Furthermore, the decline will be accelerated as a result of “dematerialisation”, whereby the Land Registry will cease to issue land or charge certificates. Title deeds relating to unregistered land will also cease to be of relevance as more and more land becomes registered under the compulsory registration of title process. Nevertheless, the Commission is not convinced that it is time to prohibit this method of creating equitable mortgages. Indeed, it may be queried whether it would be appropriate to prohibit such mortgages in so far as they involve the courts' interpretation of the effect of what landowners do with respect to their property. That interpretation is based on the application of equitable principles to the parties' actions (see Wylie *ILL* paras. 12.43 – 12.46). As dematerialisation takes effect and more and more land becomes registered land, the scope for creation of such mortgages will decrease. The view may be taken that the appropriate approach is to let existing ones fade out with time. The Commission notes that the Republic of Ireland's 2006 Bill proceeds on this basis, by continuing to recognise mortgages by deposit and other methods of creating equitable mortgages (such as assignment of an equitable interest where this is all the mortgagor owns) (see section 88(6)). **Question 59:** *For the*

time being the Commission is inclined to preserve the means of creating equitable mortgages by deposit. **DO CONSULTEES AGREE?**

Mortgagee remedies

- 8.9 Both the **1971 Survey** and **1990 Final Report** contained various recommendations relating to a mortgagee's remedies for realising its security in the event of default by the mortgagor. Before considering specific remedies, there is a general issue which needs to be addressed with respect to a mortgagee's remedies.
- 8.10 The changes to the methods of creating mortgages discussed in the previous paragraphs are largely designed to ensure that the law and legal documentation reflects the true nature of a mortgage. It is essentially a secured loan transaction and the mortgage is simply the method of providing security. The law and legal documentation relating to the mortgagees' remedies should reflect this also. The Law Commission of England and Wales recommended in its 1991 Report that in future the mortgagee's remedies should be exercisable only "for the purposes of protecting or enforcing the security" (Law Com No. 204 para. 3.4). This principle would be implemented by the Republic of Ireland's 2006 Bill (section 95(1)). **Question 60:** *In the event of default by the mortgagor, the Commission is inclined to make a recommendation that in future the mortgagee's remedies should be exercisable only for the purposes of protecting or enforcing the security.* **DO CONSULTEES AGREE?**
- 8.11 In making the recommendation in the previous paragraph the Commission considers that there is a related issue which needs addressing. Much of the current law relating to mortgagees' remedies is contained in statute law; in particular the provisions in the Conveyancing Acts 1881 – 1911 dealing with remedies like the power of sale and power to appoint a receiver. Those provisions are frequently incorporated in the legal documentation used by mortgagees but often with adaptations and variations. Often such variations will remove some of the conditions for exercise of the remedies which the statutory

provisions impose. The Acts allow for this because most of their provisions are expressly subject to the formula that they apply “only if and as far as a contrary intention is not expressed in the mortgage deed and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.” (see section 19(3) Conveyancing Act 1881 (c. 41)).

- 8.12 The question is how far this approach should be modified in any replacement legislation, especially if the principle outlined above is to be implemented, that the mortgagee’s remedies should be invoked only for the purpose of protecting or realising its security (para. 8.10 above). The Law Commission of England and Wales in its 1991 Report took the view that this principle was an overriding one and so both contractual and statutory remedies should, in future, be subject to it (Law Com No. 204 paras. 3.4 & 7.3). The Republic of Ireland’s 2006 Bill does not go that far. Instead, it imposes the principle as an overriding one in relation to housing loan mortgages only, but preserves the 1881 – 1911 Acts’ position of allowing “contracting-out” in relation to other mortgages. The view was taken that freedom to adapt and vary the statutory provisions for commercial mortgages, especially in the very complex securitisation and other financial services transactions taking place in the International Financial Services Centre (IFSC) in Dublin, was necessary to retain the Republic of Ireland’s competitive edge in the international commercial world. The Commission would be interested in hearing the views on this issue of Northern Irish practitioners experienced in mortgage transactions including complex commercial ones. **Question 61:** *The Commission inclines to the view that mortgages of residential property are best protected by specific legislation aimed at consumer protection, such as the Consumer Credit Acts. Otherwise, for the most part, the statutory provisions replacing the Conveyancing Acts 1881 – 1911 should retain their approach of providing “default” provisions only (i.e. provisions which operate subject to the terms of the mortgage deed).* **DO CONSULTEES AGREE?**

(i) Taking possession

- 8.13 The traditional law is that, by virtue of having legal title to the land vested in it, the mortgagee is entitled to take possession of the land “before the ink is dry on the mortgage” (Harman J in *Four Maids Ltd. v Dudley Marshall Properties Ltd.* [1957] Ch 317 at 320). The **1971 Survey** took the view that this was inconsistent with the nature of a mortgage as a secured loan transaction only. It recommended that, unless the mortgagor consented, a mortgagee should only take possession under a court order, with the court being given a wide discretion in how to deal with applications for possession orders (para. 209). This would extend the provisions which already exist under the Administration of Justice Acts 1970 (c. 31) and 1973 (c. 15) relating to mortgages which include a dwellinghouse (see Wylie *ILL* para. 13.021).
- 8.14 The **1990 Final Report** was more cautious on this point and took the view that such provisions should be confined to mortgages created by individuals and should not necessarily apply to all mortgages (see Volume 1 paras. 2.6.10 – 2.6.11). The Law Commission of England and Wales in its 1991 Report also distinguished between a “protected” mortgage (essentially a mortgage of property which includes a dwellinghouse effected by an individual) and a “non-protected” mortgage (essentially all other mortgages). Only the former under its proposals would be subject to the need to obtain a court order for possession. It took the view that non-protected mortgagors would be protected from premature loss of possession by an overriding statutory duty on the mortgagee who has taken possession to sell the property as quickly as is consistent with the duty to obtain the best price reasonably obtainable (see para. 8.20 below).
- 8.15 The Republic of Ireland’s 2006 Bill would impose a requirement to obtain a court order for possession in the case of a mortgage involving a housing loan, but otherwise the requirement could be varied by the terms of the mortgage (sections 95(3) and 96). Where a mortgagee has taken possession there would be a statutory duty in all cases, notwithstanding any stipulation to the contrary, to take steps within a reasonable time to exercise the power of sale (which requires obtaining the best price

reasonably obtainable) or, if it is not appropriate to sell, to lease the property and to use the rent to reduce the mortgage debt, including interest (sections 98 and 99).

8.16 **Question 62:** *The Commission inclines to the view that the requirement to obtain a court order for possession should be confined as proposed by the 1990 Final Report and the Law Commission of England and Wales to mortgages of dwellinghouses taken out by individuals. DO CONSULTEES AGREE?*

8.17 There is one other aspect of a mortgagee taking possession which should be mentioned. Under Articles 34 & 35 of the Limitation (Northern Ireland) Order 1989 (No. 1339 N.I. 11) a mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years. The consequence is that the mortgagor's title is extinguished and the mortgagee becomes owner of the property which may be worth considerably more than the debt owed (see Wylie *ILL* para. 23.33). This is an exception to the rule that title to land can be acquired under the law of limitation of actions only by "adverse" possession. Both the **1971 Survey** and **1990 Final Report** queried whether the mortgagee should be able to acquire title in this way, but in the end concluded that in the light of the restrictions on taking possession they were recommending, this would be a rare scenario (see **Survey** para. 416 and **Report** Volume 1 paras. 2.6.20 – 2.6.21). They therefore recommended no change of this aspect of the law. **Question 63:** *The Commission notes that the Republic of Ireland's Land and Conveyancing Law Reform Bill 2006 (section 98(2)) would prevent acquisition of title in this way. However, on balance, the Commission is inclined to endorse the views of the previous reports not to recommend any change in the law which currently provides that the mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years. DO CONSULTEES AGREE?*

(ii) Foreclosure

- 8.18 Foreclosure is the right of the mortgagee to obtain a court order declaring that the mortgagor's right of redemption is barred. This has long been recognised as inherently unfair in many cases because again the consequence may be that the mortgagee will end up as owner of the property which is worth more than the debt owed. For this reason, the practice was that often the court would order a sale instead of foreclosure, so that the mortgagor would, at least, get any surplus of the proceeds of the sale left over after the debt and all costs and expenses were paid. In fact no Irish court has ordered foreclosure for over a century (see Wylie *ILL* paras. 13.056 – 13.063). **Question 64:** *The Commission notes that the Republic of Ireland's 2006 Bill (section 95(2)) would formally abolish the remedy of foreclosure and considers that the same should be done in Northern Ireland. The Law Commission of England and Wales also recommended abolition in its 1991 Report (Law Com No. 204 para. 7.27). DO CONSULTEES AGREE?*
- 8.19 There is one aspect of foreclosure which should be mentioned. Although the general rule is that a mortgagee's remedies are cumulative (i.e., any or all of them may be employed, so that, if a sale does not raise the total amount owed, the mortgagee may sue the mortgagor for the balance outstanding: see *Rudge v Richens* (1873) LR 8 CP 358), foreclosure puts an end to other remedies. The argument is that by taking the whole security for the loan the mortgagee cannot also sue for the loan (see Megarry and Wade para. 25-040). Once the mortgagee has obtained a foreclosure order absolute it cannot sue on the personal covenant to pay the loan even though the property is worth less than the amount outstanding (as illustrated by a subsequent sale: see *Palmer v Hendrie* (1859) 27 Beav 349; *Lockhart v Hardy* (1846) 9 Beav 349). Such a suit is possible only if the mortgagee re-opens the foreclosure by applying to the court for an order to this effect. Such an order revives not only the personal covenant but also the mortgagor's right to redeem (see *Perry v Barker* (1806) 13 Ves Jun 198), but is unlikely to be granted where the property has been sold following foreclosure to a third party. This lack of finality about foreclosure has led the Commission to have doubts about an

argument put to it in favour of retention of the jurisdiction to order foreclosure. The suggestion has been made that in the current severe property slump, where many mortgagors are experiencing “negative” equity, there might be an advantage for some mortgagors to accede to a foreclosure order, if this meant that, although they lost their properties, they could not be pursued for any outstanding debt. The Commission doubts whether retention of the jurisdiction would have this effect. Even if the courts were amenable to reviving the jurisdiction, it must be doubted whether mortgagees would invoke it, if the consequence was that they might lose financially to a substantial extent because of current market conditions. And if that only became clear after foreclosure had been put into effect, the mortgagee might apply to re-open it. Apart from these difficulties, if the mortgagee is minded to write off a substantial portion of the debt, it does not need to invoke the cumbersome foreclosure procedure in order to achieve this. Instead, as has been the standard practice for decades, it can exercise the power of sale and take a decision after the sale whether to pursue the mortgagor for any shortfall on the total amount owed by the mortgagor. **Question 65:** *On balance, therefore, the Commission is not inclined to retain the jurisdiction of the courts to order foreclosure.* **DO CONSULTEES AGREE?**

(iii) Sale

- 8.20 The **1971 Survey** and **1990 Final Report** proposed retaining the provisions in the Conveyancing Acts 1881 – 1911 relating to the mortgagee’s power of sale (without obtaining a court order), subject to minor modifications. The one substantive change recommended was that the statutory duty on building societies to obtain the best price possible (Building Societies Act (Northern Ireland) 1967 (c. 31) section 36; see now Schedule 4 para. 1(1)(a) of the Building Societies Act 1986 (c. 53), which applied to Northern Ireland (section 122)) should apply to all mortgagees (which probably reflects the position at common law: see Wylie *ILL* paras. 3.034 – 3.036) (**Survey** para. 228). The Law Commission of England and Wales recommended the same (Law Com No. 204 para. 7.23) and this change would be

implemented by the Republic of Ireland's 2006 Bill (section 102). **Question 66:** *The Commission endorses this change and proposes retaining the provisions in the Conveyancing Acts 1881 – 1911 relating to the mortgagee's power of sale (without obtaining a court order) subject to the addition of a statutory duty on all mortgagees to obtain the best price possible. DO CONSULTEES AGREE?*

8.21 There is one issue which was not dealt with by the **1971 Survey** and **1990 Final Report**. In its 1991 Report the Law Commission of England and Wales recommended abolition of the distinction made in the statutory provisions (Law of Property Act 1925 sections 101 and 103, of which sections 19 and 20 of the Conveyancing Act 1881 (c. 41) are the equivalent here) between when powers like the power of sale "arise" (i.e. become available) and "become exercisable" (i.e. can be invoked against the mortgagor). The Law Commission criticised both the "logic and the operation of this two stage procedure. In particular, it fails to distinguish genuine default justifying enforcement of the security and it encourages mortgagees to draft mortgage deeds in such a way that mortgagors are artificially put in technical default almost at the outset". This last point refers to the practice of inserting a very short legal redemption date (such as three or six months after commencement of the mortgage) in the mortgage deed, so as to make the remedies "arise". The Commission agrees with the Law Commission of England and Wales and notes that such a reform would be implemented by the Republic of Ireland's 2006 Bill (section 95). **Question 67:** *The Commission considers that a similar provision would be appropriate in Northern Ireland and recommends that the powers and rights of a mortgagee should vest as soon as the mortgage is created but they would not become exercisable unless it is for the purposes of protecting the mortgaged property or realising the mortgagee's security. DO CONSULTEES AGREE?*

8.22 The Commission has noted the recent controversy in England and Wales concerning the statutory power of sale which is exercisable without a court order. In *Horsham Properties Group Ltd. and another v Clark* [2008] EWHC 2327 (Ch) it was ruled

that this statutory power did not breach the European Convention on Human Rights, but following much criticism in the media the Secretary of State for Justice ordered an investigation into what was referred to as a “legal loophole” allowing lenders to sell a home without a court order (*The Times* 11 November 2008). It remains to be seen what the result of that investigation will be, but the Commission has noted that the Republic of Ireland’s 2006 Bill was amended at the Committee stage (sections 95(3) & 99(2) & (3) require a lender to obtain court authority before exercising the statutory power of sale in the case of housing loan mortgages). The Commission is concerned that there is a danger of overreacting to a particular case. It notes that the *Horsham* case did not involve a traditional family home, but rather the landlords of a buy-to-let property. Furthermore, in practice, the statutory power to sell out of court is usually preceded by an application to court for an order for possession. The point is that the lender will usually wish to sell with vacant possession and if the mortgagor is still in possession of a dwellinghouse (as his or her home), such a court order will have to be obtained, as the Commission discussed earlier (see paras. 8.13 – 8.17). The Commission also notes that HM Treasury has recently announced the introduction of a UK wide Homeowners Mortgage Support Scheme which will provide assistance to some of those borrowers facing repossession. **Question 68:** *In view of this the Commission is not inclined at this stage to propose any further restriction on the mortgagee’s statutory power of sale. DO CONSULTEES AGREE?*

(iv) Appointment of receiver

- 8.23 The two-stage provisions in the Conveyancing Act 1881 referred to above in relation to the statutory power of sale apply also to the statutory power to appoint a receiver (Wylie *ILL* para. 13.050). **Question 69:** *The Commission recommends that the reform suggested in Question 67 above (para. 8.21) should apply equally to this power. DO CONSULTEES AGREE?*

Other mortgagee rights

- 8.24 The **1971 Survey** and **1990 Final Report** recommended changes to the law governing various other rights which a mortgagee commonly enjoys.

(i) Consolidation

- 8.25 The **1971 Survey** recommended restoration of the pre-1881 position whereby a mortgagee had the automatic right to insist on redemption by the mortgagor of all mortgages held with that mortgagee, so as to avoid the risk of redemption of a well-secured mortgage while leaving unredeemed a mortgage on a property no longer good security (paras. 217 – 218). The Conveyancing Act 1881 requires a mortgagee to reserve the right expressly and this is usually done. On the other hand, the Law Commission of England and Wales took the view that the right of consolidation should be abolished as “no convincing argument was put that it serves any useful purpose” and in the interests of simplifying the law (Law Com No. 204 para. 6.44).

- 8.26 The Commission takes the view that there may be an argument against retention of the right of consolidation, which is that a mortgagor should not be penalised or inhibited from redeeming a particular mortgage because the mortgagee has made a mistake or acted unwisely in assessing the security value of another of the mortgagor’s properties. That is a risk which the mortgagee should have to bear. The Commission notes that the Republic of Ireland’s 2006 Bill would abolish the right in respect of housing loan mortgages (section 91). **Question 70:** *The Commission is inclined to recommend abolition of the right of consolidation and is not convinced that there should be exceptions for different types of mortgages.* **DO CONSULTEES AGREE?**

(ii) Insurance

- 8.27 The **1971 Survey**, the **1990 Final Report** and the Republic of Ireland’s 2006 Bill recommended a number of changes to the statutory provisions in the Conveyancing Act 1881 (section 23) relating to insurance of the mortgaged property. The **1971 Survey** recommended increasing the two-thirds of the

reinstatement cost limit to the maximum amount due to the mortgagee (para. 230), but the **1990 Final Report** recommended that the maximum insurance sum should be the market value of the property or the cost of reinstating it, whichever is the greater, and that the mortgagee should be able either to apply the insurance money in discharge of the debt or require its use in repairing or reinstating the property (Volume 1 paras. 2.6.27 – 2.6.28). The Commission notes that section 109 of the 2006 Bill modifies the statutory provisions to the extent that property should be insured for the full reinstatement value and the mortgagee should be able either to apply the insurance money in discharge of the debt or require its use in repairing or reinstating the property. **Question 71:** *The Commission notes the modifications made by the Republic of Ireland's 2006 Bill (section 109) and is inclined to recommend similar provisions for Northern Ireland.* **DO CONSULTEES AGREE?**

- 8.28 The **1990 Final Report** also recommended that the arrangement with the Office of Fair Trading which enables building societies to allow borrowers some choice of insurer should apply by statute to all other mortgagees of dwellinghouses (Volume 1 para. 2.6.29). **Question 72:** *The Commission is not convinced that this is necessary now in view of the increasing regulation and supervision of mortgage lenders.* **DO CONSULTEES AGREE?**

(iii) Tacking

- 8.29 Both the **1971 Survey** (paras. 219 – 220) and **1990 Final Report** (Volume 1 paras. 2.6.24 – 2.6.25) recommended substantial changes to the law of “tacking”, whereby a mortgagee may claim priority over another mortgagee in circumstances where the law of priorities would normally not have this consequence (see Wylie *ILL* paras. 13.159 – 13.162). First, it was recommended that the method known as “*tabula in naufragio*” (“the plank in the shipwreck”) should be abolished. Under this a mortgagee with low priority may secure priority over an earlier mortgagee by purchasing an even earlier interest in the land. This method was actually abolished by the Vendor and Purchaser Act 1874 (c. 78) (section 7) but restored

by the Conveyancing Act 1881 (section 73). It can rarely operate in Ireland, because in the rare cases where it might apply, the priorities will be governed by the Registry of Deeds system rather than common law rules distinguishing between legal and equitable interests. **Question 73:** *The right to such tacking would be abolished again in the Republic of Ireland's 2006 Bill (section 110(3)) and the Commission thinks the same should be done in Northern Ireland. Accordingly the Commission recommends that the method of tacking known as tabula in naufragio should be abolished.* **DO CONSULTEES AGREE?**

- 8.30 The earlier reports also recommended that the other form of tacking which is more commonly used, tacking further advances to the original mortgage, should be rationalised. Such tacking is often a feature of bank loans, but the law on how far the bank should be allowed to tack was far from clear at common law (see Wylie *ILL* paras. 13.161 – 13.162). Some clarification so far as registered land is concerned was introduced by legislation. In essence, the proposal in the earlier reports was that the law relating to unregistered land should be made to accord with the statutory provisions for registered land (see Land Registration Act (Northern Ireland) 1970 section 43) (see **1971 Survey** para. 220; **1990 Final Report** Volume 1 paras. 2.6.24 – 2.6.25). **Question 74:** *A similar change would be made in the Republic of Ireland's 2006 Bill (section 110) and the Commission thinks it should be made in Northern Ireland too. Accordingly the Commission recommends that the more common form of tacking, by way of adding further advances to the original mortgage, should be rationalised.* **DO CONSULTEES AGREE?**

CHAPTER 9. CONTRACTS FOR THE SALE OF LAND

INTRODUCTION

- 9.1 A contract for the sale or other disposition (such as a lease or mortgage) of land must comply with the usual requirements of the general law relating to contracts. Thus the parties must have the legal capacity to enter into a contract, must intend to create legal relations and must reach a consensus which is supported by consideration. What renders contracts relating to land special is the additional requirement that the contract must be sufficiently evidenced by writing to satisfy the Statute of Frauds (Ireland) 1695 (c. 12), if that Statute is pleaded by the defendant in an action to enforce the contract (see Wylie and Woods *ICL* Chapter 6; Megarry and Wade Chapter 15). We deal with this fundamental issue first before going on to consider other matters relating to such contracts.

STATUTE OF FRAUDS (IRELAND) 1695 (C. 12)

- 9.2 Section 2 of this Statute enacted for Ireland a provision introduced in England and Wales by the Statute of Frauds 1677 (c. 3). In essence, it requires that if a court is asked to enforce a contract relating to land (usually by seeking the equitable remedy of specific performance) and the defendant raises the Statute as a defence, the plaintiff will be expected to produce some written evidence of the alleged contract which has been signed by the defendant (the “party to be charged”) or by the defendant’s agent (see Farrell, *Irish Law of Specific Performance* Butterworths (1996) Chapter 3).
- 9.3 Section 2 of the 1695 Statute, like its 1677 Westminster counterpart, has been the subject of voluminous litigation over the centuries. In particular, there has been much dispute as to the form and content of the written evidence of the contract which is required (the “memorandum or note in writing”). The case law establishes that a wide range of documents may

qualify, provided they contain basic information about the parties, the property, the price (consideration) and any other terms which the parties considered “essential” or “material” (the correct description is also a matter of some controversy). The section requires only that the defendant in an action to enforce the contract has signed the written evidence. The plaintiff may have signed nothing. There is no requirement that the entire contract be in writing and signed by both parties. In practice, however, it is usual in most land transactions for the parties, under the guidance of their legal advisers, to adopt the more formal approach. A written contract in the standard form (incorporating General Conditions of Sale) issued by the Law Society of Northern Ireland is usually used.

- 9.4 The preamble to the 1695 Statute stated that its purpose was the “prevention of many fraudulent practices” (in essence requiring written evidence should reduce the risk of persons falsely claiming another person had entered into a contract with them). However, the courts quickly realised that the Statute itself could be “used as an instrument of fraud” by allowing persons who had in fact agreed to buy or sell land to resist enforcement. This led to the courts developing the doctrine of part performance, whereby the plaintiff in an action for specific performance can counter a defence which relies on the Statute by pleading that the plaintiff has engaged in acts which show independently that the parties entered into a contract. The action will then take the following form: the plaintiff claims specific performance; the defendant raises the defence that the alleged contract is unenforceable for want of sufficient written evidence to satisfy the Statute of Frauds; the plaintiff counters this defence by arguing that, notwithstanding lack of written evidence, the plaintiff is still entitled to equitable relief because his or her acts of part performance establish the existence of a contract (see Wylie and Woods *ICL* para. 6.49). The rationale for the doctrine of part performance has been a matter of some debate, both judicially (see *Lowry v Reid* [1927] NI 142; *Steadman v Steadman* [1976] AC 536; *Mackie v Wilde* [1998] 2 IR 578) and academically (see Wallace, “Part Performance Re-examined” (1974) 25 NILQ 453; Swann, “Part Performance:

Back from the Dead?” (1997) Conv 293), but there is no doubt as to its frequent application by the courts.

- 9.5 The doctrine of part performance is an example of the courts invoking equitable principles – in this instance the traditional maxim that “equity will not allow a statute to be used as an instrument of fraud.” That maxim may be regarded nowadays as an example of wider equitable jurisdiction to prevent unconscionable behaviour. It is important to draw attention to this in the present context because in more recent times the courts have utilised, in relation to enforcement of contracts relating to land, other equitable doctrines, such as constructive trusts and proprietary estoppel (see the English cases *Yaxley v Gotts* [2000] Ch 162 but see *Yeoman’s Row Management Ltd. & Another v Cobbe* [2008] UKHL 55; and articles, Dixon, “Invalid Contracts, Estoppel and Constructive Trusts” [2005] Conv 207; McFarlane, “Proprietary Estoppel and Failed Contractual Negotiations” [2005] Conv 501). These doctrines are, of course, recognised by the courts of Northern Ireland (see recent cases such as *Murphy v Murphy & Another* [2007] NICH 5; *Scott v Scott* [2007] NIFam 2; *McDermott & Another v McDermott* [2008] NICH 5).

REFORM

- 9.6 Given the antiquity of the 1695 provisions (and their Westminster equivalent) and the considerable uncertainty created by the extensive case law interpreting them, it is not surprising that reforms have been recommended over the years.

England and Wales

- 9.7 The provisions of the 1677 Statute were recast in more modern language by section 40 of the Law of Property Act 1925 (c. 20). This did not alter the substance of the provisions, so that the basic requirement remained that only written evidence signed by the party to be charged had to be produced in court. The doctrine of part performance was expressly recognised. However, when the Law Commission of England and Wales reviewed the subject, it recommended introducing much more

certainty to the law by replacing the old provisions based on the 1677 Statute with entirely new ones (see *Transfer of Land: Formalities for Contracts for Sale etc of Land* (1985) Consultation Paper No. 92 and Report (1987) Law Com No. 164. Its recommendations were implemented by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (c. 34). In essence, this provides that no contract relating to land comes into existence unless all the terms agreed by the parties are put in writing and signed by all the parties (or their agents). A failure to abide by this formality means that no contract at all exists and so, although the section did not say so explicitly, there would appear to be no longer any place for the doctrine of part performance (this doctrine assumes that there was an agreement capable of being partly performed). The section did, however, expressly save the operation of “resulting, implied or constructive trusts.” It did not mention other equitable doctrines, such as proprietary estoppel, but, as mentioned earlier (para. 9.5 above), the English courts have taken the view that it is still open to them to invoke it as well. The result is that informal agreements which do not satisfy section 2 may nevertheless be enforceable by invoking such doctrines.

- 9.8 Apart from the uncertainty as to the continued applicability of certain equitable doctrines, section 2 of the 1989 Act has proved to be controversial in other respects. Thus there were doubts as to how it applied to options to purchase – to the initial grant of the option or the subsequent exercise of it or both (*Spiro v Glencrown Properties Ltd.* [1991] Ch 537 ruled in favour of the former only)? There were doubts as to how it applied to the common practice in England and Wales of exchanging signed copies of the contract (*Commission for the New Towns v Cooper (Great Britain) Ltd.* [1995] 2 All ER 929 ruled that exchange of a signed letter of offer and signed letter of acceptance, both containing the full terms of the agreement, was not enough). It has been held that an equitable mortgage by deposit of title documents can no longer be effected by deposit only and must instead satisfy the full requirement of a written contract as prescribed by section 2 of the 1989 Act (*United Bank of Kuwait v Sahib & Others* [1997] 1 Ch 107). It has also been held that “signature” has the narrow meaning of

parties writing their own names with their own hands (*Firstpost Homes Ltd. v Johnson* [1995] 4 All ER 355) and any variations to an existing contract must fulfil the full requirements of the section (*McCausland v Duncan Lawrie Ltd.* [1997] 1 WLR 38). On the other hand, a “lock-out” agreement (whereby an owner of land agrees with a prospective purchaser not to deal with any other party for a specified period) does not come within the section (*Pitt v PHH Asset Management Ltd.* [1994] 1 WLR 327) nor does an independent collateral agreement which is not itself a contract for the sale or other disposition of an interest in land (*Record v Bell* [1991] 1 WLR 853).

- 9.9 Section 2 of the 1989 Act expressly excluded from its requirements certain contracts, such as a contract for a short term lease, which itself can be granted orally (under section 54(2) of the Law of Property Act 1925). It also excluded a contract made in the course of a public auction (subsection (5)(b)) while at the same time stating that section 40 of the 1925 Act ceased to have effect (subsection (8)). The result is that there are now no formalities at all for auction sales. Previously such sales were subject to the Statute of Frauds written evidence requirement and the courts had ruled that an auctioneer had implied authority to sign the written memorandum or note on behalf of either party (i.e. including the successful bidder/purchaser).

Republic of Ireland

- 9.10 The Republic of Ireland’s law was, of course, governed also by the 1695 Statute and its operation was reviewed by the Irish Law Reform Commission initially in the late 1980s. Its *Report on Gazumping* (LRC 59-1999) concluded that, notwithstanding the extensive litigation on section 2 of the 1695 Statute, its effect was now relatively well understood and it was not convinced that the new regime introduced in England and Wales (see paras. 9.7 – 9.9 above) was justified (paras. 3.18 – 3.21). Its later *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) adhered to this view. It drew attention to the controversial features of the English 1989 Act outlined above (paras. 9.8 – 9.9) and concluded that it was more appropriate to

retain the existing provisions until an “e-conveyancing” system comes on stream (see para. 8.03). The point being made here is that under a system whereby contracts might be created electronically and instantaneously at the touch of a button on a computer keyboard, the whole basis of technical formalities would have to be reconsidered. So the Commission recommended that, in the interim, new legislation should be confined to recasting the Statute of Frauds provision in more modern language, such as was done in section 40 of the Law of Property Act 1925 (see para. 9.7 above). This has been reflected in section 51 of the Land and Conveyancing Law Reform Bill 2006, which provides:

“(1) Subject to *subsection (2)*, no action shall be brought to enforce any contract for the sale or other disposition of land unless the agreement on which such action is brought, or some memorandum or note of it, is in writing and signed by the person against whom the action is brought or that person’s authorised agent.

(2) *Subsection (1)* does not affect the law relating to part performance or other equitable doctrines.”

It should be noted that subsection (2) saves not only the operation of part performance but also of other “equitable doctrines”, which must include not only those relating to constructive and resulting trusts but also proprietary estoppel (see paras. 9.5 & 9.7 above).

Northern Ireland – Previous reports

- 9.11 Given the controversy surrounding this area of the law it is not surprising that it has been addressed by previous reports in Northern Ireland. The **1971 Survey** confined itself to recommending consolidation of various statutory provisions relating to contracts for the sale of land, conveyances, and other instruments, including the Statute of Frauds (Ireland) 1695 (see Chapter 5). Its provision in the draft Property Bill appended to the **Survey**, therefore, followed section 40 of the Law of Property Act 1925 (see para. 9.7 above). On the other

hand, the **1990 Final Report** adopted the fundamental change recommended by the Law Commission of England and Wales and implemented by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (see paras. 9.7 – 9.9 above). The whole matter was then reviewed again by the Law Reform Advisory Committee (see Discussion Paper No. 8 *Formalities for Contracts relating to the sale of Land or Interests in Land and the Rule in Bain v Fothergill*). In its subsequent 2003 Report (LRAC No. 12 *Formalities for Contracts relating to the Sale of Land or Interests in Land*) it too recommended adopting the English 1989 provisions, but with some modification. Thus it recommended that the use of equitable doctrines like proprietary estoppel should be confirmed explicitly and the position of contracts relating to short term leases should be aligned with the provisions of the Landlord and Tenant Law Amendment Act, Ireland, 1860 (c. 154) (Deasy's Act) (section 4 permits oral creation of leases "for a year or from year to year or for any lesser period": see Wylie *ILT* paras. 5.26 – 5.34).

- 9.12 It seems to the Commission that there are two main options for reform. One is to adopt the provisions in section 2 of the 1989 Act. The Commission agrees with the Law Reform Advisory Committee that if this option were chosen, it would be important to correct the ambiguities and uncertainties which have arisen since those provisions came into force and to make them accord with the law of Northern Ireland (see paras. 9.8 – 9.9 above). It must be recognised, however, that this would involve a major change in the law and it may be questioned whether it is worth imposing this on practitioners when the likelihood is that the whole issue of formalities will have to be reconsidered if an e-conveyancing system is introduced which covers the contract stage of the transaction. Although the Commission has no doubt that e-conveyancing will be introduced eventually, because there is an almost universal movement towards it throughout the common law world, it is impossible to predict when it will become a practical reality and what its scope will be (initially it may be confined to an "e-registration" system, under which it deals only with the registration stages of a conveyancing transaction). If the view is taken that there is nevertheless an inevitability about development of e-

conveyancing, it may be that the better option would be to adopt the position taken in the Republic of Ireland, that is, preserve the substance of the present law relating to formalities for land contracts and revisit the subject as part of the development of an e-conveyancing system. **Question 75:** *The Commission considers that the arguments in favour of these two options are finely balanced but inclines towards postponing consideration of substantive changes to the law governing formalities for land contracts until development of an e-conveyancing system is much further advanced. In the interim reform should be confined to modernising the wording of the Statute of Frauds (Ireland) 1695. DO CONSULTEES AGREE?*

SALE OF LAND BY AUCTIONS ACT 1867 (C. 48)

- 9.13 This Act regulates the terms upon which a sale of land by public auction (as opposed to by “private treaty”, where a purchaser is found by the landowner personally or by an estate agent) is conducted. Auction sales commonly arise where there is a forced sale, such as occurs where a lending institution repossesses the land from a defaulting mortgagor and sells it in order to realise its security (see Chapter 8). However, auction sales are not as common in respect of unforced residential sales as is the case in the Republic of Ireland, though they are sometimes used for sales of commercial properties. The 1867 Act governs matters like fixing a reserve price and reserving the vendor’s right to bid at the auction. The Law Society of Northern Ireland’s standard contract form reflects these provisions in its *General Conditions of Sale* (see Condition 20).
- 9.14 The wording of the 1867 Act has been criticised (see Wylie and Woods *JCL* paras. 2.15 – 2.18). For example, the Act requires a vendor to specify whether there is a reserve price and to reserve a right to bid (if this is wanted), but it is not clear whether this must be done in the written conditions of sale or whether it is sufficient for the auctioneer to declare it orally at the auction itself. The Act does not make it clear what the sanction is for failing to abide by the Act (e.g., does it invalidate the sale altogether or simply convert one intended to be with a reserve into one without a reserve or render the contract voidable only at the option of the purchaser?). It is also not

clear whether the conditions of sale must state both that there is a reserve price and a right to bid – it has been argued that simply reserving a right to bid implies existence of a reserve price (but note that the case usually cited to support this, *Dimmock v Hallett* (1866) 2 Ch App 21, was decided before the 1867 Act came into force). It may also be questioned whether a right to bid at the auction of the vendor’s own property should even be allowed in today’s climate of consumer protection. Arguably, even though bidders are warned of the possibility, there is an inherent risk of unfairness or what might be regarded as sharp practice where genuine bidders cannot be sure that competing bidders are also “genuine” in the same sense (i.e. not just bidding to push up the final sale price).

9.15 The **1990 Final Report** recommended (Volume 1, para. 2.5.13) restating the 1867 Act’s provisions, subject to some clarifications (such as making it clear that the right to bid could be reserved only if there is no reserve price). It also recommended dropping the provisions in section 7 of the 1867 Act relating to reopening of court sales, on the basis that such matters should be dealt with by rules of court. On the other hand, it also suggested dropping section 8 which prevents the other provisions of the Act (relating to bidding and reserve prices) applying to court sales. In the Republic of Ireland the Law Reform Commission made similar recommendations for recasting the 1867 Act in its *Consultation Paper on the Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) (paras. 8.08 – 8.09). The Bill appended to its subsequent Report (LRC 74-2005) contained a section (section 55) which would have implemented this. It read –

“(1) Where land is offered for sale by auction it may be offered –

- (a) subject to a reserve price,
- (b) with a right to bid up to that price (but not beyond it) reserved, and, in either of these events, the fact that it is so offered must be stated.

- (2) Where it is not stated that the land is offered for sale subject to a reserve price, the sale is without reserve.
- (3) Where the sale is without reserve –
 - (a) the vendor shall not bid, or employ a person to bid, at the sale,
 - (b) the auctioneer shall not knowingly take any bidding from the vendor or any person employed by the vendor,
 - (c) if the vendor or a person employed by the vendor bids at the sale, the sale is voidable by the purchaser,
 - (d) the highest bidder shall be deemed to be the purchaser.
- (4) Where it is stated that a right to bid up to the reserve price is reserved, the vendor or one (but not more than one) person on the vendor's behalf may bid at the auction up to that price in such manner as may be appropriate, but if more than one person bids as or on behalf of the vendor or any bid is made by or on behalf of the vendor beyond the reserve price, the sale is voidable by the purchaser.
- (5) In this section –

“employ” means engage as an agent or servant with or without reward, and cognate words shall be read accordingly;

“stated” means specified in all advertisements, the particulars or conditions of sale and any other publicity relating to the auction and at the time of the auction.”

This section does not appear in the 2006 Bill currently before the Republic of Ireland's Oireachtas (Parliament), but the Commission understands that this is because separate

legislation is being prepared for the regulation of auctioneers and estate agents (as recommended by the *Report of the Auctioneering/Estate Agency Review Group* published in July 2005 by the Republic of Ireland's Department of Justice, Equality and Law Reform).

- 9.16 The Commission accepts that some aspects of the 1867 Act are unsatisfactory and that, in so far as it is an Act specific to land auctions, there is an argument for replacing it as part of reform of the law (including legislation) relating to land transactions. The **1990 Final Report's** recommendations and section 55 of the Republic of Ireland's original 2006 Bill indicate how this might be done. However, the Commission is concerned that some of the issues which arise in respect of land auctions (such as how far the vendor should be entitled to reserve the right to bid for his or her own property) may apply to auctions of other types of property. This suggests that it might be more appropriate to deal with the law relating to auctions as a whole (including land auctions) as part of a separate project. This, in effect, was the view taken ultimately in the Republic of Ireland. **Question 76:** *On balance the Commission is inclined to take the same view and to regard reform of the law relating to auctions as outside the scope of this Project. DO CONSULTEES AGREE?*

OTHER CONTRACT MATTERS

- 9.17 There are a few other matters relating to contracts for the sale or other disposition of land which were referred to in the earlier reports. One was the so-called rule in *Bain v Fothergill* (1874) LR 7 HL 158 (a very controversial judicial rule limiting the damages recoverable by a purchaser where the vendor fails to prove the title to the land contracted for), but that rule was abolished by Article 9 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (No. 1452 N.I. 7). Nothing further need be said about that rule.
- 9.18 Although the rule in *Bain v Fothergill* has gone, there is another controversial matter which arises in relation to a vendor's failure to show sufficiently good title to the land contracted to be sold. Sometimes doubts as to the title may emerge which would

prevent the vendor from obtaining an order for specific performance in order to force the purchaser to go through with the purchase. However, notwithstanding this the vendor may not be technically in breach of contract because there is a condition in the contract preventing the purchaser from raising requisitions or objections to the title. The result is then that the purchaser is not entitled to exercise the usual right conferred by the General Conditions of Sale in the Law Society's standard contract form (Conditions 18.1 & 18.2) to rescind the contract and to recover the deposit paid under the contract (see Wylie and Woods *ICL* paras. 13.34 – 13.36). The leading English case (*Re Scott and Alvarez's Contract* [1895] 2 Ch 603) established that the court in such circumstances had no power to order return of the deposit. The Irish courts at the same time expressed considerable doubts about whether this principle applied to Ireland (see, e.g., *Re Lyons and Carroll's Contract* [1896] 1 IR 383 and *Re Turpin and Ahern's Contract* [1905] 1 IR 85), but subsequent uncertainty on the matter seems to have existed in the Republic of Ireland's courts (see *White v Spendlove* [1942] IR 224 and *Re Flynn and Newman's Contract* [1948] IR 104).

- 9.19 The point was put beyond doubt in England and Wales by section 49(2) of the Law of Property Act 1925, which reversed *Re Scott and Alvarez's Contract* and conferred jurisdiction to order return of the deposit where the court "refuses to grant specific performance of a contract, or in any action for the return of a deposit." The English courts have pointed out that this provision applies usually where a purchaser is unable to complete (where the vendor is unable to complete the purchaser will normally have a legal right to return of the deposit) and such failure would normally involve the penalty of forfeiture of the deposit. The discretion conferred by the statutory provision should only be exercised where there are mitigating factors, such as how close the purchaser came to completing and what alternatives were proposed to the vendor: see *Omar v El-Wakil* [2002] 2 P & CR 3; *Aribisala v St. James Homes (Grosvenor Dock Ltd.)* [2008] 3 All ER 762.

9.20 Both the **1971 Survey** (para. 168) and **1990 Final Report** (Volume 2, draft Property Order Article 75) recommended enactment of a similar provision here, making it clear that the discretion included ordering return of part only of the deposit. The Republic of Ireland's 2006 Bill would contain a similar provision (section 54) which reads:

“Where the court refuses to grant specific performance of a contract for the sale or other disposition of land, or in any action for the return of a deposit, the court may, where it is just and equitable to do so, order the repayment of the whole or any part of any deposit, with or without interest.”

Question 77: *The Commission has concluded that a similar provision should be enacted in Northern Ireland. Accordingly it recommends that where a court refuses to grant specific performance of a contract for the sale of land, it should be able to make an order in respect of the deposit if appropriate. DO CONSULTEES AGREE?*

9.21 Section 9 of the Vendor and Purchaser Act 1874 (c. 78) introduced a special summary procedure (a “vendor and purchaser summons”) to enable the parties to a contract for the sale or other disposition of land to apply to the court to resolve a dispute relating to the contract. It is settled that this can be used only to resolve disputes relating to matters like the correct interpretation of the contract's provisions or whether the vendor has shown good title or whether a requisition raised by the purchaser is proper. It cannot be used to challenge the validity of the contract itself (see Wylie and Woods *ICL* paras. 13.26 – 13.29).

9.22 The 1874 Act's provision was re-enacted in substance by section 49(1) of the Law of Property Act 1925. Both the **1971 Survey** (draft Property Bill clause 69(1)) and the **1990 Final Report** (Volume 2 draft Property Order Article 74) recommended a similar re-enactment here. Such a provision would also be contained in section 55 of the Republic of Ireland's 2006 Bill. It appears that the procedure is rarely

invoked in England and Wales nowadays (see Megarry and Wade para. 15-124), but the Commission considers that it is useful to retain the jurisdiction. **Question 78:** *The Commission endorses the recommendations in the earlier reports and proposes to re-enact the provision in section 9 of the Vendor and Purchaser Act 1874 to enable the parties to a contract for the sale of land to apply to the court to resolve a dispute relating to the contract.* **DO CONSULTEES AGREE?**

CHAPTER 10. CONVEYANCES

INTRODUCTION

- 10.1 This Chapter is concerned with various aspects of the law and documentation relating to conveyances of land – the process of transferring ownership from one person to another. It is mostly concerned with “unregistered land”, that is, land the title to which has not yet been registered in the Land Registry and so is not “registered land”. The law and procedure governing registered land have been the subject of extensive modern legislation, such as the Land Registration Act (Northern Ireland) 1970 (c. 18) and the Registration (Land and Deeds) (Northern Ireland) Order 1992 (No. 811 N.I. 7). The Land Registration Rules (Northern Ireland) 1994 (No. 424) (made under the 1992 Order) contain detailed rules governing transfers and transmissions of registered land.
- 10.2 Although all land in Northern Ireland is now subject to “compulsory registration”, it is important to note that it will be some considerable time before title to every parcel of land will become registered. This is because the obligation to register the title to land which is not yet registered arises only when a “triggering event” occurs with respect to the land in question, such as a sale of the freehold or of a leasehold interest exceeding 21 years (the events triggering compulsory registration are set out in Schedule 2, Part I of the 1970 Act). The result is, therefore, that a substantial number of transactions involving unregistered land will continue to occur. In such cases, solicitors carrying out the conveyancing on behalf of the parties have to abide by the law and procedure relating to unregistered land throughout most of the process. Compulsory registration simply requires that the final stage of completion includes registration of the title acquired by the purchaser.
- 10.3 It should also be noted that the development of an e-conveyancing system (see para 9.12 above) is unlikely to have

a major impact on unregistered land conveyancing. Most e-conveyancing systems have developed from or are an extension of e-registration systems. The common pattern in other common law jurisdictions is that the operation of the Land Registry becomes increasingly computerised, so that conveyancers carry out transactions such as searches and applications for registration online. Where the e-conveyancing system is to be extended to non-registration aspects of the conveyancing process, such as pre-contract enquiries and the formation of the contract, it is usually contemplated that this development will be confined to registered land (see the review carried out by the Republic of Ireland's Law Reform Commission published in 2006: *Report on eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79-2006)).

Question 79: *The Commission has concluded, therefore, that there remains a need for provisions to govern the conveyancing process as it applies to unregistered land.* **DO CONSULTEES AGREE?**

- 10.4 As regards the scope of such provisions, the current position is that there are extensive legislative ones enacted largely during the 19th century. These are contained in statutes like the Real Property Act 1845 (c. 106), the Vendor and Purchaser Act 1874 (c. 78) and the Conveyancing Acts 1881 – 1911. In addition there are some more arcane provisions contained in earlier statutes such as the Statute of Uses (Ireland) 1634 (c. 1) and the Conveyancing Act (Ireland) 1634 (c. 3) (for discussion of the operation of this legislation, see Wylie and Woods *ICL* paras. 14.67 & 18.77). These statutes deal with several matters relating to the conveyancing process. One is the title to be shown (or deduced) by a vendor of land, its investigation by the purchaser (in each case usually acting through their respective solicitors) and what protection the purchaser should have from fraud or other improper action or behaviour by the vendor. Another matter is the formalities relating to the transfer of title, the use of deeds and their operation. A further related matter is the contents or provisions of such deeds. The rest of this Chapter deals with these matters in turn.

TITLE TO BE DEDUCED

- 10.5 The Vendor and Purchaser Act 1874 and the Conveyancing Act 1881 (c. 41) contain various provisions relating to what is known as an “open” contract for the sale or other disposition of land. “Open” in this context means open as to the title to be deduced (shown) by the vendor, which occurs when the contract entered into by the vendor and purchaser does not specify what this is. In practice, it is usual for the contract to contain express provisions on this matter and the Law Society of Northern Ireland’s standard form contains a section in which it can be done. The result is that the 1874 and 1881 Acts contain what are essentially “default” provisions, that is, provisions which will operate only where the parties’ contract fails to provide expressly for the matters in question.

Length of Title

- 10.6 The previous Reports on reform of the law in Northern Ireland recognised that the 1874 and 1881 provisions were unsatisfactory in several respects. The **1967 Lowry Report** suggested that the length of title to be deduced by the vendor under section 1 of the 1874 Act should be reduced from 40 years to 20 years (see para. 142(c)). It drew attention to the fact that the English Law of Property Act 1925 (c. 20) had reduced the period there to 30 years. However, the English Law of Property Act 1969 (c. 59) reduced it further to 15 years and the **1971 Survey** recommended a similar reduction in Northern Ireland (para. 162). On the other hand, the **1990 Final Report** recommended reverting to the **1967 Lowry Report’s** recommended 20-year period, on the ground that this would be consistent with the provision in section 4 of the Evidence Act (Northern Ireland) 1939 (c. 12) which makes a document not less than 20 years old prove itself (Volume 1 para. 2.5.14). Such an “inconsistency” exists now in England and Wales (section 4 of the Evidence Act 1938 (c. 28) also provides for a period of 20 years) and the Commission is not so convinced that this is a good reason for resiling from the **1971 Survey’s** recommendation. It notes that the Republic of Ireland’s Law Reform Commission also recommended 20 years rather than 15 years on the basis that the latter was “uncomfortably close”

to the 12-year limitation period governing actions to recover possession of land (see *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paras. 8 – 9; *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) para. 8.11). The point is that the 12-year period (after which any rival claimant to the title would be barred) may be extended in cases of fraud or disability (see the Limitation (Northern Ireland) Order 1989 (No. 1339 N.I. 11) (Articles 48 & 71)). The Republic of Ireland's Land and Conveyancing Law Reform Bill 2006 initially specified a 20-year period, but the Government, at the behest of the Law Society of Ireland, has amended this to 15 years at the Committee Stage of the Bill's progress through the Dáil (see section 56).

10.7 The Commission's view on this matter is influenced by the experience in England and Wales since 1969. There appear to have been no difficulties arising from the reduction of the title period to 15 years and the fears expressed in the Republic of Ireland about the "uncomfortable closeness" to the 12-year limitation period (see para. 10.6 above) seem to have been unfounded. That seems to have been accepted now in the Republic of Ireland. **Question 80:** *The Commission is inclined to recommend that the statutory period for title to be deduced by a vendor under an "open" contract should be reduced from 40 years to 15 years, as has been the position in England and Wales since 1969 and as is proposed in the Republic of Ireland in the Land and Conveyancing Law Reform Bill 2006. DO CONSULTEES AGREE?*

10.8 The **1990 Final Report** also drew attention to what may be regarded as a corollary statutory provision (Volume 1 para. 2.5.14). This is the provision in section 2 of the Vendor and Purchaser Act 1874 that recitals, statements and descriptions in deeds which are 20 years old at the date of a contract for sale should be taken, unless proved to be inaccurate, to be sufficient evidence of their truth. **Question 81:** *Notwithstanding the disparity between the 1874 Act's 40-year period for title deduction and the 20-year period for presumed truth of statements in title deeds, the Commission inclines to the view*

that the two statutory periods relating to deduction of title and presumed truth of statements in deeds should be made to coincide and the latter should also be reduced to 15 years. The Republic of Ireland's 2006 Bill has been amended to this effect (as it was passed by the Seanad (Senate); a 20-year period was initially stated but both provisions have now been amended so that it is a 15-year period (section 59): see para. 10.6 above). **DO CONSULTEES AGREE?**

- 10.9 The **1990 Final Report** also pointed out that a consequence of the reduction in the statutory period of title might be that a purchaser could face a higher risk of not discovering some interest created by a deed executed prior to the statutory period (in essence, a deed prior to the "good root of title" deed from which the vendor is required to deduce title: see Wylie and Woods *ICL* Chapter 14). A purchaser would normally take subject to such an interest where the deed creating it was, as is usual, registered in the Registry of Deeds, but there is a problem which arises from how searches are made in that Registry. It has long been the case that such searches can only be made in the index of names of grantors named in the registered deeds and those names can only be searched if the deeds in question are produced by the vendor as part of the deduction of title. The index of lands (which enabled searches to be made by reference to address of the land) was abandoned during the Second World War and abolished in 1967 (section 1(1) of the Registration of Deeds (Amendment) Act (Northern Ireland) 1967 (c. 30) deemed it to have been closed on 31 December 1944). The **1990 Final Report** took the view that since the difficulty in tracing pre-root deeds arises from the closure of the index of lands, purchasers who might, as a result, suffer loss by a failure of the system, and not through their own fault, should be entitled to compensation from the Registry (Volume 1 para. 2.5.15). A similar provision for compensation was made in England and Wales in 1969 when the reduction in the title period to 15 years was made (see Law of Property Act 1969 section 25). There is no Registry of Deeds system operating now in England and Wales but a similar problem can arise there in respect of unregistered land in respect of the Land Charges Registry (under which charges are

registered against the name of the owner of the land and not against the address of the land). The Commission notes that the provision for compensation in England and Wales is strictly limited. There is no right to compensation in respect of a charge which the purchaser would have discovered had he or she insisted on seeing the length of title which the vendor would be obliged to deduce under the statutory provisions relating to “open” contracts (see para. 10.5 above). This means that solicitors acting for purchasers should consider the risk of contracting expressly to accept less title than the statutory period (see *Barnsley’s Conveyancing Law and Practice* Thompson, 4th ed. Butterworths (1996) p 274). In the vast majority of cases that risk would be minimal. **Question 82:** *The Commission considers that the question of which pre-root deeds and searches should be provided by the vendor is really more of a matter of contract between the parties, than a matter that should be covered by legislation. In practice, if clients suffer loss as a result of failing to trace a pre-root deed which has an effect on the title they can rely on their solicitor’s insurance. On this basis the Commission is not inclined to recommend any provision for compensation.* **DO CONSULTEES AGREE?**

Leasehold Titles

- 10.10 Both the **1971 Survey** (see para. 163) and the **1990 Final Report** (Volume 1 para. 2.5.16) drew attention to the fact that the Vendor and Purchaser Act 1874 (section 2) and the Conveyancing Act 1881 (sections 3(1) and 13(1)) restrict quite severely on an “open” contract how much of the superior title the grantee or assignee of a lease can require to be deduced (see Wylie and Woods *ICL* Chapter 14). The consequence is that, unless the grantee or assignee manages to get the grantor or assignor to agree otherwise expressly, often no title at all or very restricted title only will be deduced. Thus, where a freehold owner contracts to grant a lease, the intended lessee under an open contract cannot require that owner to deduce any title at all. Where an existing lessee contracts to grant a sublease, the intended sublessee again cannot require deduction of any title to the head lessor’s freehold title.

10.11 The **1971 Survey** recommended that any person intending to acquire a leasehold interest not less than 35 years should have an absolute right (i.e. any express stipulation to the contrary in the contract for sale would be void) to call for title to the freehold (where the interest was to be derived from this) or to the lessee's interest (where the interest contracted for was to be derived from this) (see para. 163). The **1990 Final Report** eventually concluded that use of a limit linked to the length of lease was arbitrary and so recommended that an intended lessee should be entitled to production of the lessor's title regardless of the length of lease. On the other hand, the Commission notes that the Republic of Ireland's 2006 Bill would provide that the superior title may be called for wherever the lease or sublease is for a term exceeding 5 years, but this would still be subject to the terms of the contract (see section 57). It is important to appreciate the considerable limits to the application of any such provisions. They would apply only where the grant of the leasehold interest in question was preceded by a formal contract for the grant. Many tenancies are, of course, created informally by, e.g., an oral grant or formally without any prior contract. This applies particularly to periodic tenancies, like a weekly, monthly and yearly tenancy, but also to short-term fixed period leases. **Question 83:** *However, having considered the options and previous recommendations, the Commission inclines to the view that where a purchaser is acquiring a leasehold interest, the question of calling for title to the freehold is a matter of contract which should be left to be determined by the parties themselves and their solicitors. DO CONSULTEES AGREE?*

Rule in *Patman v Harland*

10.12 Linked to the preceding discussion concerning the position of grantees of a leasehold interest, the **1971 Survey** also drew attention to a principle developed by the courts, the rule in *Patman v Harland* (1881) 17 Ch D 353 (see para. 164). Under this rule, a grantee would be fixed with constructive notice of any adverse interest affecting the superior freehold or leasehold title even though, under the restrictions imposed for open contracts by the 1874 and 1881 Acts, the grantee was

prohibited from calling for deduction of that title. This clearly seems unfair to such grantees and, in effect, forces the grantee's solicitor to advise that the contract should specify that the superior title should be deduced. This runs counter to the statutory provisions and so, as was done in England and Wales (Law of Property Act 1925 section 44(7)), the **1971 Survey** recommended abrogation of the rule. This was endorsed by the **1990 Final Report** (Volume 2 draft Property Bill section 71(6)). A similar provision is contained in the Republic of Ireland's 2006 Bill (section 57(4)). **Question 84:** *The Commission also recommends abrogation of the rule in Patman v Harland.* **DO CONSULTEES AGREE?**

Other Conditions of Title

- 10.13 The **1971 Survey** recommended that various provisions relating to production of title documents by the vendor contained in section 2 of the Vendor and Purchaser Act 1874 and section 3 of the Conveyancing Act 1881 should be re-enacted, subject to some modifications (see para. 165). For example, the prohibition on requiring the vendor to produce an instrument dated or made before the root of title should not apply in every case; if a post-root instrument was executed under a pre-root power of attorney, the deed creating that power should be produced as the post-root instrument's validity is dependent upon it. The **1990 Final Report** followed this recommendation (Volume 2 draft Property Order Article 73). **Question 85:** *The Commission endorses the recommendation and proposes that the various statutory provisions relating to production of title documents should be re-enacted, subject to some modifications.* **DO CONSULTEES AGREE?**

DEEDS AND THEIR OPERATION

- 10.14 It is one of the curious features of our law that the ancient methods of conveying title to land, some of which date back to early feudal times, have never been removed. The Real Property Act 1845 introduced the modern concept of a deed of grant for freehold land (the grant and assignment of leases are governed separately by provisions in the Landlord and Tenant Law Amendment Act, Ireland, 1860 (c. 154) (Deasy's Act) and

are outside the scope of the present project) but it did not abolish methods such as feoffment with livery of seisin, a “bargain and sale”, a “lease and release” and various combinations operating under the Statute of Uses (Ireland) 1634 (see Wylie *ILL* paras. 3.023 – 3.030). **Question 86:** *The 1971 Survey recommended abolition of these arcane methods, so that the modern deed would become the sole method of conveying freehold land (as was done in England and Wales by section 51 of the Law of Property Act 1925) (see para. 169). The 1990 Final Report endorsed this (Volume 2 draft Property Order Article 78) as does the Commission. DO CONSULTEES AGREE?*

10.15 The **1971 Survey** recommended the repeal of the Statute of Uses (Ireland) 1634, which was designed to prevent loss of feudal dues caused by conveying land to “uses” (see para. 5.3 above). This purpose became largely redundant with the abolition of most such dues shortly afterwards by the Tenures (Abolition) Act (Ireland) 1662 (c. 19) (see Wylie *ILL* para. 3.015). **Question 87:** *The 1990 Final Report (Volume 3 draft Property (Consequential Provisions) Order Schedule 1) endorsed the repeal of the Statute of Uses (Ireland) 1634 as does the Commission. DO CONSULTEES AGREE?*

10.16 The **1971 Survey** also recommended that in future no “resulting trust” should be implied in a voluntary conveyance merely because it was not expressed to convey the land “unto and to the use of” the grantee. The object of this was to get rid of that time-honoured formula used in conveyances over the centuries to avoid the conveyance becoming a nullity (because a resulting use arose in favour of the grantor which was “executed” by the Statute, thereby passing title back to grantor). In practice, it is used in all conveyances and not just voluntary ones (see Wylie and Woods *ICL* para. 18.86). A similar step was taken in England and Wales in 1925 when the Statute of Uses 1535 (c. 10) was repealed (see Law of Property Act 1925 section 60(3); Megarry and Wade para. 11-014). However, the reference to “resulting trust” has proved to be controversial because it suggests that the provision has a wider effect than merely getting rid of a formula hitherto used in deeds. In particular, it

has been questioned whether it has a wider effect on the modern doctrine of resulting trusts, whereby a gift of property to someone gives rise to a (rebuttable) presumption of a resulting trust in favour of the grantor (see Russell LJ in *Hodgson v Marks* [1971] Ch 892 at 933 and Lord Browne-Wilkinson in *Tinsley v Milligan* [1993] 3 All ER 65 at 87). It is very doubtful whether the provision was intended to affect the modern doctrine of resulting trusts and the Commission notes that the equivalent provision in the Republic of Ireland's 2006 Bill (section 62(3)) refers instead to a resulting "use". **Question 88:** *The Commission thinks that the same wording should be used in the provision for Northern Ireland and that in future no resulting use should be implied in a voluntary conveyance merely because the words "unto and to the use of" were not used.* **DO CONSULTEES AGREE?**

- 10.17 As regards the formalities for deeds and other instruments, this matter was reviewed by the Law Reform Advisory Committee (see Discussion Paper *Deeds and Escrows* No. 7) and the recommendations in its 2002 Report (*Deeds and Escrows* LRAC No. 10) were implemented by the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005 (No. 1452 N.I. 7) (Articles 3 – 8). There are, however, some further matters relating to operation of deeds relating to land which require consideration.
- 10.18 The **1971 Survey** recommended that the need to include words of limitation (to indicate the freehold estate being conveyed) in deeds relating to unregistered land should be abolished (para. 171). This would bring the law into line with what has long been the case with the transfers of registered land (see Land Registration Act (Northern Ireland) 1970 section 35). It is important to appreciate, as the **1990 Final Report** emphasised, that this provision is essentially a "fall-back" one designed to correct a mistake or carelessness on the part of the conveyancer (Volume 1 para. 2.5.29). It provides what will pass if the conveyance fails to specify it. However, the conveyance should still specify what is to pass because other provisions may hang on this, such as the implied covenants for title (which apply to what is "expressed to be conveyed") (see para. 10.25

below). **Question 89:** *On that basis the Commission endorses the earlier recommendations and proposes that in future the need to include words of limitation, to indicate the freehold estate being conveyed, should be abolished. DO CONSULTEES AGREE?*

10.19 The **1971 Survey** recommended that there should be a set of statutory definitions of words commonly used in deeds (such as “month” and “person”) and other meanings (such as the singular including the plural, the masculine including the feminine and vice versa), similar to those provided for statutes by the Interpretation Act (Northern Ireland) 1954 (c. 33). A similar provision was made in England and Wales in 1925 (Law of property Act 1925 section 61). The **1990 Final Report** endorsed this (Volume 2 draft Property Order Article 89). The Commission notes that the Republic of Ireland’s 2006 Bill (section 74) would go rather further by providing, in effect, that the general rules of construction applicable to, and particular meanings, construction or effect given to, words and expressions in statutes by the Interpretation Act, apply to such words and expressions in any instrument relating to land, unless the context requires otherwise. **Question 90:** *The Commission regards this provision as being very useful for private instruments and recommends that a similar provision should be adopted in Northern Ireland providing a statutory definition of words commonly used in deeds similar to that provided for statutes by the Interpretation Act (Northern Ireland) 1954. DO CONSULTEES AGREE?*

10.20 The **1971 Survey** drew attention to the “general words” provision in section 6 of the Conveyancing Act 1881 (c. 41). This is one of that Act’s “word saving” provisions, designed to reduce the wording of conveyances by providing that a conveyance passes to the grantee, without having to specify them in detail, all physical features which make up the land and all rights which attach to the land. The **1971 Survey** recommended re-enactment of such a provision but subject to an important qualification. As mentioned earlier in this Consultation Paper (see para. 4.40 above), very controversially the courts of England and Wales have interpreted the

equivalent there (now section 62 of the Law of Property Act 1925) as converting what previously was a mere licence or privilege revocable at any time into a full legal easement which might last indefinitely (see e.g. *Wright v Macadam* [1949] 2 KB 744; *Goldberg v Edwards* [1950] Ch 247; *Graham v Philcox* [1984] QB 747; Tee, “Metamorphoses and section 62 of the Law of Property 1925” [1998] Conv 115). This seems clearly to be an unintended consequence of the original “word-saving” provision and can be a substantial trap for an unwary grantor. For example, if a landlord grants his or her tenant permission to cross adjoining land also owned by the landlord as an act of generosity or good neighbourliness, the tenant would initially have a bare licence only, which the landlord could revoke at any time. However, according to the case law of England and Wales, if the landlord later conveys to the tenant the freehold reversion relating to the previously tenanted land, the tenant, who then becomes the freehold owner of that land, will acquire under section 62 a freehold easement (a right of way) over the landlord’s adjoining land. To avoid this automatic consequence the conveyance must contain an express provision countermanding the effect of the section. The **1971 Survey** recommended that this possible effect of section 6 of the 1881 Act should be prevented in any replacement of it. The **1990 Final Report** endorsed this (Volume 2 draft Property Order Article 95(4)) and the Commission noted earlier (para. 4.40) that the Republic of Ireland’s 2006 Bill would do likewise (see section 70(3)(a)(ii) – the section does not “extend the scope of, or convert into a new interest or right, any licence, privilege or other interest or right existing before the conveyance”).

Question 91: *The Commission reiterates the view that the word-saving provision in section 6 of the Conveyancing Act 1881 should not operate to “upgrade” rights and should pass only existing rights. DO CONSULTEES AGREE?*

- 10.21 The **1971 Survey** also referred to another controversial aspect of this statutory provision. This is whether it applies to the typical *Wheeldon v Burrows* ((1879) 12 ChD 31) situation, that is, so as to convert a *quasi*-easement into a full easement when land previously in the ownership of one person is subdivided by conveying part of it to another person (see para. 4.39 above).

Question 92: *The Commission drew attention to this aspect of section 6 of the 1881 Act in Chapter 4 and reiterates the view expressed there, that the section should not apply to this situation (see para. 4.41). DO CONSULTEES AGREE?*

- 10.22 Both the **1971 Survey** (Chapter 14) and the **1990 Final Report** (Volume 2 draft Property Order Articles 237 & 238) recommended re-enactment of provisions relating to voluntary conveyances intended to defraud subsequent purchasers of the same land, currently in sections 1 & 3 of the Conveyancing Act (Ireland) 1634, as amended by the Voluntary Conveyances Act 1893 (c. 21). Those provisions are somewhat confusing (e.g., notwithstanding the provision that such conveyances are “void”, the courts have interpreted this as meaning “voidable” only at the option of the purchaser: see *National Bank Ltd. v Behan* [1913] 1 IR 512; *Re Moore* [1918] 1 IR 169) and the recommendation was that they should be recast in clearer and more modern language. This was done in England and Wales (see Law of Property Act 1925 section 173) and a similar recasting is included in the Republic of Ireland’s 2006 Bill. Section 73 (so far as relevant) of this reads:

“(1) Subject to *subsection (2)*, any voluntary disposition of land made with the intention of defrauding a subsequent purchaser of land is voidable by that purchaser.

(2) For the purpose of *subsection (1)*, a voluntary disposition is not to be read as intended to defraud merely because a subsequent disposition of the same land was made for valuable consideration.”

Question 93: *The Commission recommends a similar recasting for Northern Ireland. Subject to that, the statutory provisions relating to voluntary conveyances intended to defraud subsequent purchasers should be re-enacted. DO CONSULTEES AGREE?*

- 10.23 It should be noted that the provisions in sections 10, 11 & 14 of the 1634 Act relating to conveyances designed to defraud creditors were replaced by Articles 367 - 369 of the Insolvency

(Northern Ireland) Order 1989 (No. 2405 N.I. 19) (see Hunter, *Northern Ireland Personal Insolvency* (SLS Legal Publications (Northern Ireland) (1992) paras. 14.101 – 14.106). The **1971 Survey** (Chapter 14) and **1990 Final Report** (Volume 2 draft Property Order Article 238) also recommended re-enactment of the Sales of Reversions Act 1867 (c. 4), as was done in England and Wales (Law of Property Act 1925 section 174). That Act was designed to counter judicial suspicion of sales of “reversionary” interests (that is some future interest which has not yet fallen into possession), by providing that such a sale should not be voidable merely because the sale seemed to be at an “undervalue”. The Commission notes that the Republic of Ireland’s Law Reform Commission took the view that this sort of thing was more than adequately covered by equitable jurisdiction to set aside “improvident bargains” and transactions vitiated by improper conduct such as fraud, duress, undue influence or other unconscionable conduct (see Consultation Paper *Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) para. 8.40). The Republic of Ireland’s 2006 Bill repeals the 1867 Act without including any replacement. **Question 94:** *The Commission is inclined to recommend the same approach in Northern Ireland and to repeal the Sale of Reversions Act 1867 without replacement. DO CONSULTEES AGREE?*

CONTENTS OF DEEDS

- 10.24 The **1971 Survey** (see Chapter 5) and **1990 Final Report** (Volume 2 draft Property Order Part VI) recommended re-enactment, with some modifications, of various provisions relating to conveyances and other instruments to be found in the Conveyancing Act 1881 and Law of Property Amendment Acts 1859 (c. 35) and 1860 (c. 38). Many of these recommendations, such as those relating to conveyances by, and covenants entered into by, a person to or with himself and others, were implemented by Part III of the Property (Northern Ireland) Order 1978 (No. 459 N.I. 4). The one matter not dealt with which merits some consideration is the subject of covenants for title.

- 10.25 Both the **1971 Survey** (paras. 180 – 181) and the **1990 Final Report** (Volume 1 paras. 2.5.45 – 2.5.51) drew attention to the extremely convoluted provisions in section 7 of the Conveyancing Act 1881. These imply various covenants as to the grantor’s title depending on the capacity in which the grantor is expressed in the deed to convey (e.g., “as beneficial owner”, “as trustee”, “as mortgagee” or other specified capacity). It has long been recognised that not only are the provisions (as contained in the extremely lengthy section 7) very difficult to follow, but also they are unsatisfactory in some respects (e.g. the covenants are often rendered nugatory because the section requires, not only that the grantor should be “expressed” to convey in a particular capacity, but also “actually convey” in that capacity; the consequence is that the covenants cannot be invoked in the very situation where they are most needed, a conveyance by a grantor who has no title at all: see Wylie and Woods *ICL* para. 21.08).
- 10.26 The **1971 Survey** and **1990 Final Report** recommended a complete recasting of section 7 of the 1881 Act so as to remove its flaws and to set out the provisions relating to the different implied covenants in a much clearer and understandable format. Their draft legislation adopted the format of putting the operative provisions in the body of the legislation and setting out the actual covenants themselves in a schedule. The Commission notes that the same has been done in the Republic of Ireland’s 2006 Bill (sections 79 – 80 and Schedule 3). The Commission has no doubt that this approach is a considerable improvement of the unsatisfactory section 7 of the 1881 Act. However, it should be pointed out that an even more radical approach was taken in England and Wales.
- 10.27 Following recommendations made by the Law Commission (see *Transfer of Land: Implied Covenants for Title* (1991) Law Com No. 199) the Law of Property (Miscellaneous Provisions) Act 1994 (c. 36) overhauled the law relating to implied covenants for title in England and Wales (see Megarry and Wade paras. 7-151 – 7-156). Under its provisions, the covenants are replaced by either a “full” or “limited” title guarantee. Where a full guarantee is given the liability of the vendor is more extensive

than under the previous law, which generally confined liability for the actions of specified persons. Since these provisions operate by implication, they can be excluded or varied expressly by the terms of the conveyance. **Question 95:** *Notwithstanding that, the Commission is not convinced that the 1994 provisions are a substantial improvement on the scheme proposed by the earlier reports and is inclined to recommend the scheme that would be adopted in the Republic of Ireland. Therefore the Commission proposes a complete recasting of section 7 of the Conveyancing Act 1881. DO CONSULTEES AGREE?*

CHAPTER 11. LEGISLATION

INTRODUCTION

- 11.1 Much of the law which governs the land law and conveyancing system of Northern Ireland is contained in legislation. Two features of this legislation are particularly striking. One is its antiquity. It is extraordinary that in the 21st century there remain in force ancient statutes enacted during the 13th century as part of the feudal system, such as the Statute of Westminster the Second 1285 (*De Donis Conditionalibus*) (13 Edw. I) (c. 1) (which created the fee tail estate – see para. 3.28 above) and the Statutes of Westminster the Third 1289 – 1290 (*Quia Emptores*) (18 Edw. I) (cc. 1, 2, 3) (which relate to freehold estates – see paras. 2.7 – 2.11 & 5.9 above). Many statutes enacted in subsequent centuries remain on the statute book, such as numerous statutes enacted by the Irish Parliament during the 17th century (examples are the Statute of Uses (Ireland) 1634 (10 Chas. 1 sess. 2) (c. 1) and the Tenures Abolition Act (Ireland) 1662 (14 & 15 Chas. 2 sess. 4) (c. 19). Indeed, it is probably true to say that most of the legislation relating to land law and the conveyancing system still in force was enacted prior to the establishment of Northern Ireland in 1921. Much of it was passed at Westminster during the 19th century, such as the Conveyancing Acts 1881 – 1911 and the Settled Land Acts 1882 – 1890 (see List of Statutes).
- 11.2 As the previous paragraph suggests, the other striking feature of the legislation still in force in Northern Ireland is the extremely wide range of sources from which it is derived. It is doubtful whether any other jurisdiction has such a wide range. Statutes relating to land law and the conveyancing system have been passed by the following legislatures:
- (1) The Parliament of Ireland during the period 1310 - 1800 (when the Act of Union joined that Parliament with the Parliament of Great Britain);

- (2) The Parliament of England during the period 1226 - 1707, some of which's "Statutes of the Realm" were applied to Ireland (e.g. by Poyning's Law 1495 which was enacted by the Irish Parliament or individually, expressly or by implication);
- (3) The Parliament of Great Britain during the period 1708 - 1800, some of which's statutes were again applied expressly or by implication to Ireland;
- (4) The Parliament of the United Kingdom of Great Britain and Ireland (from 1921, Northern Ireland) from 1801 – date;
- (5) The Parliament of Northern Ireland from 1921 – 1972;
- (6) The Assembly of Northern Ireland from 2000 – 2002 & 2007 – date;
- (7) Orders in Council made under the Northern Ireland Acts 1974 & 2000.

11.3 The existence of such a bewildering range of legislation clearly creates difficulties for practitioners who have to keep abreast of it. It makes the law extremely complex and inaccessible. In order to understand the law on a particular aspect of land law or conveyancing it will often be necessary to refer to many statutes enacted hundreds of years apart. Furthermore, many of the older statutes are couched in archaic language which is very difficult to understand. Even statutes enacted less than 150 years ago can be very verbose and technical in their language.

11.4 Both the **1971 Survey** and **1990 Final Report** had as one of their primary aims the modernisation of legislation. They both contained new proposed legislation which would have replaced much of the statute law enacted in previous centuries (see the extensive Repeals Schedules in the **1971 Survey's** Property Bill (5th Schedule) and the **1990 Final Report's** Property (Consequential Provisions) Order (Schedule 1)). This was an objective which had been achieved in England and Wales by the 1925 Birkenhead legislation (see List of Statutes) and will

be in the Republic of Ireland by the Land and Conveyancing Law Reform Bill 2006 (see Schedule 2). **Question 96:** *The Commission has no doubt that a similar objective should form part of the present Project and that one of its primary aims should be the modernisation of the statute book.* **DO CONSULTEES AGREE?**

REVIEW OF LEGISLATION

- 11.5 The Commission is undertaking as part of the current project a review of all the legislation relating to land law and the conveyancing system, similar to that which was carried out in the Republic of Ireland prior to introduction of the 2006 Bill (see the Irish Law Reform Commission's Consultation Paper *Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004) pp 2 – 3). A comprehensive initial review of all primary legislation from the 13th century to date has already been undertaken. Following this review, some six hundred and fifty statutes having a relevance to land law have been identified and placed in a cumulative table. This table has been used as a base to produce tables focused on the specific areas, the subjects of Chapters 2 – 10.
- 11.6 It is envisaged that the outcome of this review will lead, as in the Republic of Ireland, to three possible conclusions (explained below) as to what should be done with respect to particular statutes or to particular provisions within statutes. The point about this last remark is, of course, that many statutes deal with various aspects of private or public law (such as the law relating to forcible entry and various aspects of family law), only some of which may relate to land law or the conveyancing system. The current project must be confined to the latter and will have no impact on other aspects of particular legislation.

Repeal without replacement

- 11.7 This conclusion with respect to a particular statute or provision within it is straightforward. It recognises that there are still many statutes on the statute book which have ceased to have any practical function in modern times. This may be because their purpose has long since been achieved or can no longer be

achieved because the legal system has moved on or is not worth achieving because of changes in society. Another reason why a statute should be repealed without replacement is because the Commission's proposed new legislation would adopt a new way of dealing with the matter covered by the old statute or would make a radical change in the law which renders such a statute redundant.

11.8 **Question 97:** *In order to give consultees an indication of the scale and scope of the changes to legislation likely to result from the Commission's proposals, the following is a list of the main statutes likely to come within the category for "repeal without replacement".* **DO CONSULTEES AGREE?** It must be noted that this list is confined mostly to whole statutes. The draft legislation which will be attached to the Commission's Final Report will include numerous textual amendments to particular provisions in statutes dealing in some respect with land law and the conveyancing system, some of which will involve a simple repeal of the provision in question. In order to put the statutes in context and to assist explanation as to why it is envisaged that they will be repealed without replacement, the statutes are listed below in the order of the previous Chapters –

(1) Feudal Tenure

Forfeiture Act (Ireland) 1639 (15 Chas. 1 sess. 2) (c. 3): This Act of the old Irish Parliament related to feudal rents and other services to be performed by Crown grantees. Most of these services were abolished by the Tenures Abolition Act (Ireland) 1662 (see below). The few that remained to be collected by the Crown, such as quit rents, were of trifling amounts and are no longer collected (see paras. 2.9 and 4.6 above). The 1639 Act has ceased to fulfil any function in modern times.

Tenures Abolition Act (Ireland) 1662: This Act abolished most of the forms of feudal tenure and converted them into "free and common socage" (which came to be known as "freehold": see para. 2.13

above). The Act has long since fulfilled its purpose and no longer has any function.

(2) Estates in Land

Statute of Westminster, the Second 1285 (*De Donis Conditionalibus*): This Statute of the old English Parliament was extended to Ireland by Royal Writ. It created the fee tail estate (see para. 3.28 above) which the Commission has proposed should be abolished (see paras. 3.28 – 3.33 above). On that basis the statute would cease to have any function.

Fines and Recoveries (Ireland) Act 1834 (4 & 5 Will. 4) (c. 92): This statute also relates to the fee tail estate (para. 3.28 above).

(3) Easements and other rights over Land

Tithe Rentcharge (Ireland) Act 1838 (1 & 2 Vict.) (c. 109) and **Tithe Arrears (Ireland) Act 1839** (2 & 3 Vict.) (c. 3): Tithe rentcharges payable to the Church Temporalities Fund (which stemmed from the disestablishment of the Church of Ireland in 1869: see para. 4.6 above) ceased to be collected in 1995 as they were considered to be uneconomic. There may be some such private rentcharges still surviving (see the Land Law Working Group's *Interim Report on Ground Rents and other Periodic Payments* (1983) paras. 6.3 – 6.4), but they probably should be dealt with by a revised redemption scheme.

(4) Future interests

Contingent Remainders Act 1877 (40 & 41 Vict.) (c. 33): This Act related to extremely arcane law concerning the feudal system's need to avoid an "abeyance of seisin" or "arbitrary shifting of seisin", seisin being the vital concept concerning responsibility for performance of feudal services (see para. 5.2 above). This has nothing to do with land ownership in

modern times and, as a result of the Commission's earlier proposals, contingent remainders would cease to operate as legal interests in freehold land and would be equitable interests only (see para. 5.3 above). The consequence would be that this Act would cease to have any function. The same would apply to particular provisions relating to contingent remainders in other statutes, such as **section 8** of the **Real Property Act 1845** (8 & 9 Vict.) (c. 106) and **section 7** of the **Law of Property Amendment Act 1860** (23 & 24 Vict.) (c. 38).

Accumulations Act 1892 (55 & 56 Vict.) (c. 58): The Commission drew attention earlier to the anomaly which exists in Northern Ireland because this Westminster Act was applied to Ireland whereas the earlier Accumulations Act 1800 (39 & 40 Geo. 3) (c. 98) did not apply. Implementation of the recommendation that there should no longer be any rule governing accumulations would involve repeal of the 1892 Act (see para. 5.7 above).

Perpetuities Act (Northern Ireland) 1966 (c. 2): This modern statute is listed here provisionally because of the Commission's mooted proposal earlier that the rule against perpetuities should be abolished (see paras. 5.14 – 5.19 above). If that proposal is implemented this Act would cease to have any function, although there may have to be a saving for section 13 (modified fees) (see para. 3.19 above).

(5) Settlements and trusts

Landed Estates Court (Ireland) 1858 (21 & 22 Vict.) (c. 72): This Court was established to facilitate the break up and sale of large estates in Ireland, but its operation was superseded by later developments, in particular the land purchase scheme operated by the Land Commission and the powers conferred on limited owners of land by the Settled Land Acts 1882 - 1890 (see below). Most of the 1858 Act has already been

repealed (by various Statute Law Revision Acts (e.g. 1875 (c. 66), 1892 (c.19), 1893 (c. 54), 1953 (c.5) and 1963 (c. 30) and by the Judicature (Northern Ireland) Order 1978 (c. 23) and what remains can probably be repealed in view of the Commission's new scheme for settlements and trusts of land proposed earlier (Chapter 6).

Settled Land (Ireland) Act 1847 (10 & 11 Vict.) (c. 46): This Act was one of the forerunners of the Settled Land Acts 1882 – 1890 and enabled applications to be made to the court for authorisation to carry out various transactions with respect to settled land. This and other later Acts (see below) were also superseded by the Settled Land Acts 1882 – 1890, which conferred various statutory powers of dealing with such land without the need to incur the trouble and expense of an application to the court. As a consequence the earlier Acts fell into disuse and would appear never to have been invoked in modern times. Again there would be no function for them under the Commission's proposed new scheme for settlements and trusts of land.

Settled Estates Act 1877 (40 & 41 Vict.) (c. 18): This Act consolidated earlier Acts of 1856 (c. 120), 1858 (c. 77), 1864 (c. 45), 1874 (c. 33) and 1876 (c. 30). What was said above in relation to the **Settled Land (Ireland) Act 1847** applies equally to this Act.

(6) Mortgages

Clandestine Mortgages Act (Ireland) 1697 (9 Will 3) (c. 11): This Act was designed to protect subsequent mortgagees from the mortgagor's failure to disclose prior judgments made against the mortgagor or prior mortgages of the same land. The Act became redundant once provision was made for registration of deeds by the Registration of Deeds Act (Ireland) Act 1707 (c. 2) and for registration of judgments by the Judgments (Ireland) Act 1844 (c. 90). Thereafter, a

failure to register the prior mortgage or judgment meant a loss of priority to the subsequent mortgagee. That mortgagee could protect itself by making a search in the register prior to lending.

Satisfied Terms Act 1845 (8 & 9 Vict.) (c. 112): This Act concerns mortgages of freehold land by demise (granting the mortgagee a lease rather than conveying the freehold). Such mortgages are extremely rare (usually only being created where the freehold was held under a fee farm grant and the mortgage was created by way of sub-grant: see para. 8.6 above). The 1845 Act provided where the purpose of the lease (demise) was satisfied (i.e. by the mortgagor paying off the loan) the lease merged in the mortgagor's retained freehold, so that there was no need for the mortgagee to surrender the lease. The need for this provision became redundant once the method of discharging mortgages by "endorsed receipt" was introduced initially for building society mortgages (see Building Societies Act (Northern Ireland) 1967 (c. 31) section 37 and Schedule 6) and then extended to all other mortgages (see Property (Discharge of Mortgage by Receipt) (Northern Ireland) Order 1983 (No. 766 N.I. 9); see also Registration (Land and Deeds) (Northern Ireland) Order 1992 (No. 811 N.I. 7) (Article 51 and Schedule 1 paragraph 5).

Mortgagees Legal Costs Act 1895 (58 & 59 Vict.) (c. 25): This Act is an obscure provision sanctioning a solicitor or solicitor's firm lending money on the security of a mortgage to bill the borrower for professional charges and fees. This sort of transaction must be extremely rare and runs the risk of a conflict of interest arising on the part of the solicitor. Both the **1971 Survey** and **1990 Final Report** listed the Act for repeal without replacement.

(7) Conveyances

Statutes of Uses (Ireland) 1634: This Statute is another relic from the feudal age. It was designed to prevent loss of feudal dues by using conveyances “to uses”, but its purpose became largely redundant with the abolition of most of those dues by the Tenures Abolition Act (Ireland) 1662 (see above). It spawned various complications in the methods of conveying land which also became obsolete with recognition of the simple deed as the method of conveying land by the Real Property Act 1845 (section 2). In view of the further simplifications proposed by the Commission earlier (see paras. 10.14 – 10.16) this statute should be repealed without replacement.

Sales of Reversions Act 1867 (31 & 32 Vict.) (c. 4): The Commission recommended earlier that this Act should be repealed without replacement (see para. 10.23 above).

Replace with substantial amendment

11.9 Statutes, or particular provisions within statutes, will come within this category where the conclusion from the review is that there is a role for that statute or provision in today’s land law or conveyancing system, but subject to substantial amendments to the existing statute or provision. The need for such amendments may derive from several factors. One may be that substantial updating is required to adapt the statute or provision to modern circumstances. Another may be that the existing statute or provision, although having sound objectives, is not achieving those objectives in the most effective way. Another may be that adaptations have to be made to ensure that the statute or provision accords with substantial changes to the law being made by new legislation.

11.10 **Question 98:** *The following list is a preliminary indication of statutes which seem to fall into this category and which the Commission proposes to replace with substantial amendment. DO CONSULTEES AGREE?* Again for ease of reference they

are listed in the order of the topics covered by previous Chapters.

(1) Feudal Tenure

Statutes of Westminster, the Third 1289 – 1290 (*Quia Emptores*): These Statutes were a cornerstone of the feudal system, of particular relevance to the concepts of tenure and freehold estates (see paras. 2.8 – 2.12 above). Whatever decision is made ultimately with respect to reform of these concepts (see the discussion in Chapters 2 & 3), the likelihood is that substantial amendments will have to be made to the provisions still on the statute book. Those relating to subinfeudation have long served their purpose and along with the provision relating to apportionment of feudal services are now obsolete. On the other hand, the rule against inalienability which the Statute established in respect of freehold land should be preserved (see para. 5.9 above).

(2) Easements and other rights over land

Prescription Act 1832 (2 & 3 Will. 4) (c. 71) and **Prescription (Ireland) Act 1858** (21 & 22 Vict.) (c. 42): The Commission recommended earlier (para. 4.32) that the existing law of prescription, including the exceptionally complicated regime introduced by the 1832 Act (which was applied to Ireland by the 1858 Act) should be overhauled. A completely new statutory scheme would replace it (see paras. 4.25 – 4.38 above). In passing, attention is also drawn to the recommended substantial amendment to the operation, in the context of acquisition of easements by implication, of **section 6** of the **Conveyancing Act 1881** (see paras. 4.40 – 4.41 & 10.20 – 10.21 above).

(3) Settlements and Trusts

Settled Land Acts 1882 – 1890: The Commission recommended earlier that the statutory regime

governed by these five Acts (of 1882, 1884, 1887, 1889 and 1890) should be replaced by a completely new regime to govern all settlements and trusts of land (see Chapter 6).

(4) Concurrent ownership of land

Partition Acts 1868 (31 & 32 Vict.) (c. 40) and **1876** (39 & 40 Vict.) (c. 17): The Commission recommended earlier that the provisions of these Acts should be replaced by a new discretionary jurisdiction conferred on the courts (see paras. 7.19 – 7.21).

(5) Mortgages

Conveyancing Act 1881 Parts IV and V: The Commission recommended earlier that the provisions in the 1881 Act relating to mortgages should be amended in several respects (see paras. 8.20 – 8.27 above).

(6) Conveyances

Conveyancing Act (Ireland) 1634 (10 Chas. 1 sess. 2) (c. 3) (as amended by the Voluntary Conveyances Act 1893 (56 & 57 Vict) (c. 21): The Commission recommended earlier a recasting of the provisions in these Acts, including some substantial amendments (see para. 10.22 above).

Vendor and Purchaser Act 1874 (37 & 38 Vict.) (c. 78) (as amended by sections 3 and 13 of the Conveyancing Act 1881): The Commission recommended earlier that the provisions in these Acts relating to deduction of title should be amended substantially (see paras. 10.5 – 10.13 above).

Consolidate/replace without substantial amendment

- 11.11 **Question 99:** *In order to make the law more accessible, it is proposed that new legislation to implement the Commission's recommendations should consolidate, in one Act, all existing*

statutory provisions relating to land law and the conveyancing system. **DO CONSULTEES AGREE?** In some respects this exercise may not be a pure consolidation in the strictest sense. Many of the statutes which would be replaced are couched in somewhat archaic language, not surprising given their antiquity. Thus, although the substance of their provisions is worth preserving, their replacement in the new legislation would be expressed in more modern legislative language. Furthermore, statutes of later centuries tend to use somewhat convoluted language, so that, again, in replacing the substance of their provisions considerable recasting of the language is likely to occur. A good illustration of this was referred to earlier, the replacement of the provisions relating to covenants for title in **section 7** of the **Conveyancing Act 1881** (see paras. 10.25 – 10.27 above).

- 11.12 One matter which has been considered by the Commission is how far the process of consolidation/replacement without substantial amendment should go. In particular, the issue arises as to whether the new legislation should consolidate comparatively recent statutes, such as those implementing some of the recommendations of the **1971 Survey** and **1990 Final Report** and of the Law Reform Advisory Committee. Obvious examples are the **Commission on Sales of Land Act (Northern Ireland) 1972** (c. 12) (now the **Commission on Disposal of Lands (Northern Ireland) Order 1986** (No. 767 N.I. 5)), **Property (Northern Ireland) Orders 1978** (No. 459 N.I. 4) and **1997** (No. 1179 N.I. 8) and **Part II** of the **Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005** (No. 1452 N.I. 7). The subject of ground rents will be reviewed in the supplementary Consultation Paper and the **Ground Rents Act (Northern Ireland) 2001** (N.I. 5) will be examined at that time. It is likely that that Act will also be consolidated into the new legislation. **Question 100:** *In summary, the Commission is inclined to the view that the need for accessibility of the law suggests that the new legislation should consolidate all statutory provisions, including recently enacted ones, which come within the scope of the subject matter of the Consultation Paper. It should not include subjects which have been deliberately excluded, such as landlord and*

tenant law, planning law, succession law and legislation relating to registration of deeds and title. DO CONSULTEES AGREE?

- 11.13 Turning then to statutes which are likely to be consolidated or replaced without substantial amendment, apart from legislation enacted in recent decades such as was mentioned above, the following statutes would seem to fall into this category: **Statute of Frauds (Ireland) 1695** (7 Will. 3) (c. 12) (**section 2** – see para. 9.12 above); **Real Property Act 1845** (see para. 10.14 above); much of the **Conveyancing Acts 1881 – 1911** (see Chapter 10); **Bodies Corporate (Joint Tenancy) Act 1899** (62 & 63 Vict.) (c. 20).

QUESTIONS

CHAPTER 2 FEUDAL TENURE

Legislation - Administration of Estates Act (NI) 1955

1. The Commission takes the view that those forms of escheat which still remain ought to be removed. In circumstances where escheat can still arise, it ought to be replaced by a statutory provision for the ownerless property to pass to the Crown as *bona vacantia*. Do consultees agree? (para. 2.17)

Options for reform

2. There are three possible ways forward in relation to feudal tenure:
 - (1) Preserve the *status quo*, retaining the concepts of both feudal tenure and estates;
 - (2) Abolish feudal tenure but retain the concept of estates;
 - (3) Abolish both feudal tenure and the concept of estates.

In the light of the move towards a system of universal registration of title, the Commission is inclined to recommend that both feudal tenure and the doctrine of estates should be abolished. Do consultees agree? (para. 2.56)

CHAPTER 3 ESTATES IN LAND

Reduction in legal estates

3. The Commission takes the view that the number of legal estates in land should be reduced. In particular the fee simple estate should become the sole estate conferring legal title to freehold land and any other freehold estate would create an equitable interest only. Such an equitable interest would be overreached on a conveyance of the fee simple and would thereafter attach to the “capital money” raised on the sale or other conveyance. Do consultees agree? (para. 3.9)

Freehold Estates - Fee simple

4. If the suggestion mooted in Question 2, Chapter 2 (that the concept of estates should be abolished along with the concept of tenure) were adopted, the Commission takes the view that a fee simple should, in future, be regarded as conferring “ownership” of the land, with the holder of that estate being the owner with legal title to the land and, in the case of registered land, registered as “owner”. The current Land Registry system of registering a person as “full owner” would seem to be easily adaptable to such a concept. Do consultees agree? (para. 3.11)

Freehold Estates - Fee simple in possession

5. Only a fee simple “in possession” should confer legal title. Do consultees agree? (para. 3.12)

Freehold Estates - Modified fees

6. It seems to the Commission that the main options for dealing with modified fees are as follows:
 - (1) To treat them all as a fee simple absolute;
 - (2) To treat them all as settlements;
 - (3) To treat some modified fees as conferring legal title and the others as involving a settlement;
 - (4) To add interests like a possibility of reverter and right of entry or re-entry attached to modified fees to the list of “impediments” contained in the Property (Northern Ireland) Order 1978 and enable the holders of existing modified fees to apply to the Lands Tribunal for orders under Part II of that Order modifying or extinguishing such impediments;
 - (5) To prohibit the creation of any further modified fees and to convert existing ones into a fee simple absolute, allowing any claimant to a reversion or remainder to register that right in the Registry of Deeds or the Land Registry as appropriate within a set time limit, for example three years.

On balance, the Commission is inclined to recommend a combination of option (1) and option (4), on the basis that the combination of the effect of the relevant section of the Perpetuities Act (Northern Ireland) 1966 and such a jurisdiction given to the Lands Tribunal to deal with possibilities of reverter and rights of re-entry which survive, will result in modified fees ceasing to be a problem in the near future. Any holder of a modified fee who experiences difficulties in dealing with it would be able to invoke the Tribunal's jurisdiction. This avoids any doubts about unfair treatment of existing holders of such rights. Do consultees agree? If not, what other option should be adopted? (paras. 3.24 - 3.25)

Freehold Estates - A minor's interest

7. The Commission recommends that in future, a minor's interest in land would be equitable only and the legal title would be vested in trustees who would be able to deal with it on behalf of the minor. Do consultees agree? (para. 3.27)

Freehold Estates - Fee tail

8. The Commission takes the view that there should be a prohibition on the future creation of a fee tail estate. Do consultees agree? (para. 3.31)
9. Further, the Commission is inclined to opt for a provision automatically converting all existing fee tail estates into a fee simple where there is no protectorship or any protectorship has ceased to exist. There would be no automatic conversion where a reversionary or remainder interest has already vested and could not be divested by a disentailing assurance. Do consultees agree? (para. 3.33)

Freehold Estates - Life estate

10. The Commission takes the view that the life estate should be retained, but as an equitable estate only. Do consultees agree? (para. 3.34)

Overreaching of equitable interests

11. The Commission has not reached a conclusion on this difficult issue but it does seem that the options for dealing with the overreaching of equitable interests are as follows (para. 3.45):

- (1) To provide that the interests of equitable owners are overreached where there are two or more legal owners, but not where there is a single owner, subject to the modification that a purchaser is not bound by an interest in possession which is not reasonably discoverable by inspection. Given that conveyancers have learned to live with making enquiries as to persons in occupation, the Commission is inclined to recommend adoption of this approach with the modification that an interest would not be subjected to the doctrine of notice but to the discoverability of the interest holder's occupation. Do consultees agree?
- (2) To confer additional protection on equitable claimants in occupation by ensuring that their consent is obtained to any sale. This proposal would increase the burden of enquiries that would have to be made by purchasers and mortgagees and the Commission is not inclined to adopt it. Do consultees agree?
- (3) To extend the principle of overreaching to cover conveyances by a single legal owner. The Commission is concerned about the hardship and potential injustice which may be caused to individual claimants if such an approach is adopted. Do consultees share those concerns?
- (4) To couple an extended principle of overreaching with reform of the law of cohabitants. This seems to the Commission to raise substantial issues which go well beyond the present Project and so it doubts whether this option can be pursued at this stage. Do consultees agree?

Leasehold estates

12. The Commission takes the view that the leasehold estate should also be an estate in land which confers legal title, but that such an estate would specifically exclude a tenancy at will or a tenancy at sufferance. Do consultees agree? (para. 3.47)
13. The Commission is aware that there are several other issues relating to leasehold estates which have proved to be controversial in recent times. For example, leases for periods

of uncertain duration, leases for discontinuous periods, and non-proprietary leases. Notwithstanding the connection such issues have with the law of estates, the Commission takes the view that they raise matters of a wider scope, especially in relation to the general law of landlord and tenant. It has concluded that such issues should be considered as part of a review of that law and so should not form part of the present project. Do consultees agree? (para. 3.49)

CHAPTER 4 EASEMENTS AND OTHER RIGHTS OVER LAND

Incorporeal Hereditaments - Periodic rents

14. In view of the provisions of the Property (Northern Ireland) Order 1997 and the Ground Rents Act (Northern Ireland) 2001, the Commission has concluded that there is no need for further legislation relating to periodic rents, apart from a review of the operation of the 2001 Act's redemption scheme. Do consultees agree? (para. 4.8)

Incorporeal Hereditaments - Franchises

15. The Commission takes the view that there is no need to deal with ancient franchise rights in new legislation, other than to recognise their existence. Do consultees agree? (para. 4.10)

Incorporeal Hereditaments - Titles and offices

16. The Commission takes the view that there is no need for any new proposed legislation to deal with titles and offices divorced from ownership of an estate or interest in land (connected with, but separate from the title or office). Do consultees agree? (para. 4.11)

Licences and similar interests

17. The Commission takes the view that it would not be appropriate to interfere with the development by the courts of the general law of licences, especially where this involves the application of equitable principles. Do consultees agree? (para. 4.15)

Rights of residence

18. The Commission takes the view that the position of the holder of a right of residence in relation to unregistered land should be clarified along the lines of section 47 of the Land Registration Act (Northern Ireland) 1970, so that in relation to unregistered land, a right would be protected by the person being in occupation and would be registrable. Do consultees agree? (para. 4.17)

Agistment and Conacre

19. The Commission recognises that the system of agistment and conacre lettings should be reviewed; however, the Commission considers that it raises issues which are outside the scope of this Consultation Paper. Do consultees agree? (para. 4.19)

Reform - Land obligations

20. The Commission has concluded that further reform of the law concerning obligations relating to land should concentrate not on a scheme for covenants, but on other areas of the law such as that relating to easements and profits *à prendre*. Do consultees agree? (para. 4.22)

Reform - Easements and profits - Prescription

21. The Commission inclines to the view that the doctrine of prescription can still serve a useful function and should not be abolished altogether. Do consultees agree? (para. 4.28)
22. The Commission inclines to the view that operation of the doctrine of prescription should no longer apply to profits *à prendre*. Do consultees agree? (para. 4.29)
23. The Commission considers that the doctrine of prescription should continue to apply to the acquisition of positive easements. Do consultees agree? (para. 4.30)
24. On balance the Commission is also inclined to retain prescription for negative easements as well as positive easements. Do consultees agree? (para. 4.31)
25. The Commission takes the view that the law of prescription should be considerably simplified. It considers that the

Prescription Act 1832 (applied to Ireland by the Prescription (Ireland) Act 1858) should be repealed and replaced by a much simpler statutory scheme. Do consultees agree? (para. 4.32)

26. As regards the details of a new statutory scheme to replace the 1832 Act, the Commission is inclined to propose:

- (1) the statutory prescription period should be 20 years (not 12 years as has previously been suggested);
- (2) the right claimed should be one that is capable of subsisting as an easement;
- (3) the right should be enjoyed openly and peaceably;
- (4) the running of the prescriptive period should be terminated by interruption of enjoyment of the right claimed for a continuous period of 12 months or by registration of a notice by the owner of the servient land;
- (5) the prescriptive easement should be commensurate in extent with the right enjoyed during the prescriptive period.

Do consultees agree? (para. 4.33)

27. The Commission is inclined to recommend that provisions shall also be implemented to cover situations where the dominant or servient owner is a tenant or beneficiary of a trust or suffers from some incapacity as well as provisions to govern interference by third parties, enabling the servient owner to interrupt enjoyment by the dominant owner by registration of a notice (extending the provisions of the Rights of Light Act (Northern Ireland) 1961 to all easements) and abandonment as a result of 12 years non-user, but subject to changing the period to 20 years. Do consultees agree? (para. 4.34)

28. It seems to the Commission that there are three ways in which a new, much simplified scheme of prescription might operate:

- (1) Upon completion of the requisite prescriptive period and satisfaction of other conditions, the easement would automatically vest in the dominant owner;

- (2) The dominant owner would be required to obtain a court order confirming the prescriptive claim and that order would have to be registered in the Land Registry or the Registry of Deeds as appropriate;
- (3) The dominant owner can apply directly (without a court order) for registration of the prescriptive easement, with the right to register being an interest binding a purchaser. Any dispute would have to be referred to the court.

At this stage the Commission is undecided as to which option to recommend and would be interested to receive the views of consultees on the various options. Which option do consultees prefer? Is there some other option which is preferable? (paras. 4.37 - 4.38)

Reform - Easements and profits - Implied rights

29. In relation to the acquisition of implied rights by prescription, the Commission takes the view that there should be a new statutory scheme to replace the rule in *Wheeldon v Burrows*. There should be a single provision for the reciprocal rights and obligations which continue or accrue when land is divided into parcels for sale. Do consultees agree? (para. 4.39)
30. The Commission takes the view that a provision should be introduced to replace section 6 of the Conveyancing Act 1881 to ensure that only existing rights pass with a conveyance of the land and that any precarious rights would not be upgraded or transformed into more extensive rights. Do consultees agree? (para. 4.40)
31. The Commission takes the view that a replacement of section 6 of the Conveyancing Act 1881 should make clear that on a conveyance of land it does not create any new interest or right or convert any quasi-interest or right existing prior to the conveyance with a full interest or right. Do consultees agree? (para. 4.41)

Reform - Easements and profits - Categories of easements and profits

32. The Commission takes the view that the courts should be left to develop the concepts of easements and profits and to adapt them to changing conditions in society. Do consultees agree? (para. 4.43)

Reform - Party structures

33. At this stage the Commission is not inclined to recommend legislation on party structures. Do consultees agree? (para. 4.45)

Reform - Access to neighbouring land

34. At this stage the Commission is not inclined to recommend legislation on access to neighbouring land. Do consultees agree? (para. 4.46)
35. The Commission takes the view that, if ultimately the conclusion is reached that legislation relating to the provision of access to neighbouring land should be introduced; jurisdiction should be conferred on the Lands Tribunal to deal with neighbour disputes involving both party structures and access to carry out works to buildings which may not be party structures. Do consultees agree? (para. 4.47)

CHAPTER 5 FUTURE INTERESTS

Common law contingent remainder rules

36. The Commission takes the view that legal remainder interests should be abolished, that the Statute of Uses (Ireland) 1634 should be repealed and that most future interests in land should be converted into equitable interests. Do consultees agree? (para. 5.3)

Rule against accumulations

37. The Commission takes the view that no special accumulations rule should be enacted in Northern Ireland, and that the Accumulations Act 1892 should be repealed. Further, the Commission is not convinced of any need for a special rule for charities in this respect. Do consultees agree? (para. 5.7)

Rule against inalienability

38. The Commission takes the view that the rule against inalienability is one feature of the feudal system which remains of practical relevance. It illustrates one of the key features of “freehold” land and distinguishes it from “leasehold” property. That distinction would remain relevant even if the change mooted in Question 2 (converting freehold land into allodial ownership) were adopted. Do consultees agree? (para. 5.9)

Reform

39. The Commission concludes that, apart from accumulations, there are two areas of the law relating to future interests which require review with respect to reform. These are the rule against perpetuities (in its strict sense) and the rule against inalienability as it applies to gifts or trusts for non-charitable purposes or in favour of non-charitable bodies. Do consultees agree? (para. 5.12)

Reform - Rule against perpetuities

40. The Commission is inclined to the view that the case for abolition of the rule against perpetuities should prevail in the interests of simplification of the law and on the basis that there should be less complicated methods of deterring settlors or testators tempted to control future devolution of property. Do consultees agree? (para. 5.19)
41. On the other hand, if the conclusion is reached that the rule against perpetuities should be retained rather than abolished altogether, the Commission takes the view that it should be reformed; that the rule should be restricted in its application to successive estates and interests in property and to powers of appointment and there should be a single perpetuity period of 125 years. Do consultees agree? (para. 5.22)

Reform - Rule against inalienability

42. The Commission is inclined to recommend abolition of the rule against perpetual trusts if the rule against perpetuities is also abolished. If the rule against perpetuities is retained the Commission would be inclined to retain the rule against perpetual trusts with appropriate modification (such as adoption of a new perpetuity period). Do consultees agree? (para. 5.25)

CHAPTER 6 SETTLEMENTS AND TRUSTS

Reform - Unitary trusts of land

43. The Commission proposes that a unitary trusts of land scheme should be introduced, which would encompass both the traditional settlement and the trust for sale. It would always be a holding trust by default and full legal title would be vested in the trustees; the trustees would be given full power to deal with the land as if they were the absolute owners. The exercise of the powers by the trustees would be for the general benefit of the beneficiaries and the general law of trusts would be applicable. Do consultees agree? (para. 6.9)

CHAPTER 7 CONCURRENT OWNERSHIP OF LAND

Introduction - Co-parcenary

44. In view of their rarity and of the Commission's earlier proposals for abolition of fees tail and conversion of existing ones, the Commission takes the view that there is no point in considering reform of the law of co-parcenary. Do consultees agree? (para. 7.2)

Reform - Legal tenancies in common

45. The Commission is inclined not to interfere with the existing freedom of the parties to devise their own methods of holding land, which allows both joint tenancies and tenancies in common to exist in law. Do consultees agree? (para. 7.10)
46. The Commission notes that there may be issues concerning aspects of a legal tenancy in common in relation to undivided grazing land held in common and the common parts of flat developments, but it is inclined to leave these matters for consideration at a later stage. Do consultees agree? The subject of flat developments is outside the scope of this Project and it is unlikely that recommendations in relation to this Project should be made concerning common land. Do consultees agree? (para. 7.11)

Reform - Severance of a joint tenancy

47. The Commission takes the view that if, contrary to its current inclination, a scheme prohibiting the creation of legal tenancies in common was introduced, severance of a legal joint tenancy

should also be prohibited, but allowed in equity only. Do consultees agree? (para. 7.13)

48. The Commission takes the view that there is no need to recommend any provision to deal with the problem of requiring a surviving joint tenant to prove that the joint tenancy has not previously been severed because such a problem could not arise in Northern Ireland. Do consultees agree? (para. 7.14)
49. The Commission is considering statutory provisions in relation to the methods of severance. In particular it considers that a provision for service of a simple notice in writing (with statutory rules as to what constitutes "service") on the other joint tenant or tenants might be useful. Do consultees agree? (para. 7.15)
50. The Commission takes the view that unilateral severance of a joint tenancy should not take effect until a notice or declaration of severance in the prescribed form is registered in the Land Registry or Registry of Deeds as appropriate and the other joint tenants have been served with notice of the severance. Do consultees agree? (para. 7.18)

Reform - Partition

51. The Commission takes the view that the Partition Acts 1868 and 1876 should be replaced with a broad discretion given to the courts to make the appropriate order; not to intervene if that is appropriate or to resolve a dispute as between concurrent owners in relation to the property in question (supplemented by guidance as to how the court should exercise its discretion). Do consultees agree? (para. 7.21)

Reform - Commorientes

52. The Commission is inclined to adopt a provision whereby *commorientes* is treated as an event which severs a joint tenancy, so that the deceased persons would be treated as holding their jointly owned land as tenants in common. Do consultees agree? (para. 7.23)

Reform - Common land

53. If the general prohibition of legal tenancies is implemented, contrary to the Commission's inclination, the Commission

recommends that any common rights noted on the folios of neighbouring farms should be excepted from the proposed prohibition of legal tenancies in common. Do consultees agree? (para. 7.25)

54. While recognising that there are matters in relation to shared use of rural land which may require urgent investigation and reform the Commission is inclined to the view that they are too divorced from the land law and conveyancing matters which are the subject of the present Project to justify their inclusion within it. Do consultees agree? (para. 7.29)

Reform - Cohabitants

55. The Commission has indicated that it considers a review of the law relating to cohabitation is outside the scope of the current Project. It also may have to be reconsidered in the light of recent developments elsewhere. In any event, such reconsideration, like any more general review, raises much wider issues involving other areas of law, in particular family law, and so should be regarded as outside the scope of this Project. Do consultees agree? (para. 7.35)

CHAPTER 8 MORTGAGES

Introduction - Consumer Protection

56. The Commission takes the view that consumer and regulatory matters are outside the scope of the present Project, which is primarily concerned with reform of technical land law and conveyancing matters. Do consultees agree? (para. 8.1)
57. The Commission takes the view that, given the Consumer Credit Act 1974 was recently amended for both England and Wales and Northern Ireland, it is probably not appropriate to recommend a new jurisdiction to replace that conferred by the 1974 Act. The view that the equitable jurisdiction should be left to be developed by the courts should be adhered to at this stage and the Commission's proposals for reforms should concentrate on other matters. Do consultees agree? (para. 8.4)

Reform - Creation of mortgages

58. The Commission takes the view that the charge system used for registered land should be applied to unregistered land and

that mortgages by conveyance or assignment should be abolished. Do consultees agree? (para. 8.7)

59. For the time being the Commission is inclined to preserve the means of creating equitable mortgages by deposit. Do consultees agree? (para. 8.8)

Reform - Mortgagee remedies

60. In the event of default by the mortgagor, the Commission is inclined to make a recommendation that in future the mortgagee's remedies should be exercisable only for the purposes of protecting or enforcing the security? (para. 8.10)
61. The Commission inclines to the view that mortgagors of residential property are best protected by specific legislation aimed at consumer protection, such as the Consumer Credit Acts. Otherwise, for the most part, the statutory provisions replacing the Conveyancing Acts 1881 – 1911 should retain their approach of providing default provisions only (i.e. provisions which operate subject to the terms of the mortgage deed). Do consultees agree? (para. 8.12)

Reform - Mortgagee remedies - Taking possession

62. The Commission inclines to the view that the requirement to obtain a court order for possession should be confined to mortgages of dwellinghouses taken out by individuals. Do consultees agree? (para. 8.16)
63. On balance the Commission is inclined not to recommend any change in the law which currently provides that the mortgagor is barred from bringing an action to redeem the mortgage after the mortgagee has been in possession for 12 years. Do consultees agree? (para. 8.17)

Reform - Mortgagee remedies - Foreclosure

64. The Commission considers that the remedy of foreclosure should be formally abolished. Do consultees agree? (para. 8.18)

65. On balance, The Commission is not inclined to retain the jurisdiction of the courts to order foreclosure. Do consultees agree? (para. 8.19)

Reform - Mortgagee remedies - Sale

66. The Commission proposes retaining the provisions in the Conveyancing Acts 1881 – 1911 relating to the mortgagee's power of sale (without obtaining a court order), subject to the addition of a statutory duty on all mortgagees to obtain the best price possible. Do consultees agree? (para. 8.20)
67. The Commission recommends that the powers and rights of a mortgagee should vest as soon as the mortgage is created but they would not become exercisable unless it is for the purposes of protecting the mortgaged property or realising the mortgagee's security. Do consultees agree? (para. 8.21)
68. The Commission is not inclined, at this stage, to propose any further restriction on the mortgagee's statutory power of sale. Do consultees agree? (para. 8.22)

Reform - Mortgagee remedies - Appointment of receiver

69. The Commission recommends that the reform suggested in Question 67 (para. 8.21) above should also apply equally to the power to appoint a receiver. Do consultees agree? (para. 8.23)

Reform - Other mortgagee rights - Consolidation

70. The Commission is inclined to recommend abolition of the right of consolidation and is not convinced that there should be exceptions for different types of mortgages. Do consultees agree? (para. 8.26)

Reform - Other mortgagee rights - Insurance

71. The Commission notes the modifications made by the Republic of Ireland's 2006 Bill (section 109) regarding statutory provisions in the Conveyancing Act 1881 (section 23) relating to insurance of the mortgaged property. The Commission is inclined to recommend similar provisions for Northern Ireland. Do consultees agree? (para. 8.27)

72. In view of the increasing regulation and supervision of mortgage lenders the Commission is not convinced that it is necessary now to provide, by statute, that all mortgagees of dwellinghouses should have a choice of insurer. Do consultees agree? (para. 8.28)

Reform - Other mortgagee rights - Tacking

73. The Commission recommends that the method of tacking known as *tabula in naufragio* (whereby in the case of unregistered land, a mortgagee with low priority may secure priority over an earlier mortgagee by purchasing an even earlier interest in the land) should be abolished. Do consultees agree? (para. 8.29)
74. The Commission recommends that the other, more common, form of tacking by way of adding further advances to the original mortgage should be rationalised. Do consultees agree? (para. 8.30)

CHAPTER 9 CONTRACTS FOR THE SALE OF LAND

Reform – Statute of Frauds (Ireland) 1695 s. 2

75. The fundamental issue here is whether the current statutory requirement for a contract to be evidenced in writing should be recast in more modern language or whether a provision for the contract itself to be in writing should be introduced. After considering the arguments for both options, the Commission inclines towards postponing consideration of substantive changes to the law governing formalities for land contracts until development of an e-conveyancing system is much further advanced. In the interim reform should be confined to modernising the wording of the Statute of Frauds (Ireland) 1695. Do consultees agree? (para. 9.12)

Sale of Land by Auctions Act 1867

76. On balance, the Commission is inclined to regard reform of the law relating to auctions as outside the scope of this Project. Do consultees agree? (para. 9.16)

Other contract matters

77. The Commission considers that, where a court refuses to grant specific performance of a contract for the sale of land, it should be able to order repayment of the whole or any part of a deposit where it is just and equitable to do so. Do consultees agree? (para. 9.20)
78. The Commission proposes to re-enact the provision in section 9 of the Vendor and Purchaser Act 1874 to enable the parties to a contract for the sale of land to apply to the court to resolve a dispute relating to the contract. Do consultees agree? (para. 9.22)

CHAPTER 10 CONVEYANCES

Introduction

79. The Commission has concluded that there remains a need for provisions to govern the conveyancing process as it applies to unregistered land. Do consultees agree? (para. 10.3)

Title to be deduced - Length of title

80. The Commission is inclined to recommend that the statutory period for title to be deduced by a vendor under an “open” contract should be reduced from 40 years to 15 years. Do consultees agree? (para. 10.7)
81. The Commission inclines to the view that the two statutory periods relating to deduction of title and presumed truth of statements in deeds should be made to coincide and the latter should also be reduced to 15 years. Do consultees agree? (para. 10.8)
82. The Commission considers that the question of which pre-root deeds and searches should be provided by the vendor is really much more of a matter of contract between the parties, than a matter which should be covered by legislation. In practice, if clients suffer loss as a result of failing to trace a pre-root deed which has an effect on the title they can rely on their solicitor’s insurance. On this basis the Commission is not inclined to recommend any provision for compensation. Do consultees agree? (para. 10.9)

Title to be deduced - Leasehold titles

83. The Commission inclines to the view that where a purchaser is acquiring a leasehold interest, the question of calling for title to the freehold is a matter of contract which should be left to be determined by the parties themselves and their solicitors. Do consultees agree? (para. 10.11)

Title to be deduced - Rule in Patman v Harland

84. The Commission recommends abrogation of the rule in *Patman v Harland* whereby a grantee is fixed with constructive notice of any adverse interest affecting the superior title even though the grantee is prohibited from calling for deduction of that title. Do consultees agree? (para. 10.12)

Title to be deduced - Other conditions of title

85. The Commission recommends that various statutory provisions relating to production of title documents by the vendor contained in section 2 of the Vendor and Purchaser Act 1874 and section 3 of the Conveyancing Act 1881 should be re-enacted, subject to some modifications. Do consultees agree? (para. 10.13)

Deeds and their operation

86. The Commission recommends abolition of the arcane methods of conveying title to land so that the modern deed would become the sole method of conveying title to freehold land. Do consultees agree? (para. 10.14)
87. The Commission recommends the repeal of the Statute of Uses (Ireland) 1634. Do consultees agree? (para. 10.15)
88. The Commission recommends that in future no resulting use should be implied in a voluntary conveyance merely because it was not expressed to convey the land “unto and to the use of” the grantee. Do consultees agree? (para. 10.16)
89. The Commission recommends that in future the need to include words of limitation (to indicate the freehold estate being conveyed) in deeds relating to unregistered land should be abolished. Do consultees agree? (para. 10.18)

90. The Commission recommends that there should be a set of statutory definitions of words commonly used in deeds (such as “month” and “person”) and other meanings (such as the singular including the plural, the masculine the feminine and vice versa), similar to those provided for statutes by the Interpretation Act (Northern Ireland) 1954. Do consultees agree? (para. 10.19)
91. The Commission takes the view the general word-saving provision in section 6 of the Conveyancing Act 1881 should not operate to upgrade rights and should pass only existing rights. Do consultees agree? (para. 10.20)
92. The Commission reiterates the view that section 6 of the Conveyancing Act 1881 should not apply to the typical *Wheeldon v Burrows* situation, that is, so as to convert a quasi-easement into a full easement when land previously in the ownership of one person is subdivided by conveying part of it to another person. Do consultees agree? (para. 10.21)
93. The Commission recommends re-enactment of the provisions relating to voluntary conveyances intended to defraud subsequent purchasers currently in sections 1 and 3 of the Conveyancing Act (Ireland) 1634 (as amended by the Voluntary Conveyances Act 1893). Do consultees agree? (para. 10.22)
94. The Commission is inclined to recommend the repeal of the Sales of Reversions Act 1867 without replacement. Do consultees agree? (para. 10.23)

Contents of deeds

95. In relation to implied covenants for title, the Commission is inclined to recommend a complete recasting of section 7 of the Conveyancing Act 1881 in a much clearer and understandable format. Do consultees agree? (para. 10.27)

CHAPTER 11 LEGISLATION

Introduction – Modernisation of the Statute Book

96. The Commission considers that one of the primary aims of the Project should be the modernisation of the statute book. Do consultees agree? (para. 11.4)

Review of Legislation - Repeal without replacement

97. The Commission envisages that the following are the main statutes that would be repealed without replacement. Do consultees agree? (para. 11.8)

Chapter 2: Feudal Tenure

Forfeiture Act (Ireland) 1639

Tenures Abolition Act (Ireland) 1662

Chapter 3: Estates in land

Statute of Westminster, the Second 1285 (*De Donis Conditionalibus*)

Fines and recoveries (Ireland) Act 1834

Chapter 4: Easements and Other Rights over Land

Tithe Rentcharge (Ireland) Act 1838

Tithe Arrears (Ireland) Act 1839

Chapter 5: Future Interests

Contingent Remainders Act 1877

Real Property Act 1845 (section 8)

Law of Property Amendment Act 1860 (section 7)

Accumulations Act 1892

Perpetuities Act (Northern Ireland) 1966

Chapter 6: Settlements and Trusts

Landed Estates Court (Ireland) 1858

Settled Land (Ireland) Act 1847

Settled Estates Act 1877

Chapter 8: Mortgages

Clandestine Mortgages Act (Ireland) 1697

Satisfied Terms Act 1845

Mortgagees Legal Costs Act 1895

Chapter 10: Conveyances

Statute of Uses (Ireland) 1634

Sales of Reversions Act 1867

Review of Legislation - Replace with substantial amendment

98. The Commission envisages that the following are the main statutes that would be replaced with substantial amendment. Do consultees agree? (para. 11.10)

Chapter 2: Feudal Tenure

Statutes of Westminster, the Third 1289 - 1290 (*Quia Emptores*)

Chapter 4: Easements and other rights over Land

Prescription Act 1832

Prescription (Ireland) Act 1858

Chapter 6: Settlements and Trusts

Settled Land Acts 1882 - 1890

Chapter 7: Concurrent Ownership of Land

Partition Act 1868

Partition Act 1876

Chapter 8: Mortgages

Conveyancing Act 1881 Parts IV and V

Chapter 10: Conveyances

Conveyancing Act (Ireland) 1634

Vendor and Purchaser Act 1874

Review of Legislation - Consolidate or replace without substantial amendment

99. In order to make the law more accessible it is proposed that new legislation to implement the Commission's recommendations should consolidate, in one Act, all existing statutory provisions relating to land law and the conveyancing system. Do consultees agree? (para. 11.11)
100. The Commission is inclined to the view that the consolidation of statutory provisions should include recently enacted ones as long as they come within the scope of the subject matter of the Consultation Paper but not include those subjects which have been deliberately excluded. Do consultees agree? (para. 11.12)

Examples of the recent statutes that would be consolidated or replaced without substantial amendment are: the Commission on Sales of Land Act (Northern Ireland) 1972 (now the Commission on Disposal of Lands (Northern Ireland) Order 1986), the Property (Northern Ireland) Orders 1978 and 1997 and Part II of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2005.

Examples of the older statutes that would also be consolidated or replaced without substantial amendment are: Statute of Frauds (Ireland) 1695 (section 2); Real Property Act 1845; much of the Conveyancing Acts 1881 – 1911 and Bodies Corporate (Joint Tenancy) Act 1899.

ABBREVIATIONS

The following abbreviations are used in the Consultation Paper:

1967 Lowry Report:	Report of the Committee on the Registration of Title to Land (1967).
1971 Survey:	Survey of the Land Law of Northern Ireland (1971).
1990 Final Report:	Final Report of the Land Law Working Group (1990).
Megarry and Wade:	Megarry and Wade, <i>The Law of Real Property</i> , 7 th ed. by Harpum, Bridge and Dixon (2008) Sweet and Maxwell Ltd.
Pearce and Mee:	Pearce and Mee, <i>Land Law</i> , 2nd Edition (2000) Round Hall Sweet and Maxwell
Wylie and Woods, ICL:	Wylie and Woods, <i>Irish Conveyancing Law</i> , 3 rd ed. (2005) Tottel Publishing.
Wylie, ILL:	Wylie, <i>Irish Land Law</i> , 3rd ed. (1997) Butterworths.
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Northern Ireland
Law Commission

promoting law reform in Northern Ireland

Linum Chambers
2 Bedford Square
Bedford Street
Belfast BT2 7ES

T : +44 (0) 28 9054 4860

E : info@nilawcommission.gov.uk

W : www.nilawcommission.gov.uk

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