Reforming the Law of Prescription: A Cautionary Tale from Ireland

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The law on the prescriptive acquisition of easements and profits,[1] as it evolved in England and Wales and was inherited by other common law jurisdictions, has long been considered unsatisfactory. 'Clouds and darkness [had] settled down over the whole subject' even before the 'fitting addition to the chaos' represented by the Prescription Act 1832.[2] It is not surprising, therefore, that reform is under consideration in a number of jurisdictions. The Law Commission of England and Wales put forward a set of proposals in its 2011 Report on *Making Land Work: Easements, Covenants and Profits à Prendre*,[3] and other law reform bodies have also made recent recommendations on the matter in, for example Northern Ireland,[4] Tasmania[5] and Victoria.[6]

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1 That is, acquisition on the basis of long enjoyment of the relevant right.

2 J Salmond, *Essays in Jurisprudence and Legal History* (London, Stevens and Haynes, 1891) 120.

3 *Making Land Work: Easements, Covenants and Profits à Prendre* (Law Com No 327, 2011); henceforth 'Law Commission Report'. See generally M Dixon, 'Editor's Notebook' [2012] *Conveyancer and Property Lawyer* 1; B Bogusz, 'The Doctrine of Lost Modern Grant: Back to the Future or Time to Move On?' [2013] *Conveyancer and Property Lawyer* 198.

4 *Report* [*on*] *Land Law* (NILC 8, 2010) 21–24; 150–56; 253–57. See also *Consultation Paper* [*on*] *Land Law* (NILC 2, 2009) 80–90.

5 Tasmanian Law Reform Institute, *Law of Easements in Tasmania* (Final Report No 12, 2010) 7–9, 22–32, 48–52.

As part of a wide-ranging reform of land law in the Republic of Ireland, the law of prescription was radically recast by Part 8 of the Land and Conveyancing Law Reform Act 2009 (the LCLRA). The three existing forms of prescription – common law prescription, prescription under the doctrine of lost modern grant, and statutory prescription under the Prescription Act 1832 – were abolished and replaced by a new form of statutory prescription. The period for the acquisition by prescription was reduced to 12 years, creating what one commentator has described as 'The most liberal system of prescription ever proposed'.[7] The new regime was due to come into effect after a three-year transition period but, before this period had elapsed, the scheme was modified by the Civil Law (Miscellaneous Provisions) Act 2011. Unfortunately, even after the 2011 amendments, there appear to be significant difficulties with the new Irish scheme. This chapter analyses the problems that have arisen in Ireland in relation to the reform of the law of prescription and considers the possible lessons for reformers in other jurisdictions, giving special attention to comparisons with the proposals made by the Law Commission for England and Wales in 2011.

The first section of the chapter briefly sets the recent Irish reforms in the context of the major overhaul of Irish land law in the LCLRA. Having discussed the decision in Ireland to reform rather than abolish the prescriptive acquisition

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[6] Victoria Law Reform Commission, *Easements and Profits: Final Report 22* (2011) 50–57, 61–62. See also Victoria Law Reform Commission, *Easements and Profits: Consultation Paper* (2010) 59–69.

[7] P Bland, 'A "Hopeless Jumble": The Cursed Reform of the Law of Prescription' (2011) 16 (Irish) *Conveyancing and Property Law Journal* 54, 59 (henceforth 'A Hopeless Jumble'). Strictly speaking, this claim goes too far given that in California, eg the period for prescription is five years (and five years of non-user will extinguish a prescriptively acquired easement): WH Pivar and R Bruss, *California Real Estate Law,* 5th edn (Chicago, Dearborn, 2002) 384.

of easements and profits, the chapter then analyses the main features of the new legislative scheme. The chapter next considers the difficulties that have arisen in relation to the transitional issues arising from a move from the old position, where a number of forms of prescription are recognised, to a situation where a claim can only succeed under one form of statutory prescription. Finally, the chapter assesses the extent to which the 2011 reforms have succeeded in addressing the problems with the original scheme in the LCLRA.

I. Land Law Reform and the Law of Prescription in Ireland

Ireland did not have an equivalent of England and Wales' Law of Property Act 1925 and important aspects of Irish land law remained substantially unreformed up to 2009. One comparatively modern aspect of the law was the system of land registration, governed by the Registration of Title Act 1964. This system is broadly similar to that which existed in England and Wales prior to the reforms (eg in relation to the scope of adverse possession) in the Land Registration Act 2002. Ireland also has a long-established system of registration of deeds,[8] relevant to land not yet covered by the registration of title system, which continues to serve a function somewhat similar to the Land Charges scheme in England and Wales.[9]

The Law Reform Commission (LRC) played a major role in the development of the LCLRA. As part of an ongoing project in the land law and conveyancing area, the LRC published a number of reports on specific points,

[8] See Registration of Deeds and Title Act 2006, Pt 3, replacing the Registration of Deeds Act 1707.

[9] Under the Land Charges Act 1972.

including one in 2002 in relation to the prescriptive acquisition of easements.[10] Not long afterwards, in the context of a governmental project to prepare for the introduction in Ireland of a system of electronic conveyancing,[11] the LRC published a more general report on *Reform and Modernisation of Land Law and Conveyancing Law* in 2005.[12] In 2006, a Bill was introduced based on the draft Bill appended to that report.[13] The Land and Conveyancing Law Reform Act was ultimately passed in 2009 and virtually all its provisions came into force on 1 December 2009.

In the area with which the current chapter is concerned, the position in Ireland before 2009 was broadly similar to that in England and Wales. The old law was very complicated, in that three separate forms of prescription could be relied upon by a claimant. A common thread running through these three types of prescription was the need to show 'user as of right', that is enjoyment of the right claimed without force, secrecy or permission. The three types of prescription are: (1) common law prescription; (2) prescription under the doctrine of lost modern grant; and (3) statutory prescription. Common law prescription requires the claimant to show user as of right from time immemorial (ie since 1189), thus allowing the court to conclude that there must

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[10] *Report on the Acquisition of Easements and Profits à Prendre by Prescription* (LRC 66-2002), henceforth 'the LRC Report'. Irish Law Reform Commission Reports are available at www.lawreform.ie. See also P Bland, 'Clothing Fact with Right[:] Proposed Changes to Prescription and Adverse Possession' (2003) 8 (Irish) *Conveyancing and Property Law Journal* 86.

[11] For a detailed account of this project, see Law Reform Commission, *eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79-2006) ch 1.

[12] Report on *Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74-2005).

[13] See generally, J Mee, 'The Land and Conveyancing Law Reform Bill 2006: Observations on the Law Reform Process and a Critique of Selected Provisions' (2006) 11 (Irish) *Conveyancing and Property Law Journal* 67 and 91.

have been a grant of the right before that date. The courts were willing to accept proof of 20 years' enjoyment as raising a presumption that the enjoyment went back to 1189. Unfortunately, this presumption gave way to evidence showing the more recent origins of the enjoyment in question. It has been suggested in England that, in light of the development of the doctrine of lost modern grant (discussed below), 'common law prescription may be considered, for practical purposes, almost, if not entirely, obsolete'.[14] Under the doctrine of lost modern grant, developed by the courts around the end of the eighteenth century, proof of 20 years' user as of right allows the court to presume that a grant was made in modern times but that this grant has been lost and so cannot be produced in court. Despite complaints about the fictional nature of the doctrine, it has kept its importance into modern times.

As a result of the deficiencies in common law prescription and the unsatisfactory element of fiction in the doctrine of lost modern grant, an attempt was made by the legislature to reform the law in this area. Unfortunately, the resulting legislation, the Prescription Act 1832 (extended to Ireland by the Prescription (Ireland) Act 1858) is 'one of the worst drafted Acts on the Statute Book'.[15] It left the situation even more confused than before, since it did not succeed in replacing the two existing forms of prescription. A further source of complexity is that the statute provides for two distinct prescriptive periods: a short period of 20 years for easements and 30 years for profits and a long period

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[14] Law Commission for England and Wales, *Easements, Covenants and Profits à Prendre: A Consultation Paper* (CP 186, 2008) 67 (henceforth 'Law Commission CP').

[15] English Law Reform Committee, *Fourteenth Report, Acquisition of Easements and Profits by Prescription* (London, HMSO, 1966) 14.

of 40 years for easements and 60 years for profits. The short period aimed to fulfil the function of the doctrine of lost modern grant by reforming common law prescription, while the long period has independent significance largely because, in calculating it, it is not necessary to subtract periods when the servient owner was under a legal disability. A key limitation on prescription under the 1832 Act is that the period of user as of right must come 'next before some suit or action', that is the right must have been enjoyed up until the taking of legal proceedings.[16] Thus, the right under the Act remains inchoate and does not crystallise until adjudicated upon by the court.[17] This limitation, in particular, meant that the doctrine of lost modern grant retained its importance, since it has the key advantage over statutory prescription that the period of user does not have to come immediately before the action is brought. Thus, for example, in the Irish case of *Orwell Park Management Ltd v Henihan*,[18] a claim under the doctrine of lost modern grant, based on user as of right from 1937 to 1972, was not defeated by the fact that the right had not been used from 1972 to 1989.

This last point creates a problem for potential purchasers of land, which the English Law Commission described as a 'conveyancing trap of some magnitude'.[19] This problem was explained by the Irish Law Reform Commission as follows:

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[16] s 4.

[17] However, it is not necessary to wait until a dispute arises and it is possible to go to court to seek a declaration as soon as the requirements of the statute have been satisfied.

[18] *Orwell Park Management Ltd v Henihan* [2004] IEHC 87 (Irish High Court; available on BAILII (www.bailii.org)).

[19] *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com No 254, 1998) 75.

> An easement which has been legally established at some point in the past, but which has not been used for a considerable period of time, may not be readily discoverable upon an inspection of the land. Notwithstanding this, the purchaser will be bound by that easement.[20]

Crucially, the purchaser will be bound even if title to the land is registered.[21] It is provided in Ireland's Registration of Title Act 1964, section 72(1)(h) that the burdens which affect land without registration include

> easements and profits à prendre, unless they are respectively created by express grant or reservation after the first registration of the land.

Thus, although an easement or profit obtained by prescription will not (under the old law of prescription) show on the register, it will nonetheless bind the land since it has not been created expressly. The desire to address this problem helped to shape the new Irish legislation on prescription.

II. Reform or Abolition?

Prescription has long been recognised by the law but in modern times its status has become less secure. It was suggested by Lord Hoffmann in *R v Oxfordshire County Council*[22] that 'Any legal system must have rules of prescription which

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[20] LRC Report (n 10) 13.

[21] If title to the land is unregistered, at common law the easement or profit will be binding on the purchaser because it is a legal (rather than an equitable) interest which, when compared to the purchaser's interest, comes 'first in time': see JCW Wylie, *Irish Land Law*, 5th edn (Haywards Heath, Bloomsbury Professional, 2013) 139. Given that there is no deed capable of registration associated with the easement or profit obtained by prescription, the registration of deeds system in the Registration of Deeds and Title Act 2006 is not applicable to the relevant situation (ibid, 141–42).

[22] *R v Oxfordshire County Council* [2000] 1 AC 335.

prevent the disturbance of long-established de facto enjoyment'.[23] However, in the context of a system of land registration that aspires to be 'not a system of registration of title but a system of title by registration',[24] it is not obvious that it is necessary to permit the acquisition of easements and profits by prescription.[25] While prescription does not excite the same controversy as the broadly analogous doctrine of adverse possession (the scope of which has been radically curtailed in England and Wales),[26] it does allow 'the acquisition of rights which were neither intended by the servient owner nor for which he was paid or compensated'.[27] As long ago as 1966, the majority of the English Law Reform Committee decided to recommend abolition.[28] However, notwithstanding the legal 'climate change' that has made it possible to question the need to permit the prescriptive acquisition of easements and profits,[29] the Irish legislation involves reform, rather than abolition, of prescription.[30]

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[23] Ibid, 349. See generally, A Goymour, 'The Acquisition of Rights in Property through the Effluxion of Time' in E Cooke (ed), *Modern Studies in Property Law*, vol 4 (Oxford, Hart Publishing, 2007).

[24] Law Commission, *Land Registration for the Twentyfirst Century: A Consultative Document* (Law Com No 254, 1998) 220–21, quoting *Breskvar v Wall* (1971) 126 CLR 376, 385 per Barwick CJ.

[25] See generally, S Bridge, 'Prescriptive Acquisition of Easements: Abolition or Reform?' in E Cooke (ed), *Modern Studies in Property Law*, vol 3 (Oxford, Hart Publishing, 2005); F Burns, 'Easements and Servitudes Created by Implied Grant, Implied Reservation or Prescription and Title-by-Registration Systems' in M Dixon (ed), *Modern Studies in Property Law*, vol 5 (Oxford, Hart Publishing, 2009). See also C Sara, 'Prescription – What is it For?' [2004] *Conveyancer and Property Lawyer* 13.

[26] Land Registration Act 2002, Pt 9 and Sch 6.

[27] F Burns, 'Prescriptive Acquisition of Easements in England and Legal "Climate Change"' [2007] *Conveyancer and Property Lawyer* 133, 140.

[28] Law Reform Committee, *Fourteenth Report* (n 15) 11–12.

[29] See generally Burns (n 27).

[30] The LCLRA even retains the possibility of prescriptive acquisition of profits, in contrast to the approach proposed by the English Law Commission. Note the discussion in LRC Report (n 10) 21–22 and contrast Law Commission Report (n 3) 28.

The possibility of abolition was discussed briefly in the Law Reform Commission's Report in 2002.[31] However, the LRC concluded that 'legal recognition should be given to a situation where a right has been enjoyed openly over a long period of time', arguing that 'there is no less moral justification for the acquisition of easements by prescription than there is for obtaining a title to land by adverse possession'.[32] The discussion was not particularly rigorous and, strangely, no mention was made of the relationship between prescription and land registration.[33] Thus, while there is a fair case for the abolition of prescription, this case was not fully ventilated in the course of the law reform process in Ireland. Arguably, the difficulties that have arisen from the attempt to modify the law of prescription in Ireland add a modest degree of further weight to the argument in favour of outright abolition (on a prospective basis) in other jurisdictions.

III. The New Irish Legislative Scheme

The new Irish scheme[34] differs from the older forms of prescription in a number of ways. The 1832 Act had merely attempted to build on the common law, providing that a common law prescription claim would not be defeated only by the fact that the period of user did not go all the way back to 1189. The LCLRA, by contrast, gives a comprehensive statement of the new rules (relying only on

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[31] LRC Report (n 10) 20–22.

[32] Ibid, 21.

[33] See further, J Mee, 'Reform of the Law on the Acquisition of Easements and Profits à Prendre by Prescription' (2005) 27 *Dublin University Law Journal* 86, 94–98.

[34] See generally, Wylie, *Irish Land Law* (n 21) 408–20.

the old law in an implicit way, by borrowing existing concepts). Although the drafting of the relevant provisions is rather unclear, the intention of the drafters was that, after the expiry of a transition period, claims could only be made on the basis of the new rules, with the old rules forming the basis for any possible claim during the transition period. However, as will be discussed in a later Part of the chapter, various difficulties arose in connection with the intended transition to the new rules. Before these problems are considered, the current Part will look in turn at the key features of the new scheme.

A. The Length of the Prescription Period

The standard period for a successful prescription claim is set by the LCLRA at 12 years user as of right, with a more stringent requirement of 30 years for state land and 60 years where the state land is foreshore.[35] It is provided in section 33 of the LCLRA that '"user as of right" means use or enjoyment without force, without secrecy and without the oral or written consent of the servient owner'. The reference to 'oral or written consent' is intended to clarify that, unlike in one respect under the Prescription Act 1832,[36] oral consent is effective to destroy a claim to 'user as of right'.

The decision to shorten the period from 20 years to 12 years arose from a view on the part of the Law Reform Commission that 'In this somewhat technical area of the law, there is particular merit, from the point of view of both

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[35] s 33.

[36] A claim under the longer period set down by the 1832 Act is not defeated by proof that oral, rather than written, consent had been given at the start of the period (although the giving of oral consent during the period would set the clock back to zero): see C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property,* 8th edn (London, Sweet and Maxwell, 2012) 1316.

accessibility and consistency, in bringing together, so far as policy will allow, the law of limitations with the law on prescription'.[37] In its 1966 Report, the English Law Reform Committee had similarly favoured (if prescription were not to be abolished) reducing the period to 12 years in order to ensure consistency with the law on adverse possession as it then stood in England and Wales.[38] The Law Reform Committee pointed out that the limitation period in respect of adverse possession had been 20 years at the time of the Prescription Act 1832, so that the periods for adverse possession and prescription had been aligned in the past.[39]

More recently, however, the Law Commission was not convinced by the argument in favour of aligning the period applicable in the prescription context with the 10-year period now applicable in relation to adverse possession under the Land Registration Act 2002. The view to this effect put forward in the Law Commission's 2008 Consultation Paper[40] was supported by a majority of those responding to the consultation.[41] In its 2011 Report, the Law Commission acknowledged that under its proposed 'entirely new scheme of prescription, the qualifying minimum period of long use could have been of any length' but explained its recommendation in favour of a 20-year period on the basis that 'the

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[37] LRC Report (n 10) 19. In Ireland, the standard limitation period for adverse possession remains at 12 years for both registered and unregistered land.

[38] *Fourteenth Report* (n 15) 14.

[39] Ibid.

[40] Law Commission CP (n 14) 80–84.

[41] *Easements, Covenants and Profits à Prendre Consultation Analysis* (Consultation Paper 186 (Consultation Analysis), 2011) 57–58.

general feeling' of consultees supported the choice of this period which had 'the benefit of familiarity from the current law'.[42]

On the whole, the decision in Ireland to reduce the prescription period to 12 years appears to have been misguided. As Peter Bland points out, the fact that 'it will be easier for students to remember the general prescriptive period if it is the same as the limitation period for the recovery of land…is a facile justification for the policy aim of assimilating adverse possession and prescription'.[43] Any benefit accruing from 'alignment' and 'consistency' seems rather abstract and limited by the fact that there are many differences between prescription and adverse possession unrelated to the length of the limitation period. On the other hand, decreasing the prescription period to 12 years has the concrete effect of making it considerably easy to succeed in a prescription claim. This does not seem to make sense in light of the fact, mentioned above, that there are serious arguments in favour of abolishing prescription altogether. Indeed, it may be that the English Law Commission also over-estimated the value of retaining the familiar 20-year prescription period. It is arguable that a simple method of reducing potential litigation in relation to prescription and filtering out comparatively unmeritorious claims would be to increase the prescriptive period, say to 30 or 40 years.

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[42] Law Commission Report (n 3) 53.

[43] Bland, 'A Hopeless Jumble' (n 7) 55.

B. Absence of Interruption

Section 33 of the LCLRA provides that there must be no 'interruption', which is defined as 'interference with, or cessation of, the use or enjoyment of an easement or profit a prendre for a continuous period of at least one year'.[44] Apparently inadvertently, this provision appears to conflate two separate requirements under the old law – the requirement in the relevant sections of the 1832 Act[45] that there be no interruption in the enjoyment of the right (meaning no 'hostile obstruction')[46] and the requirement, not expressly set out in the 1832 Act but implicit in the requirement to establish user as of right for a particular period, that the enjoyment of the right be sufficiently continuous.

Under the old law, user must be continuous but not incessant,[47] so that 'a non-user for more than a year…may be so explained as to warrant a jury in finding an actual enjoyment for the statutory period'.[48] Thus, for example, in *Carr v Foster*,[49] a claim to a common of pasturage was not defeated by the fact that there had been a two-year gap in the use of the right because this was explained by the fact that the claimant's predecessor in title did not have any commonable beasts at the time. The new Irish legislation's definition of 'interruption' has the potential to defeat a claim (probably in comparatively unusual circumstances)

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[44] s 33.

[45] ss 1, 2 and 3.

[46] *Megarry and Wade* (n 36) 1314. Wylie suggests that the interruption could be 'due to natural causes' rather than be the result of the acts of the servient owner or a stranger: *Irish Land Law* (n 21) 403. However, this suggestion is not supported by the authority cited, *Hall v Swift* (1838) 4 Bing NC 381, and cannot be reconciled with the wording of s 4 of the 1832 Act which makes a requirement in relation to the time when the claimant had notice 'of the person making or authorizing the [interruption] to be made'.

[47] *Hollins v Verney* (1884) 13 QBD 304, 315 per Lindley LJ.

[48] Ibid, 314.

[49] *Carr v Foster* (1842) 3 QB 581.

where there has been a cessation of a year or more in the enjoyment of the right and, under the old law, this cessation could have been explained away on the basis of the circumstances.

C. Retention of 'Next before Some Suit or Action' Requirement[50]

Section 4 of the 1832 Act stipulated that the prescription periods in that Act

> shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question.

The effect of this provision is that an easement or profit is not established simply upon the completion of the requisite period of enjoyment of the right claimed; the enjoyment must continue up to the time that the matter is contested in a 'suit or action'. The inclusion of this requirement in the 1832 Act was described by Holdsworth as 'absurd'[51] and by Simpson as 'the fatal flaw in the scheme of the statute'.[52] Claimants who did not satisfy the 'next before some suit or action' requirement could choose to rely instead on the doctrine of lost modern grant, meaning that the law became more, rather than less, complex after the introduction of the 1832 Act.

Possibly, however, the 'fatal flaw' in the 1832 Act can more accurately be identified as the introduction of the 'next before some suit or action' requirement

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[50] The LCLRA dispenses with the old phrasing of 'next before some suit or action' and this phrase is used in the current chapter only as a convenient shorthand.

[51] W Holdsworth, *A History of English Law*, vol VII (London, Methuen & Co, 1937) 351.

[52] AWB Simpson, *A History of the Land Law,* 2nd edn (Oxford, Oxford University Press, 1986) 268.

combined with the failure to abolish the doctrine of lost modern grant. Citing the view of Lord Blackburn in *Dalton v Angus*,[53] Simpson argued that

> the lost modern grant fiction had to be preserved, for otherwise great injustice would have been done in cases where a claimant could show twenty years' user, but could not show twenty years' user immediately before he brought his action.[54]

Lord Blackburn had spoken of the fact that 'old rights even from time immemorial' would have been liable to be defeated if the old forms of prescription had been abolished.[55] Clearly, however, it could have been stipulated in the 1832 Act that the abolition of the old doctrines would be prospective in nature. This would have ensured the survival of any rights that could, at the time that the 1832 Act came into force, have successfully been claimed under the old doctrines.

Thus, the experience with the 1832 Act does not, of itself, demonstrate that the 'next before some suit or action' requirement is unsuitable to be included in a modern system of prescription. Although the precise reasons for inclusion in the 1832 Act are not clear,[56] the requirement is not without some

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[53] *Dalton v Angus* (1881) 6 App Cas 740, 814.

[54] Simpson, *A History of the Land Law* (n 52) 269.

[55] (1881) 6 App Cas 740, 814.

[56] The explanation offered by Holdsworth, *A History of English Law* (n 51) 350–52 is that 'both the framers of the Act, and the Real Property Commissioners [whose *First Report* (1829) preceded the 1832 Act], were guilty of confusing the mode of the operation of a statute of limitation, and the mode of the operation of prescription': ibid, 351. This position is supported, on the basis of a somewhat different argument, by Simpson, *A History of the Land Law* (n 52) 268–69. However, notwithstanding the eminence of the relevant commentators, their arguments in this instance seem artificial and unconvincing (although the point cannot be pursued here). An alternative explanation suggested by the *First Report of the Real Property Commissioners* (1829) is that the reformers saw themselves as improving the law of common law prescription by reducing the length of 'legal memory', ie the 'time whereof the memory of man runneth not to the contrary': ibid, 51. Their proposal was that, instead of lasting all the way back to 1189, legal memory would last for a specified period of years measured back from the present. In order to

attractions in practical terms. The initial approach of the Law Commission for England and Wales, in its 2008 Consultation Paper on *Easements, Covenants and Profits à Prendre*, was to recommend its retention.[57] The advantage identified at the time by the Law Commission was that 'In the event of litigation the court is required to confine its review to a relatively recent period of time, when the evidence will be easier to obtain and to evaluate'.[58] However, the responses to the Law Commission's Consultation Paper showed that the relevant rule 'is exceptionally unpopular'.[59] In one sense, of course, it is not surprising that the rule would be the subject of 'clearly evident and widespread dislike'[60] since, in light of the 1832 Act's failure to abolish the doctrine of lost modern grant, the rule serves no coherent function in the current law. However, consultees felt that, even under a new scheme, the relevant requirement could cause injustice, for example 'in cases where use stopped because of advancing age or illness'.[61] The Law Commission accepted this argument and did not include the requirement under discussion in its final proposals.[62]

In contrast, the new Irish scheme does include the 'next before some suit or action' requirement.[63] The main justification identified for this approach was

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establish a prescriptive right, the claimant would have to show enjoyment throughout that truncated period of 'legal memory', ie right up to the time of the claim.

[57] Law Commission CP (n 14) 80–81.

[58] Ibid, 81.

[59] Law Commission Report (n 3) 54.

[60] *Easements, Covenants and Profits à Prendre Consultation Analysis* (Consultation Paper 186 (Consultation Analysis), 2011) 62.

[61] Ibid, 61.

[62] Law Commission Report (n 3) 54–55.

[63] See LCLRA, s 35(2) which requires there to have been 'a relevant user period immediately before the commencement of the action'.

that it would facilitate conveyancing by eliminating the 'conveyancing trap'[64] of prescriptive easements capable of binding a purchaser even though they could not easily be discovered because they had not been exercised for a long time before the conveyance.[65] Overall, however, it seems that it would have been preferable for the Irish reformers to have discarded the requirement. A key difficulty with making prescriptive acquisition subject to a 'next before some suit or action' requirement is that it encourages litigation, since delay in crystallising the right could lead to its being lost due to future events. As is illustrated by the manner in which English law has developed, the conveyancing problem presented by prescriptive easements and profits can be addressed from a different angle.[66]

In fact, the LCLRA adds an element of flexibility to the 'next before some suit or action' requirement. Section 35(3) of the LCLRA provides that the court has discretion to waive the requirement if it 'is satisfied that it is just and equitable to do so in all the circumstances of the case'. This provision was introduced at the last moment,[67] in light of concerns that had earlier been raised in the Oireachtas (the Irish Parliament) that the requirement might operate in a harsh manner in individual cases. Unfortunately, this attempt to improve matters

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[64] See text to nn 19–21 above.

[65] Note the discussion in LRC Report (n 10) 25–27, also referring to the advantage that claims would have to be based on comparatively fresh evidence which would make it easier to ascertain the facts.

[66] Under the (English) Land Registration Act 2002, Sch 3, para 3, an unregistered legal easement or profit will not override a registered disposition unless: (i) it is within the actual knowledge of the purchaser; or (ii) it would have been obvious upon a reasonably careful inspection of the land; or (iii) it has been used within the previous year. See generally, PH Kenny, 'Vanishing Easements in Registered Land' [2003] *Conveyancer and Property Lawyer* 304; J Gaunt and P Morgan, *Gale on Easements,* 19th edn (London, Sweet and Maxwell, 2012) ch 5.

[67] The provision was inserted at Report Stage, eight days before the Bill was finally passed. See *Dáil Debates* vol 686, No 3, cols 712–14.

appears – very much in the spirit of past legislative reform in relation to prescription – to have achieved the worst of all worlds.

In the first instance, it is clearly unsatisfactory that the court is given discretion to disapply the 'next before some suit or action' requirement but no attempt is made to identify any factors to guide the exercise of that discretion. There are, unfortunately, other instances in the LCLRA where a similarly untramelled discretion is given to the court, apparently on the basis of a belief that it is important to keep the law 'simple' and that this can be achieved by leaving it up to the court to make the rules on a particular point. This is clearly a questionable approach, particularly in a small jurisdiction where there may not be a sufficient volume of cases to allow the courts, within a reasonable time, to develop a body of jurisprudence which would clarify the points left entirely open by the wording of the legislation.[68]

Secondly, allowing the court discretion to disapply the requirement does not take away the incentive to litigate because the unpredictability of the discretion means that a claimant cannot safely be advised to refrain from litigation to crystallise his or her right on the basis that the requirement might possibly be disapplied if a problem were to arise in the future. On the other hand, the existence of the discretion creates an incentive for those who fail to satisfy the 'next before some suit or action' requirement to litigate in the hope of establishing that it would be 'just and equitable' for the court to disapply that

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[68] Note the comments by the Finnegan J, speaking for the Irish Supreme Court in *Mahon v Lawlor* [2011] 1 IR 311, 323, on the absence of guidance in s 31 of the LCLRA which gives the court discretion to make orders (eg for sale or physical partition) on the application of a person with an interest in land subject to co-ownership.

requirement. Thus, the insistence upon a 'next before some suit or action' requirement, combined with a vaguely worded discretion to waive that requirement, seems to maximise the potential to generate contentious litigation.

D. Suspension in Cases of Disability

Under the LCLRA, the user period is suspended for any period where mental incapacity makes the servient owner 'incapable…of managing his or her affairs', although such a suspension can only extend the period up to a maximum of 30 years.[69] The suspension does not apply where

> [t]he court considers that it is reasonable, in the circumstances of the case, to have expected some other person, whether as trustee, committee of a ward of court, an attorney under an enduring power of attorney or otherwise, to have acted on behalf of the servient owner during the relevant user period.[70]

This latter provision has the disadvantage that the court is required to make a judgment in each case, which might not be predictable in advance, as to whether it would have been reasonable to expect someone to have acted on behalf of a person lacking mental capacity. The outside limit of 30 years provided for in the legislation already appears to serve as a generalised legislative assessment of the period within which it is reasonable to expect someone to act on behalf of the

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[69] LCLRA, s 37. Compare the English Law Commission proposals under which 'Use is not qualifying use…if it takes place at a time when the person in whom the fee simple in the servient tenement is vested is not competent to grant an easement in relation to that use for an interest equivalent to a fee simple absolute in possession'. See cl 17.3 of the Law Commission's Draft Bill: Law Commission Report, 195.

[70] s 37(2)(a). The wording of this provision appears to be defective in that it requires the court to make an all or nothing judgment as to whether a suspension should apply 'until the incapacity ceases'. It is possible to envisage a case where no one had been in a position to act on behalf of the servient owner for some of the period of user but, then, at a later point, such a person was appointed. Logically, in this kind of situation, the period of user should be suspended only for the period in which there was no one who could reasonably have been expected to act on behalf of the servient owner. See RA Pearce and J Mee, *Land Law,* 3rd edn (Dublin, Round Hall, 2011) 284.

person who lacks capacity. Thus, arguably it would have been better to omit the complication of requiring the court to make an individualised assessment in every case as to whether someone could reasonably have been expected to have acted on behalf of the servient owner who lacks capacity.

E. Prescription by and against Tenants

The Irish legislative scheme contains simplified rules on prescription by and against tenants.[71] This reflects the fact that, prior to the recent Irish reforms, there was a greater willingness on the part of the Irish courts, as compared to those in England and Wales, to allow prescription in this context.[72] Section 36 of the LCLRA provides that, if the tenant is the claimant, the right acquired attaches to the land and it will benefit the landlord at the end of the tenancy. Where the claim is against a tenant, the right acquired ends when the tenancy ends unless the tenant obtains a renewal or extension and in this case it attaches to the land for the period of that renewal/extension. Also, if the tenant acquires a superior interest, it attaches to that superior interest.

F. Registration

It is provided in section 35(1) of the LCLRA that an easement or profit can only be acquired under the statutory scheme upon the registration of a court order

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[71] LCLRA, s 36.

[72] See VTH Delany, 'Lessees and the Doctrine of Lost Grant' (1958) 74 *LQR* 82; M Merry, 'Rights of Way and Long User: The English Restriction and the Irish Rule' (2008) 38 *Hong Kong Law Journal* 51; M Merry, 'A Matter of Authority but not of Principle – Acquisition by Lessees of Easements by Long Enjoyment' [2010] *Conveyancer and Property Lawyer* 176; KFK Low, 'The Lost Modern Grant: Untwisting Tangled Tales in a Former Colony' (2011) 127 *LQR* 200; PG Turner, 'Prescription by and against Lessees' [2012] *Conveyancer and Property Lawyer* 19. The Law Commission did not favour moving English law in the direction of the Irish position: Law Commission Report (n 3) 57–58.

under section 35. Where the court is satisfied that the statutory requirements have been satisfied, it is required to make an order declaring the existence of the easement or profit claimed and this must then be registered in the Land Registry or in the Registry of Deeds as appropriate. The registration requirement is designed 'to facilitate conveyancing by ensuring that future purchasers will become aware of the easement's or profit's existence'.[73] However, the scheme in the LCLRA had the disadvantage that it was not possible for an easement to be acquired by prescription without the need for a court action. The further reform in the Civil Law (Miscellaneous Provisions) Act 2011 inserted a new section 49A into the Registration of Title Act 1964,[74] which allowed the Property Registration Authority to register an easement or profit acquired on the basis of prescription, with no need for an application to court, in uncontentious cases. This provides a convenient method, broadly analogous to a long-established procedure in relation to adverse possession,[75] whereby a prescriptive easement or profit can be recognised and registered without the need for litigation.[76]

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[73] LRC, *Report on Land and Conveyancing Law* (74-2005) 124. See J Mee, 'Reform of the Law on the Acquisition of Easements and Profits à Prendre by Prescription' (2005) 27 *Dublin University Law Journal* 86, 102–103 suggesting this idea.

[74] See s 41 of the Civil Law (Miscellaneous Provisions Act) 2011.

[75] See s 49 of the Registration of Title Act 1964.

[76] The procedure is only available where title to the dominant land is already registered or where the application for the registration of the prescriptive easement or profit is made in the context of an application for first registration of the dominant land: see s 49A(2) of the Registration of Title Act 1964, as inserted by s 11 of the Civil Law (Miscellaneous Provisions) Act 2011. This restriction reflects the policy of encouraging the extension of the scope of the land register.

IV. Transitional Issues

Significant difficulties have arisen in relation to transitional issues in respect of the introduction of the new scheme. The handling of such issues is a recurring, if not particularly glamorous, aspect of the work of law reformers. The experience in the present context in Ireland provides a reminder of how badly things can go awry. The original intention was that the LCLRA would introduce a new, improved and simplified prescription regime which would, after a short transition period, replace the old forms of prescription. The transition period was set at three years.[77] However, for reasons that are explained below, serious concerns were expressed by practitioners about the scheme and, as a result, the relevant provisions of the LCLRA were amended by the Civil Law (Miscellaneous Provisions) Act 2011. The effect of this was to extend the transition period to 12 years, the same length of time as the basic prescription period under the new regime set out in the LCLRA.

A. The Problem

The difficulty raised by the LCLRA, in its original form, was as follows. Unlike the Prescription Act 1832, the LCLRA abolishes the other methods of prescription, although preserving their operation for the duration of the transition period.[78]

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[77] s 38.

[78] At least this was the intention of the drafters. However, although the operation of common law prescription and the doctrine of lost modern grant is expressly preserved for the duration of the transition period (by the combination of ss 34 and 38), the repeal of the Prescription Act 1832 is not subject to any qualification: see LCLRA, s 8(1) and Sch 2. The assumption seems to have been that the protection in s 27 of the Interpretation Act 2005 for 'acquired' and 'accrued' rights in the context of a repeal would somehow save ripening claims under the Act: see Wylie, *Irish Land Law* (n 21) 409. Unfortunately, this argument is very weak and, therefore, it seems that the Prescription Act 1832 is not available to claimants, even during the transition period, leading to

The LCLRA states that the acquisition of easements and profits under the old law 'is abolished' (section 34) and that this abolition does not apply where a claim is made under the old law during the transition period (section 38). According to Professor John Wylie, who was centrally involved in the shaping of the 2009 reforms, once the transition period was over, a claimant would no longer be able to rely on common law prescription or the doctrine of lost modern grant even if, before the LCLRA came into force or during the transition period, he or she had satisfied the requirements of the relevant doctrine.[79] The purpose of adopting this strict approach was to ensure that a simplification of the law would be achieved quickly, since the complicated old rules would cease to be of any relevance after the expiry of a short transition period.

It will be necessary at a later point to look more closely at the plausibility of this interpretation of the legislation but, assuming that it is correct, the result is that there would be a nine-year interval, described caustically by Bland as 'the Wylie window',[80] where no prescription claim could succeed. There could be no successful claim under the new regime until a claimant had accumulated 12 years of user after 1 December 2009 (ie until 1 December 2021) and there could be no claim under the old forms of prescription once the three-year transition period ended on 30 November 2012. Therefore, someone who had a claim under

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some practical consequences in terms of prescription involving tenants and possibly in relation to easements of light. Note that a similarly optimistic view of the scope of the Interpretation Act 2005 led the drafters of the LCLRA into serious difficulties in the context of the repeal (without a saver) of important legislation related to the enforcement of mortgages: see *Start Mortgages v Gunn* [2011] IEHC 275 (on BAILII) and the eventual legislative response, the Land and the Conveyancing Law Reform Act 2013.

[79] See JCW Wylie, *The Land and Conveyancing Law Reform Act 2009: Annotations and Commentary* (Haywards Heath, Bloomsbury Professional, 2009) 144.

[80] Bland, 'A Hopeless Jumble' (n 7) 56.

the doctrine of lost modern grant, having accumulated (say) 50 years of user as of right, would be in a very precarious position after the end of the transition period on 30 November 2012. He or she would have no recourse if, before 1 December 2021, the servient owner physically interfered with the exercise of the right or took legal action to prevent its exercise. The claimant would only be able to claim under the new form of statutory prescription if he or she could maintain his or her user until 1 December 2021 and there would be no guarantee that this could be achieved. Thus, all prescriptive entitlements, unless they had been vindicated in court prior to the expiry of the transition period, would become precarious.

The result of this would be that a dominant owner who had satisfied the requirements of the doctrine of lost modern grant would have to be advised to take steps to establish the right before the end of the transition period. Bland argued that the consequences of this would not be appetising:

> The owner of the property accessed by an inchoate right of way over a boreen[81] will have to sue every owner of the land over which the boreen passes…If his land has historically drained into a ditch or other artificial watercourse, he may be faced with any number of potential defendants in a claim for an easement of watercourse. There must be few Irish properties which are not benefited by inchoate rights, such as rights of support, light or conduit. [Litigation would be] necessary unless the servient owner can be persuaded to grant an express right[82]…The result is the creation of discord and enmity between neighbours, the waste of costs, and the bloating of the Circuit Court lists, all for no social purpose.[83]

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[81] A small lane or (probably unpaved) road in the country.

[82] Bland was writing before the 2011 reforms which allow for the possibility of establishing a right without litigation by means of an application to the Property Registration Authority, although only where the servient owner raises no objection sufficient to raise a doubt as to the claimant's entitlement.

[83] Bland, 'A Hopeless Jumble' (n 7) 56.

These comments point towards a key flaw in the approach taken in the LCLRA.[84] In practice, numerous prescriptive entitlements exist that are never the subject of dispute between neighbours. Insisting that such rights must be crystallised by a certain deadline seems likely to lead to a fair deal of unnecessary litigation and the loss of rights held by those who do not realise the need for action.

It will be seen shortly that fears of an avalanche of claims prior to the expiry of the transition period led the Irish legislature to intervene to extend the transition period from 3 years to 12 years. Before this reform is discussed, it is necessary to consider whether the wording of the relevant provisions of the LCLRA does indeed ensure (as the drafters intended) that claims under the old law will be destroyed upon the expiry of the transition period, a question which retains its relevance notwithstanding the extension in 2011 of the length of the transition period. This enquiry raises interesting questions as to the manner in which the doctrine of lost modern grant operates to create easements and profits.

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[84] The original scheme was also capable of generating odd results in the case of claimants whose period of user began before the commencement of the legislation but who could not satisfy the requirements of the old law before the end of the transition period. Consider, eg a claimant whose period of user began in 1994. At the end of the transition period in 2012, the claimant would have clocked up only 18 years of user and so could not succeed under the old law. However, she could not succeed under the new law until she had clocked up 12 years of user after the commencement of the scheme in 2009 – ie not until 2021, when she would have accumulated a total of 27 years of user. In the context of a change in the law that reduced the prescription period from 20 years to 12 years, it is difficult to justify this kind of result – notwithstanding Professor Wylie's suggestion (*Irish Land Law* (n 21) 412) that 'Arguably, any scheme of such transitional provisions was bound to have "winners" and "losers"'. See generally Professor Wylie's discussion of the issues ibid, 409–12, where he is not inclined to concede that the original scheme in the LCLRA 'drew a disproportionate balance beween the interests of dominant and servient owners' (ibid, 412).

B. Does the LCLRA Destroy Claims under the Old Law after the Transition Period?

There is an important difference between a claim under the doctrine of lost modern grant and under the Prescription Act 1832. In relation to the Prescription Act 1832, even after the required statutory period of user has been clocked up, the claimant's entitlement is still inchoate and can be lost if no court action is taken to crystallise the right. On the other hand, a right claimed under the doctrine of lost modern grant is safe as soon as the 20-years user as of right has been clocked up and it is not liable to be lost if the user stops at a later stage. On this basis, it is possible to argue that the right has been established at this point and would not be affected by the subsequent legislative abolition of the doctrine of lost modern grant.[85]

Although it seems clear that this was not the intention of the drafters, there is some support in the LCLRA for this understanding of the implications of the LCLRA's abolition of the doctrine of lost modern grant. In stating the position that will prevail after the expiry of the transition period, section 35 merely states that

> an easement or profit shall be acquired at law by prescription only on registration of a court order under this section.

This provision is phrased in the future tense and would not appear to affect the position of a person who, prior to the commencement of the section,

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[85] See Pearce and Mee, *Land Law* (n 70) 286. Note that the reform proposed in England would ensure that 'if an easement has actually been acquired under the old law at the point of reform then any dispute about it will be determined according to the old law': Law Commission Report (n 3) 64. The Law Commission simply assumed that, if a claimant 'has already met the demands of common law prescription or, far more likely, lost modern grant, at the date of reform then an easement has already arisen by prescription and there is no transitional issue at all': ibid.

had already 'acquired' an easement on the basis of the doctrine of lost modern grant. Also consistent with this view is the phrasing of section 34, which states (subject to section 38) that acquisition under the old law

> is abolished and after the commencement of this Chapter acquisition by prescription shall be in accordance with section 35.

There is no express indication that the abolition of the old law is to be retrospective. Even if acquisition under the old law 'is abolished' from now on, that would not affect acquisition which has already occurred, and the same argument applies to the statement that, once the abolition of the old law takes place, acquisition 'shall be' (seeming to mean 'shall in future be') in accordance with the new law.

The counter-argument to the above interpretation of the LCLRA is that, even though a claim under the doctrine of lost modern grant can be said to be 'in the bag' after 20 years of user as of right, the effect of the LCLRA is to take away the bag. Even if a person has the necessary elements for a successful claim under the doctrine of lost modern grant, he or she needs the doctrine to survive to allow that claim to be made. This is not altered by the fact that, while the doctrine survived, he or she could have – but did not – make a claim under the doctrine.[86] It could, of course, be argued that this result is unfair, and potentially in conflict with the protections for property rights in the Irish Constitution of 1937[87] and/or with the European Convention on Human Rights.[88] The provision

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[86] If the doctrine of lost modern grant had been contained in a statutory provision, it might have been argued that, on the repeal of the relevant statute, s 27 of the Interpretation Act 2005 would have preserved rights which had been acquired or accrued prior to the repeal. However, the doctrine is not statutory and so the effect of its abolition is not governed by s 27.

[87] Bunreacht na hÉireann, art 43 and art 40.3.2.

of a transition period, however, makes this argument somewhat more difficult and the drafters of the LCLRA clearly did not see any problems in this respect. While the point seems to be unclear, the following discussion proceeds on the basis that the effect of the LCLRA 2009 is indeed that an easement or profit 'acquired' under the old law prior to 1 December 2009 is liable to be lost if no action is taken to vindicate it before the end of the transition period.

C. Extension of the Transition Period

In response to the concerns that were expressed about the original scheme in the LCLRA, the Civil Law (Miscellaneous Provisions) Act 2011 extended the transition period to 12 years.[89] This was intended to eliminate the nine-year window during which no prescriptive acquisition would have been possible. The key question is whether the simple tactic of extending the transition period to 12 years is sufficient to address the problems that were identified with the original scheme. Assuming once more that the drafters' interpretation is correct, the revised law is still capable of depriving people of rights already 'acquired' under the old methods of prescription merely because they fail to take action to vindicate them during a transition period.

The problem was admittedly much more acute when the transition period was three years. As has been seen, prior to the extension of the transition period, a claimant who had satisfied the requirements of the doctrine of lost modern

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[88] See art 1 of Protocol 1 of the European Convention and the European Convention on Human Rights Act 2003 (Ireland).

[89] See s 38 of the 2011 Act, amending s 38 of the LCLRA. The relevant changes to the law followed upon a submission made to the Department of Justice by the Law Society of Ireland, the professional body representing solicitors in Ireland.

grant would, unless he or she took steps to crystallise the right during the transition period, become vulnerable to losing the right during a nine-year window. During this window, there would be no possibility of making a successful claim even if the claimant's user continued right up to the time of the dispute – this is because the old law would no longer apply but the claimant could not yet satisfy the requirements of the new law by showing 12 years of user after the new scheme came into force. After the 2011 reforms, however, if a dispute arises after the expiry of the extended transition period of 12 years, it will normally be possible for the claimant to crystallise his or her right by claiming under the new 12-year prescriptive period, provided that he or she takes action within one year of the right ceasing to be enjoyed. However, a difficulty would arise if, at any point after the expiry of the transition period, the claimant ceases to use the right for a year or more. This could easily happen, for example if the then owner of the dominant land is an older person who has lost his or her ability to exercise the right due to infirmity. The benefit of all the previous years of user would be lost in this event and the right could only be claimed successfully if a further period of 12 years of user had elapsed by the time any dispute arises. Also, if the claim happens to relate to state-owned land, in respect of which the prescription period is much longer, the dominant owner will not be able to make a successful claim under the new law until long after the 12-year transition period has expired.[90]

[90] This problem is pointed out by Bland, 'A Hopeless Jumble' (n 7) 57. A claimant could not reach 30 years user as of right (or 60 years in the case of foreshore), so as to be able to rely on the new statutory scheme, until 2039 (or 2069).

There would also be a problem if the running of the 12-year period had been suspended due to the mental incapacity of the servient owner in circumstances where it was not reasonable to expect someone else to act on his or her behalf.[91] The effect of a suspension triggered by mental incapacity would be to ensure that, even though the 12-year transition period had expired, the claimant could not satisfy the requirements of the new law by showing 12 years of user after the new scheme came into effect. This in turn would mean that the claimant's right could be defeated even if his or her enjoyment continued to the end of the transition period and right up to the time that a dispute arose (after the servient owner's land came into the hands of someone with mental capacity). A dominant owner might not be in a position to judge whether one of his or her neighbours was, for example, beginning to suffer from dementia and so lacked mental capacity in a way that would trigger a suspension of the prescription period. Therefore, it seems that the general advice to land owners would have to be that there was a risk that a prescriptive right could no longer be protected if it did not crystallise during the transition period. In principle, it would be prudent for all land owners to consult their solicitors and obtain advice as to whether, in their individual circumstances, they might be at risk of losing important rights if they did not take steps to vindicate them. Thus, when the 2021 deadline draws closer, there could again be concerns about an avalanche of claims or at least about the creation of widespread uncertainty on the part of landowners as to whether legal action needs to be taken. It may be, therefore, that the Irish

[91] See s 37 dealing with mental incapacity on the part of the servient owner.

scheme is, even after the reforms of 2011, still unsatisfactory and needs to be reformed (again) prior to the end of the extended transition period in 2021.

V. Conclusion

The new Irish scheme in relation to the acquisition of easements by prescription is an ambitious one. It has run into difficulties because of its aggressive approach to the destruction of claims based on the old law. At a theoretical level, there is an appeal to the idea of tidying up the position in relation to prescriptive rights, by requiring those with claims under the old law to advance them within a transition period and imposing a requirement that thereafter any claims must be made within a year of the right ceasing to be used. However, in practice, this approach has the disadvantage of encouraging litigation in relation to matters that otherwise might never have become the subject of dispute. There is much to be said for the Law Commission for England and Wales's view that the avoidance of litigation should be one of the principles guiding the reform of the law of prescription.[92] Modifications to the Irish scheme in 2011 have improved the situation somewhat but do not seem to have eliminated all the problems. Therefore, although some of the choices made by the Irish legislators are worthy of consideration by legislators in other jurisdictions, in some respects the story of the Irish reforms constitutes the cautionary tale promised in the title of this chapter.

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[92] Law Commission Report (n 3) 54–55.