

A defence of estates and feudal tenure

GRAEME WATT

*Barrister of the Inn of Court of Northern Ireland**

Introduction

In a land law consultation paper of 2009, the Northern Ireland Law Commission (NILC) made the following recommendation: ‘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.’¹ In its report the commission restated this recommendation.²

The purpose of this article is to suggest that the doctrine of estates and the concept of feudal tenure both have meaningful contributions to make to our understanding of land law. Also that there are certain aspects of our present law which are difficult not only to conceptualise, but in fact to accommodate outside the framework of a doctrine of estates. Furthermore, that the changes proposed by the Law Commission will, in reality, preserve the essence of both ideas while abolishing much of the assistance that they give in forming an accurate picture of what we mean by landholding or land ownership.

The development of estates and feudal tenure

The consultation paper itself provides a short definition of estates and tenure. Tenure governs the terms on which the landowner holds the land; the doctrine of estates determines for how long that interest is held.³ A system based on tenure is one where rights in the land are granted by (or ‘held of’) another. In the common law system as it currently operates in this jurisdiction and England and Wales, the highest interest in land is possessed by the Crown. The corollary of this is that absolute ownership (allodial land) is unknown to the common law of Northern Ireland.

The consultation paper also gives a brief history.⁴ It recites the fact that the feudal system was brought to England by the Normans in 1066 and was later exported to Ireland. The fundamental principle was that the Crown had acquired title to all land and that its subjects could only hold land from a superior lord and ultimately from the Crown.

* MA (Oxon).

1 NILC 2 (2009) 35.

2 NILC 8 (2010) para 2.3.

3 NILC 2 (2009) para 2.5. See also C Harpum, S Bridge and M Dixon, *Megarry and Wade: The Law of Real Property* (8th edn Sweet & Maxwell 2012) para 2–006.

4 NILC 2 (2009) paras 2.1–2.19.

Land was held from the superior lord (as that lord's tenant) on various conditions, the breach of which could lead to the forfeiture of the land. The most that a tenant could hold was an estate in the land and not the land itself. The estate was the length of time that the tenant's interest would last. More than one estate could exist in the same parcel of land at the same time.

It should be acknowledged that the full effect of the medieval system was not experienced in that part of Ireland now found within the borders of Northern Ireland. As is well known, in the medieval period English influence in Ireland waxed and waned and only ever took permanent root around the Pale. The application of English laws was only accomplished in Ulster during the plantation, by which time the medieval system of estates and tenure was already declining in England.⁵

In its medieval heyday the conditions subject to which land was held were properly known as services. Tenants in the feudal hierarchy owed services to their lord and might in turn be owed services by their own tenants. In addition to services, the occurrence of certain events (incidents) gave rise to other rights benefitting the lord. These services and incidents were many and various and reflected the society in which they were developed. A brief survey is offered here in the full knowledge that discussion of these incidents has the tendency to lead to the conclusion that the system in which they operated has no application whatsoever in the present age.

There were four free⁶ tenures: frankalmoign, knight's service, socage and serjeanty. The first was an ecclesiastical tenure by which the holder was obliged to perform religious devotions (prayers for the lord, Masses for his immortal soul and so on). The second is the tenure which, to the modern mind, most sharply evokes the medieval world. It was this tenure by which the lord's tenants were obliged to supply armed men. However, the obligation was only ever to provide men for 40 days and this was of little military utility if an overseas expedition was planned. In England the military aspect of the tenure had in fact fallen into abeyance by the early fourteenth century.⁷ On the other hand, the tenure gave rise to incidents which continued to be of value to the lord. Socage was the default tenure and involved provision of agricultural services and payment of money. Serjeanty involved the provision of services to the king and was divided into grand and petty.⁸

Medieval incidents included the right of the lord to the fealty of his tenants and, where the tenure was knight's service, to homage. Fealty was an oath; homage a ceremony. The lord was also entitled to the wardship of his deceased tenant's children during their minority

5 L. Fox O'Mahony, 'Something Old, Something New, Something Borrowed: Land Law Reform in Northern Ireland' [2011] *Conveyancer and Property Lawyer* 355, 362.

6 Unsurprisingly, there were also unfree tenures, typically held by that stock figure of the English medieval period, the villein. Originally, unfree tenure was only recognised in the court of the lord of the manor and not by the royal courts of common law. This tenure came to be known as copyhold and by the sixteenth century had been recognised by the common law. Copyholds were converted into freeholds in England by the Law of Property Act 1922. J. C. W. Wylie's treatment of the subject (*Irish Land Law* (4th edn Bloomsbury 2010) 2.30–2.34) concludes that any vestigial significance of copyholds in Ireland would not have survived the land purchase legislation.

7 This also appears to have been the position in Ireland: Wylie (n 6) para 2.18.

8 Such as carrying the king's banner or holding his head when he felt seasick(!): *Crown Estate Commissioners v Roberts* [2008] 2 EGLR 165. Wylie (n 6) para 2.27 says that serjeanty may not have been prevalent in Ireland; although the Marquesses of Ormonde claimed the title of Hereditary Chief Butler (wine server to the sovereign) of Ireland: M. Bence-Jones, *Twilight of the Ascendancy* (Constable 1987).

and the right to decide whom they should marry.⁹ It should, however, be noted that these incidents were only appurtenant to tenure in knight's service and grand sergeanty and therefore generally only affected those at the top of feudal society. No lord was permitted to arrange a marriage which disparaged his ward.¹⁰ Another incident was the right to relief: the payment that an heir had to make to a lord to succeed to his predecessor's tenancy.¹¹ A further service, aid, was a payment to the lord on the occurrence of certain set events: knighting of the lord's eldest son, marriage of his daughter and the ransoming of his body.¹² Escheat is dealt with below.

The modern history of feudal tenure begins with the Tenures Abolition Act (Ireland) 1662 which abolished most of the ancient forms of feudal tenure and converted existing tenures into free and common socage, today known as freehold.¹³ The only important incidents of tenure which remained were escheat and forfeiture. The Crown's prerogative rights regarding the latter were abolished by the Forfeiture Act 1870. Escheat, however, remains.

Escheat as a vestigial incident of tenure

In medieval times if a tenant in fee died without leaving an heir, his estate fell to the immediate lord by way of escheat.¹⁴ This was escheat *propter defectum sanguinis*. Prior to the Statute of Westminster 1290 (*Quia Emptores*) any number of fee simple estates could exist in the same land by process of subinfeudation. There could thus be any number of lords and tenants for the one parcel of land.¹⁵ Any lord under the Crown was known as a mesne lord. The statute prohibited that practice and as a result the number of tenants in fee decreased over time until only one tenant in fee was left, holding directly of the Crown.¹⁶

9 See J H Baker, *Introduction to English Legal History* (4th edn OUP 2002) 238–40. The system was open to abuse but was not without rationale in the context of its time. For example, while the lord had a right to the tenant's land during the wardship, he had also an obligation to raise the tenant's heir. Baker says that after the Statute of Marlborough 1267 the lord was in effect trustee for his tenant's heir.

10 Magna Carta 1215, c 6. No ward could be married to someone (i) below him or her in social status, (ii) legally unsuitable such as a bastard or (iii) physically unsuitable such as someone who was deformed or past the age of childbearing: Baker (n 9) 240.

11 The heirs of a knight's fee were to pay 100 shillings by Magna Carta 1215, c 2. In Bracton's time a tenant in socage had to pay a year's rent: F Pollock and F W Maitland, *History of English Law* (2nd edn 1898, reprinted by Liberty Fund) vol I, 326.

12 Magna Carta 1215, c 12.

13 Wylie (n 6) para 2.51. See also *Re Walker's Application for Judicial Review* [1999] NI 84 at 88 (Girvan J) for a discussion of freehold and tenure and estates generally. Something should also be said about the term 'freehold' which started out being a description of tenure and is now used to describe an estate. As the types of free tenure diminished in importance, the term came to describe the duration of the interest rather than the terms on which it was held: W S Holdsworth, *An Historical Introduction to the Land Law* (1st edn OUP 1927) 52.

14 Baker (n 9) 239. The word comes from *eschier* (to fall).

15 This example is given by Pollock and Maitland (n 11) 247: 'Roger of St German holds land at Paxton in Huntingdonshire of Robert of Bedford, who holds of Richard of Ilchester, who holds of Alan of Chartres, who holds of William le Boteler, who holds of Gilbert Neville, who holds of Dervorguil Balliol, who holds of the king of Scotland, who holds of the king of England.'

16 There was, in effect, a collapse of the feudal pyramid as the multiple fee simple estates came to an end by escheat or forfeiture. Typically, only one fee simple would exist today, although it is theoretically possible that more than one fee could have survived from before 1290. There is a recognition of this theoretical possibility and a simultaneous rejection of its practical significance in *Re Lowe's Will Trusts* [1973] 1 WLR 882, 886.

Consequently, escheat came to be of most significance to the Crown.¹⁷ The right of free tenants to dispose of their land by will reduced the importance of escheat yet further.

Today, if a landholder dies leaving no successors, the Crown (as the Law Commission recognises) will succeed to the land as *bona vacantia* by virtue of s 16 of the Administration of Estates Act (Northern Ireland) 1955. The same Act abolished escheat to the Crown (or a mesne lord) for want of heirs.¹⁸ It is difficult to see any great distinction between escheat as it existed prior to 1955 and the present application of *bona vacantia*. If anything escheat provided a more conceptually accurate analysis of the situation where land is without any apparent successor. This is because historically *bona vacantia* was a response to the problem posed by ownerless property. Blackstone cites Bracton:

*Haec quae nullius in bonus sunt, et olim fuerunt inventoris de iure naturali, iam effiuntur principis de jure gentium.*¹⁹

Its application therefore might make sense in the case of personal property where abandonment is possible;²⁰ however, while physical abandonment of land is obviously possible, this of itself does not equate to abandonment of title in law. Land must have an owner at all times, as was recognised by the Privy Council in *Ho Young v Bess* where it was said to be a ‘general principle’ that:

. . . the law abhors a vacuum and that title to land must always be in someone, whether the Crown or a subject . . .²¹

Escheat recognised the idea that land should never be without an owner by ensuring that, upon the absence of a successor to a deceased owner, the Crown would be able to insist on its seigniorial right of ownership. *Bona vacantia* achieves the same outcome but leaves room for a misunderstanding to arise that the Crown is picking up something that was previously without ownership.

The submission made at this point in the argument is that the feudal concept of escheat provided a convenient method for dealing with land where there was no apparent successor to the deceased landholder. Since in Northern Ireland *bona vacantia* fulfils the same function as escheat, we can therefore conclude that the principle underlying the medieval doctrine is regarded as having some usefulness. If further support were required we could note that in the Republic of Ireland feudal tenure was abolished by the Land and Conveyancing Law Reform Act 2009 but the rights of the state as ‘ultimate intestate successor’ have survived.²²

17 Holdsworth (n 13) 34.

18 S 1(5).

19 I BI Comm 299. Those things which are no person’s and formerly belonged to the finder as by natural right, become now the property of the king by the law of nations.

20 F Pollock and R Wright, *Possession in the Common Law* (OUP 1888) 44. An owner achieves abandonment by ‘quitting possession without any specific intention of putting another person in his place’. See also D Sheehan, *Principles of Personal Property Law* (Hart 2011) 24–5.

21 [1995] 1 WLR 350, 355E. The 1955 Act itself recognised this principle at s 3: where the deceased dies intestate or without nominating executors, the property vests immediately in the probate judge.

22 S 73(1) of the Succession Act 1965 which remains unaffected by the 2009 Act (see Schedule 2, pt 5). In Scotland, where feudal tenure has also been abolished (Abolition of Feudal Tenure etc. (Scotland) Act 2000), the whole concept of *bona vacantia* is obscure. This is due, apparently, to the fact that the law of Scotland regards intestate succession as impossible on the ground that no man is without a blood relative: *Stair Memorial Encyclopaedia*, vol 17, para 343. In fact, consideration of ss 11–12 of the 1955 Act suggests that the law of Northern Ireland takes the same view.

The Crown's ancient seigniorial right to escheat in the strict sense is extant in three known instances when a freehold estate determine:²³

- a where a trustee in bankruptcy or liquidator disclaims onerous property in a bankruptcy or winding up;
- b where a company is dissolved and the property passes as *bona vacantia* to the Treasury Solicitor *and is then disclaimed* by the Solicitor under s 1013 of the Companies Act 2006;
- c where the Crown makes a grant directly from its own lands and a reserved right of re-entry is triggered.

In these cases, as in succession law, the doctrine of escheat serves the useful purpose of providing for the case where land has no other obvious owner. When one looks at the proposals for reform, the Crown's rights are preserved in the three instances cited above although it would succeed to the land not as an escheat but as *bona vacantia*.²⁴ This merely puts the present scheme on a statutory footing and appears to alter only the name. But, as suggested above, the use of *bona vacantia* as the means of achieving the desired result may introduce the misunderstanding that the Crown is picking up land to which no person has title.

In actual fact, to preserve the Treasury Solicitor's right to disclaim *bona vacantia* land, the Law Commission's draft Bill provides that, even though escheat is abolished, where the Treasury Solicitor disclaims land, the land will vest in the Crown as if it were an escheat.²⁵ The reader is left to decide whether this constitutes a simplification.

The function served by tenure: the limits of 'ownership'

As stated above, tenure is concerned with the terms upon which land is held. The estate determines for how long. If we turn first to tenure, it is submitted that no matter how one conceptualises land holding there is no escaping the fundamental proposition that land must be held subject to some terms, or, in other words, such competing rights as are recognised by the law.

The consultation paper states:

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 hold it in fee simple.²⁶

If the proposed abolition of tenure and estates were enacted, the second sentence would, of course, be true but it is not clear that the proposed system of allodial ownership would add or subtract from the rights and duties currently enjoyed and borne by the tenant in fee simple absolute in possession. They would be neither more nor less owner than they are at present. The label would have changed but what else?

If anything the alteration in nomenclature, which suggests an untrammelled vision of landholding, hinders an accurate understanding. The reality is that all 'ownership' is only a

23 *Megarry and Wade* (n 3) para 2–023. The freehold does not pass to the Crown; the Crown cannot hold land of itself and thus cannot be possessed of freehold.

24 NILC 8 (2010) para 2.9.

25 NILC 8 (2010) 147 (Draft Land Law Reform Bill (Northern Ireland) cl 2(2)).

26 NILC 2 (2009) para 2.41.

collection of rights which are in competition with rival rights.²⁷ Indeed, it is in the sphere of real property that the ‘bundle of rights’ theory appears in perhaps its sharpest focus.²⁸

The importance of the function served by tenure can be highlighted by examining problems with the notion of ‘ownership’.

A. OWNERSHIP VERSUS BUNDLES

The primary proponent of the bundle theory was Wesley Hohfeld who noted that rights *in personam* were distinct claims that one person had on another. Rights *in rem* were claims that one person had, or potentially had, against a very large group of people (or, more lyrically, ‘against the whole world’).²⁹ Hohfeld distilled the distinction between the two classes down to one of quantity: a right *in rem* was merely a large collection of personal claims.³⁰

In *The Idea of Property in Law*, J E Penner argues that rights of ownership (*in rem*) do exist without that reference to a personal relationship which characterises *in personam* rights. Penner’s argument is that, aside from those to whom the owner of property has made certain specific grants of rights, the rest of the world’s obligations regarding that property (distilled to the duty not to trespass upon it) exist regardless of the particular identity of the owner of the property.

Penner gives the example of a transfer of Blackacre from A to B. If the Hohfeldian analysis is correct, then what has happened is a transfer from A to B of all the various duties which A was owed by the whole world. Penner rejects this analysis and says that the better explanation is that there has been simply a transfer of the right *in rem* from A to B and that the remainder of the world remains unaffected:

Everyone else maintains exactly the same duty, which is not to interfere with the use and control of Blackacre. It matters not in the least to C, one of the multitude, who owns Blackacre.³¹

Exploring the soundness of Penner’s theory, let us consider it against the example he gives of the transfer of Blackacre from A to B. The generality of the proposition that it matters not to C who owns Blackacre would be undermined if it were possible to identify one or more specific Cs in the multitude whose duties in respect of the *res* (Blackacre) differed according to who the ‘owner’ was. It is submitted that one such person would be a trustee in bankruptcy where Blackacre is acquired by or devolves upon an undischarged bankrupt pursuant to Article 280 of the Insolvency (Northern Ireland) Order 1989. If the owner is the bankrupt, the trustee will have extensive rights over Blackacre including the right to claim the property (we could equally say that he will have no duty to refrain from trespassing). However, if the owner is someone else, the trustee’s rights will correspondingly be fewer (or his duties more numerous).

Further arguments against Penner’s theory are presented by Shane Glackin in ‘Back to Bundles: Deflating Property Rights, Again’.³² Glackin notes that, for Penner, a right *in*

27 See J F Garner, ‘Ownership and the Common Law’ (1986) *Journal of Planning and Environment Law* 404.

28 William Swadling, ‘Ignorance and Unjust Enrichment’ (2008) 28 *Oxford Journal of Legal Studies* 627 states at 640 that, ‘despite what a layperson might think, English law has no notion of “ownership”’. He notes that this is not a problem in real property where over time a rich variety of competing named rights (e.g. easement) has been developed which obviates the need to fall back on the imprecise term of ownership.

29 *Parish of Honiton v St Mary Axe* (1710) 10 Mod 9; 88 ER 600. In that case a liability to the whole world.

30 J E Penner, *The Idea of Property in Law* (OUP 1997) 23.

31 *Ibid* 23.

32 S Glackin, ‘Back to Bundles: Deflating Property Rights, Again’ (2014) *Legal Theory* 1, 10.

personam is dependent on knowing which particular person is the duty bearer or the right holder, whereas for a right *in rem* this knowledge is not necessary.³³ Glackin is prepared to accept that such knowledge might be necessary in the case of the person claiming a special right e.g. a licence to walk Blackacre; however, he goes on to say:

This in no way entails that the rights and duties we assume in default of being specifically exempted – such as the duty to avoid trespassing on the property of others – are any less *in personam* than the exceptional ones we are granted specifically.

When we descend from the jurisprudential level it becomes clear that this is so. If C does infringe A's property rights by walking on his land then A must vindicate his right by action and when he does so the action will be brought in A's own name against C seeking damages from C personally or an injunction to restrain trespass which likewise is directed at C personally.³⁴

The criticism which Glackin levels at Penner which is most germane to the argument presented herein is, essentially, that Penner's argument is an overly complex way of describing how property law works in practice. Glackin says, that Penner's attempts, 'to shoehorn various aspects of property law into . . . this concept of a "single, coherent right" can only be described as tortuous'. In an analogy with the simplicity of Copernicus's astronomy compared to the layers of unnecessary complexity required to keep the then-prevailing Ptolemaic theory in business, Glackin asks why it is necessary to provide a unified theory of ownership when the bundle analysis more accurately represents how property law actually works:

William of Ockham's injunction that [entities are not to be multiplied beyond necessity] would serve perfectly as an epigram for the bundle theory and its insistence that the phenomenon of property can be fully explained on the basis of the individual 'sticks' without any appeal to a wider, all-encompassing relation of 'property ownership'.³⁵

By examining something of the complexity of landholding we can see just how unreflective of reality the unified concept of ownership is.

B. THE COMPLEXITY OF INTERESTS IN LAND

Firmly rejecting Penner's thesis, Glackin notes that it is in the doctrine of estates where the bundle analysis can be most clearly seen. That doctrine:

. . . introduces further, more exotic interests; I may acquire the right of occupation in an apartment from you, perhaps supplemented by various easements and rights of access, though my right to alienate it may be restricted by the terms of the license. You may in turn have only a life interest in that apartment, with a reversion vesting in a relative upon your death. These arrangements are subject to revision over time in response to economic and

33 Glackin (n 32) 10.

34 There are a number of scenarios where some person or group of persons might bring the action instead, e.g. where A dies and his executors are named as plaintiffs. However, this only strengthens the submission that the action is, in all cases, a personal one: our law would not accord standing to a plaintiff stated as 'the owner for the time being of Blackacre'. Whoever acts as plaintiff in the case of C trespassing on A's land will require to know who C is and a great many other personal details about her.

35 Glackin (n 32) 13. At one point Penner (n 30) seems to agree with this view thereby undermining his entire thesis. In *The Idea of Property in Law* at 144, he says that 'an "owner" is one who has property rights'.

social circumstances and can thus vary substantially from jurisdiction to jurisdiction, with many local peculiarities developing.³⁶

The various interests in land held by those other than the freeholder allows one to see the extent of the restrictions which would confront the person who, in the words of the Law Commission, ‘would own the land itself’: use of land must be in accordance with the criminal law and one could not, for example, use it to grow prohibited substances;³⁷ one may not use land in such a way as to unreasonably interfere with your neighbours’ land;³⁸ what one can build on the land is subject to restriction,³⁹ likewise how one builds there;⁴⁰ land use is subject to the restrictions imposed by way of freehold covenants;⁴¹ land is liable to compulsory purchase;⁴² land is liable to vest in a trustee in bankruptcy in the event of personal insolvency;⁴³ land is liable to be sold by creditors in order to satisfy outstanding court judgments.⁴⁴

At the practical level (where the Law Commission’s reforms are presumably directed) real property disputes rarely, if ever, revolve around the vindication of ‘ownership’. In the average case the holder of title to the land seeks to vindicate one or more of the discrete rights which are attendant on that title.⁴⁵ Therefore the term ‘ownership’ ‘is at best an imprecise placeholder for what really matters – which individual bears the particular stick or sticks relevant to the legal dispute in question’.⁴⁶

There is nothing to suggest that Penner and those who reject the bundle theory deny that landholding is as complex as has been suggested here.⁴⁷ The criticism is that the unified concept of ownership at best disguises and at worst distorts precisely what is involved when discussing rights in land. Accepting that ‘ownership’ is fully consistent with all the many restrictions placed upon it by our land law is little more than accepting that ‘ownership’ means whatever we (or a particular theorist) want it to mean; a problem addressed by Lord Atkin in *Liversidge v Anderson*.⁴⁸

However, while Penner’s theory of ‘ownership’ is capable of accommodating the present (and inescapable) complexity of landholding, it is far from certain that the same could be said for the concept of ownership proposed by the Law Commission. We will address this below when we examine the doctrine of estates and particularly the issue of relativity of title.

36 Glackin (n 32) 3–4.

37 Misuse of Drugs Act 1971, s 8.

38 Which might even restrict what one can have for dinner in one’s own home: *Adams v Ursell* [1913] 1 Ch 269.

39 Planning (Northern Ireland) Order 1991, Article 12.

40 Building Regulations (Northern Ireland) 2012.

41 Such as a covenant to preserve a boundary: Property (Northern Ireland) Order 1997, Article 34(4)(a).

42 Any number of provisions such as the Roads (Northern Ireland) Order 1993, Article 110.

43 Insolvency (Northern Ireland) Order 1989, Article 279.

44 Judgments Enforcement (Northern Ireland) Order 1980, Article 52.

45 Holdsworth (n 13) notes at 13 that from its inception the writ of right used to recover a freehold interest, developed at a ‘time when the chief concern of the law was to adjudicate upon a dispute between litigants – to a time when it had not begun to analyse the conceptions of ownership and possession’.

46 Glackin (n 32) 5.

47 For example Penner (n 30) says at 74: ‘The right to property is like a gate, not a wall. The right to property permits the owner . . . to make a social use of his property . . . by selectively allowing some to enter.’ Aside from this recognition of the right to grant diverse interests, Penner also notes and recognises (at 103) that the expropriation by the state of property is possible.

48 [1942] AC 206 at 245: “When I use a word,” Humpty Dumpty said in rather a scornful tone, “it means just what I choose it to mean, neither more nor less.” “The question is,” said Alice, “whether you can make words mean so many different things.” “The question is,” said Humpty Dumpty, “which is to be master – that’s all.”

C. PHILOSOPHICAL OBJECTIONS TO ABSOLUTE OWNERSHIP

There are also philosophical reasons for exercising caution in relation to the idea of absolute ownership (which do not involve a denial of the concept of private property). In his treatment of the subject, John Finnis cites Aristotle:

property ought to be common in a sense . . . possessions should be privately owned, but common in use; and to train the citizens to this is the special task of the legislator.⁴⁹

Finnis recognises that private property is necessary if for no other reason than that recognition of private property rights is essential (presuming self-interest as the principal motive of human conduct) if property is to be well managed and maximally productive. The minimum attributes of private property are that the property should be ‘more or less’⁵⁰ (i) exclusive to the owner, (ii) immune from divestment and (iii) transmissible. However, Finnis goes on to suggest that the law’s protection of these attributes should not be unconditional if ownership is to be ‘distributively just’.⁵¹ He recognises that natural resources are essentially ‘common stock’, albeit apt for distribution as private property, and goes on to note the limits to private property:

Beyond a certain private point, what was commonly available but was justly made private, for the common good, becomes again, in justice part of the common stock; though appropriated to his management and control, it is now not for his private benefit but is held by him immediately for common benefit . . .⁵²

If it appears that the limits to private property involve the imposition of duties on the owners, that is entirely the conclusion Finnis wishes us to draw. Property owners are obliged by justice to put their property to productive use;⁵³ to make the surplus yield of their property available for re-investment and consumption; to provide gainful employment; to endow charities and to relieve poverty.

Land is specifically and unsurprisingly cited by Finnis as an example of property once in the common stock⁵⁴ and it is submitted that in the various rights, noted above, held by those other than the freeholder we encounter a very clear echo of Finnis’s thesis. While his thesis is general and the instances cited above are highly specific, it is submitted that in each of the limitations to which land use is subject we do not need to look very far to see duties owed to the common weal. If a substance has been categorised as harmful to society (or certain members thereof), you may not use your land to produce it; neighbours must live peaceably with one another; land must be available if it is necessary for some scheme possessing utility for society at large; land must be available to satisfy lawful debts (including debts due to the public revenue the resources of which are used to fund the schemes just mentioned).

49 J Finnis, *Natural Law and Natural Rights* (OUP 1980) 171.

50 How much ‘more’ or ‘less’ is a task for which the present subtle system is eminently suitable.

51 A disposition is distributively just if it is a reasonable resolution of a problem of allocating something that is essentially common but which needs to be appropriated to individuals for the sake of the common good: Finnis (n 49) 166–7.

52 Ibid 173.

53 Here we might find a jurisprudential basis for the doctrine of adverse possession. See the discussion in S Jourdan and O Radley-Gardner, *Adverse Possession* (2nd edn Bloomsbury 2011) 3–17ff.

54 Finnis (n 49) 167.

We should, perhaps, not move on from this philosophical discussion without at least noting the existence of the ‘progressive property’ school of thought that has developed in the USA. The fundamentals of the idea appear in a short *Statement*.⁵⁵ Among the principles are the following:

Property confers power. It allocates scarce resources that are necessary for human life, development, and dignity. Because of the equal value of each human being, property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation.

Property enables and shapes community life. Property law can render relationships within communities either exploitative and humiliating or liberating and ennobling. Property law should establish the framework for a kind of social life appropriate to a free and democratic society.

The progressive school would agree (to say the least) with the submission above that land must be available if it is necessary for some scheme possessing utility for society at large. Of course, agreement with this submission is only the starting point of a long discussion about what constitutes utility and what interference is permissible to realise it. The progressive school adopts a radical standpoint on these issues.⁵⁶ The only point it is necessary to make here is (the blindingly obvious one) that a denial of the existence of absolute ownership does not oblige one to take an equally radical approach.

The aim so far has been to demonstrate that land use is subject to restrictions imposed by the law. It is the law which ‘makes’ private property⁵⁷ and it is the law which regulates it. All landholding is to that extent at the sufferance of the law and talk of absolute ownership is misleading at best and erroneous at worst.

Next though we must address a potentially controversial proposition: the impossibility of absolute ownership on the part of a private person is inextricably bound up with the idea that only the Crown may fully own land.

A problem with tenure: the position of the Crown

The potential controversy arises because it may be argued that the Crown is ill qualified to act as the ultimate repository of ownership. There is a general and a specific objection.

The general objection is expressed by Professor Wylie who has written that the abolition of feudal tenure in the Republic of Ireland was brought about in part because the notion of all land being held ultimately from the state as an expression of the fealty due to the state was held to be inconsistent with the principles of a modern, democratic state governed by a written constitution.⁵⁸ The answer to this objection is that the recognition of the state as

55 (2009) 94 Cornell Law Review 743 <<http://cornelllawreview.org/articles/a-statement-of-progressive-property>>. I am grateful to an anonymous reviewer for introducing me to progressive property.

56 In one article on the subject, ‘The Ambition and Transformative Potential of Progressive Property’ (2013) 101 California Law Review 107 <<http://scholarship.law.berkeley.edu/californialawreview/vol101/iss1/5>>, Ezra Rosser notes at 111 that ‘efforts to change property law from the inside – through use of property concepts alone – are unlikely to bear fruit’. The same article also notes that the progressive approach might extend to land redistribution (not that radical to real property lawyers in Ireland). It would be fair to say that ‘progressive property’ straddles the porous border between the jurisprudential school and political activism.

57 ‘Our property is nothing but those goods, whose constant possession is establish’d by the laws of society.’ David Hume (1798) ‘A Treatise of Human Nature [1739]’ in L A Selby-Bigge and P H Niddich (eds) (Clarendon Press) 491. Cf. Bunreacht na hÉireann, Article 43(1).

58 Wylie (n 6) 2.53. It is assumed that Wylie is criticising the imposition of fealty onto landowners rather than lamenting the denial of its benefits to non-landowners.

supreme landowner is meant to embody the limited rights of land holders under the law and the interdependence of citizens on each other. It is submitted that this is, in fact, profoundly expressive of firm democratic ideals (particularly where threats to democracy are seen to originate in the concentration of much capital in the hands of a few).

However, to address the general objection in the particular context of the Republic of Ireland, it should perhaps be noted that Bunreacht na hÉireann is explicit that, 'Fidelity to the nation and loyalty to the State are fundamental political duties of all citizens.'⁵⁹ The common law principle of *protectio trahit subjectionem* also appears to be recognised in the Irish Republic.⁶⁰ So, as in most (all?) states, fealty is demanded anyway, whether one owns land or not.

We can also call on Penner to offer a vindication of the idea that land is held of the Crown. Penner does not believe that holding land directly of the Crown is inconsistent with his theory of ownership provided the former is regarded as synonymous with the latter. In fact, he believes that tenure conveys the important fact that land is not merely property but also the territory of the state. It follows from this that the ability of a landowner to enjoy her land depends on the state's ability to hold its territory from invaders from without or from rebels within. He concludes that:

Far from obviating 'ownership' in the common law, the theory that all land is held of the Crown defines landownership in an unusually accurate way.⁶¹

The basis of the specific objection is historical. While law may be responsible for the idea of property, it was the wearers of the crown and their supporters who fashioned the feudal system. The Crown's right as ultimate landholder does not depend on its act in a governmental or judicial capacity; rather the Crown, acting personally, seized the land by force and redistributed it with little regard for distributive justice as that term is understood in the modern age. It scarcely needs to be stated that this issue is particularly acute in Ireland.⁶² Someone who was persuaded by Finnis's analysis of private property might accept having one, symbolic, landowner as an elegant means of expressing that analysis. The same person might object, however, that the Crown, particularly in an Irish context, simply could not serve in that capacity.

One begins to answer the specific objection by noting that the Crown's feudal rights would be only symbolic as, in fact, they have been largely for centuries. In describing the early feudal system Baker says:

Only the king was not a tenant; but no king after William I had the kind of control exercised in the 1070s, and no one thought of the lord king as being in any meaningful sense owner of all the land in England.⁶³

In the eighteenth century Blackstone felt able to say:

. . . it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenure, 'that the king is the universal lord and original proprietor of all the lands in the kingdom . . .'⁶⁴

59 Article 9.

60 See the interesting circumstances of *The People v Thomas* [1954] IR 319.

61 Penner (n 30) 152. Before this point is dismissed it should be recalled that within living memory the territorial integrity of this jurisdiction was severely compromised by the wartime activities of a foreign sovereign power.

62 The feudal system was, of course, instituted in a similarly violent manner in England and Wales.

63 Baker (n 9) 230.

64 II Bl Comm II 51.

While Northern Ireland remains part of the UK and while, in British constitutional theory, the Crown and executive power are synonymous, the Crown is the most appropriate entity to act as ultimate owner.⁶⁵ This is not to ignore that there are sensitive and emotive political elements to this issue. However, this is (thankfully) not a political essay and is thus bound to recognise the current constitutional arrangements.⁶⁶

The absence of a doctrine of tenure in chattels

It might be objected that chattels are likewise held subject to competing rights and no doctrine of tenure applies to them. To this objection are two responses. Firstly, when one considers the various competing rights that can exist in one chattel the application of the term 'absolute ownership' without a recognition of the limits of this terminology can be apt to mislead and is therefore no more applicable to a chattel than to land. A chattel can be subject to legal co-ownership and a wide range of equitable interests (trusts, charges, future interests, life interests and so on);⁶⁷ as with land, ownership can be lost in bankruptcy. Secondly, the temporary nature of most chattels constitutes a fundamental distinction between chattels and land and makes a fully developed doctrine of tenure in the former unnecessary.

The function served by estates

As previously mentioned, this gives notice of how long the land shall be held for, or perhaps more accurately (given, for example, the existence of future estates) when the interest in the land will begin and end. 'Proprietary rights in land are . . . projected upon the plane of time.'⁶⁸ The Law Commission recommends the clear and outright abolition of the doctrine of estates: 'the concepts of tenure and estates in land are abolished'.⁶⁹

However, the draft Bill goes on to ensure that tenancies may continue to exist at law⁷⁰ to provide, 'flexibility and sophistication'.⁷¹ It is not entirely clear that there is any consistency in purporting to abolish the doctrine of estates on the one hand while on the other retaining the most significant legal estate (although scrupulously avoiding the term, 'leasehold estate'; a consequence of course of the proposed abolition of estates). If the Law Commission can countenance the retention of the terminology of 'landlord and tenant' (which, sensibly enough, it does)⁷² with its attendant recognition of 'one person holding land of another with a superior interest, it becomes difficult to see why there is so much antipathy to the terminology of estates. What is clear is that, following the proposed reforms, the question of how long a particular interest in land is to last will be just as

65 This may seem like an inherently conservative argument but it is submitted that it has the attraction of simplicity *assuming* that some emanation of the state should be the ultimate landowner. Other emanations have the right to hold property, it is true, and they could perhaps be substituted for the Crown but the Crown is the natural candidate (if only as 'a convenient cover for ignorance': F W Maitland, *Constitutional History of England* (CUP 1908) 418).

66 As, obviously, does the Law Commission's draft Bill (see especially cl 2).

67 E McKendrick and R Goode, *Goode on Commercial Law* (4th edn Penguin 2010) 44.

68 Pollock and Maitland (n 11) 11. Holdsworth (n 13) says (at 51) that estates arose because at the time of their development there was an inability to conceive of future rights other than as 'actually existing things'.

69 NILC 8 (2010) 152 (Draft Land Law Reform Bill (Northern Ireland) cl 1(1)). Apart from a finite prescribed list, all other rights take effect as equitable interests which are liable to be overreached.

70 Cl 5(1)(a).

71 NILC 2 (2009) para 2.54

72 NILC 8 (2010) 152 (Draft Land Law Reform Bill (Northern Ireland) cl 11).

fundamental as before. The only difference is that the concept of estates, which has proved to be an adept mechanism for conceptualising such an issue, will be no longer available. This loss will be very clearly felt in the consideration of relativity of title.

Relativity of title

Once we have confronted the fact that 'ownership' disguises the true complexity of landholding, we must go a stage further and address the issue that title to land itself (the right to hold the whole bundle) is never more than a right which is better than someone else's. All title is relative and in a system dependent on such a doctrine the idea that there can ever be such thing as absolute ownership of land is unsustainable and the use of the term misleading:

At common law . . . there is no such concept as an 'absolute' title. Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by rival claimants.⁷³

The system of registered title has to a very great extent reduced the importance of the relativity of title in registered land. In the case of unregistered land, however, any title is liable to be defeated by one which is preferred by the prevailing rules, in other words by one which is 'better'. At first this sounds shocking. Perhaps the thought arises that, in the present day there should be some means of ensuring that land, which is after all the most enduring commodity we know, can be owned securely without the constant fear of that ownership being challenged.

However, for ownership to be regarded as absolute there must be a recognition that some person is the owner (until he voluntarily relinquishes ownership or dies)⁷⁴ and that this state of affairs is, like the law of the Medes and the Persians, incapable of being upset.⁷⁵ It is submitted as self-evident that this is not a satisfactory state of affairs and that any rights that the 'owner' holds must be capable of challenge. Only when, by the operation of certain procedural laws governing the right to bring an action, a challenge is no longer possible, can the owner be truly secure in his ownership.⁷⁶

The Law Commission's proposals obviously do not seek to confer absolute ownership in the sense of barring any challenge to the owner's right and, to that extent, the doctrine of relativity of title survives. However, the categorisation of someone as 'owner' is apt to disguise the true nature of their status and dilutes the conceptual accuracy provided by the doctrine of estates. The Law Commission believes that it is the present system which is misleading:

73 *Ocean Estates Ltd v Pinder* [1969] 2 AC 19, 24, 25 per Lord Diplock. Title to chattels is also relative. See *Costello v Chief Constable of Derbyshire* [2001] 1 WLR 1437 CA: a thief has good title against the whole world save the person with a better title.

74 Or loses ownership by due process of law e.g. pursuant to compulsory purchase (which has already been mentioned as an indication that absolute ownership of land is a fictitious concept).

75 Daniel 6:8.

76 The most obvious example of one of those procedural laws being, of course, the Limitation (Northern Ireland) Order 1989. The effect of the statutes of limitation on real property law has in reality been to develop substantive law. However, in essence they are simply means for restricting claims after the expiry of a certain period of time.

The Commission further recommends the introduction of a straightforward concept of ownership to align the law with public perception. Most people, other than lawyers, currently think that a freehold estate is ownership and are not aware that it is only ownership of an estate, rather than of the land itself. The Commission takes the view that this issue is of the utmost importance and firmly provides a modern foundation for property law in Northern Ireland.⁷⁷

It is respectfully submitted that it is the Law Commission's proposals which are misleading. It is not at all clear that either the 'straightforward concept of ownership' or the 'public perception' with which it is supposed to align are capable of accommodating properly such nuanced ideas of relativity of title. It is submitted that the doctrine of estates more accurately and eloquently represents, among other subtleties, the precarious nature of all landholding. It is also submitted, as examined below, that the abolition of estates will bring confusion to the law of adverse possession.

The defeasibility of registered titles

The ability of statute law to mislead landholders into thinking that they hold greater rights than they actually hold is further apparent from the operation of the system of registered landholding under the Land Registration Act (Northern Ireland) 1970 (LRA(NI)). Under this system the register is deemed to be conclusive as to title and 'full ownership' is possible.⁷⁸ This is generally held to confer a state-guaranteed title.⁷⁹ However, even in registered land the 'full owner' does not have an indefeasible title.

Firstly, the register is not conclusive where fraud has played some part in the registration of the relevant interest.⁸⁰ In response to fraud, and to other defects or errors,⁸¹ the register is liable to be rectified. The circumstances are limited and generally speaking the rectification is not permitted to prejudice the interest of a *bona fide* purchaser. These limits on the finality of the register are perhaps not totally incompatible with the register's statutory claim to be conclusive. They simply act to place conditions on the circumstances surrounding registration. Where they are operative, they say, in effect, to the registered owner, 'you ought not to have been on the register in the first place'. However, they do show that holding the title of full owner on the register is not finally determinative of the question of 'ownership'.

Secondly, there are other aspects of the registration scheme which demonstrate that even the registered title of a person validly on the register is not as certain as the term 'full owner' would suggest. Every registered owner holds subject to certain burdens which are permitted to affect the land even in the absence of registration.⁸² These burdens appear in Schedule 5 to the LRA(NI) 1970 and largely take the form of easements, covenants, charges

77 NILC 8 (2010) para 2.4. At para 2.5 the report states that the move away from tenure and estates has 'very little or no practical significance'. It is the contention of this essay that the changes do have significance; but, accepting the Law Commission's case, it is not clear why it believes such apparently meaningless change is of 'the utmost importance'. It is also submitted that the Law Commission accords an unnecessarily elevated status to 'public perception'. It is accepted that the doctrine of estates and tenure is complicated and would not be readily understood by much of the general public. The inference from the Law Commission's report is that its recommendations remedy this defect. However, in spite of the clarity admirably present in the Law Commission's draft Bill, it is not immediately apparent that even this will bring much enlightenment to the broad mass of the general public on matters of land law.

78 Land Registration Act (Northern Ireland) 1970, ss 11 and 12.

79 A H Moir and E K Moir, *Moir on Land Registration* (SLS Legal Publications 2011) 1.2.

80 LRA(NI) 1970, s 11(1).

81 *Ibid* s 69(1) mentions 'misstatement, misdescription, omission or otherwise'.

82 *Ibid* s 34(4).

and equitable interests. To that extent, while they may constitute a serious obstacle to the registered owner's enjoyment of her land they do not impinge upon her title. However, one Schedule 5 burden subject to which the registered owner holds her land is, 'all rights acquired, or in the course of being acquired, consequent on the Limitation (Northern Ireland) Order 1989'.⁸³ This preserves the law of adverse possession in relation to registered land. Once a squatter has fulfilled all the criteria stipulated in the 1989 Order (essentially once she has been in adverse possession for the requisite period of time), she has the right to replace the registered owner on the register of titles. But something more than this happens as a consequence of the provisions of s 53 of the LRA(NI) 1970 which states that the 1989 Order 'shall apply to registered land as it applies to unregistered land'. For present purposes the material provision is Article 21(1) of the 1989 Order which provides that, 'no action may be brought by any person . . . to recover any land after the expiration of' the applicable limitation period. Thus, the squatter of registered land, at the end of the limitation period, acquires not just the right to be registered but also, even in the absence of registration, the right to successfully defend any action for the recovery of land brought by the registered owner. Furthermore, any registered transferee of the registered owner (even one for value) who sought to evict the squatter by action would find that this action was absolutely barred by the 1989 Order. One could therefore have a series of registered owners whose registered title was utterly valueless.

Thirdly, every registered transferee who is a volunteer takes the land subject to all unregistered rights which bound his predecessors in title.⁸⁴ Consider the following example. At the turn of the twentieth century a leasehold tenant (A) acquires the fee simple from his landlord and is registered as full owner pursuant to the Local Registration of Title (Ireland) Act 1891. Shortly before his death he executes a conveyance to B for valuable consideration. B does not enter into possession and fails to secure registration of his interest even though at all times he has an equitable right to be registered as transferee.⁸⁵ This right is capable of passing to B's successors in title⁸⁶ and is only defeasible by a registered transferee for value.⁸⁷ A and B both die intestate. At the time of his death A is in possession and his registered interest devolves upon his personal representatives by virtue of ss 83 and 84 of the 1891 Act. The land then passes down gratuitously through A's family and in each generation A's successor is registered as owner. The registered title of A's family is at all times susceptible to the rival claim of B's successors relying on B's transmissible right to registration. Thus, even many years from A's death, the registered title of his successors of itself provides no answer to a claim from B's successors seeking their own registration. Instead, A's family are likely to plead the expiry of the limitation period⁸⁸ or laches and delay on the part of B's successors.

83 At para 14.

84 LRA(NI) 1970, s 34(5).

85 *Devoy v Hanlon* [1929] IR 246 at 262–3; see also *Moir and Moir* (n 79) para 11.4. In *McLean v McErlean* [1983] NI 258, (purchasers for value in possession claiming adverse possession against the registered owner), the Court of Appeal went even further and held that such a purchaser held the full beneficial interest in the land and that, accordingly, it would be incorrect for the vendor to treat the purchaser as if the purchaser were not the 'true owner', merely because the vendor was the registered owner.

86 On conventional property law principles. For example, an equitable interest under a valid contract for the purchase of land is devisable: *Morgan v Holford* (1852) 1 Sm & G 101; 65 ER 45.

87 S 36(1) of the 1891 Act (later s 34(5) LRA(NI) 1970).

88 The right of a purchaser to obtain possession of land which he has paid for is lost after 12 years: *McLean v McErlean* (n 86) per Gibson LJ. The situation would be otherwise were it not for that fact that the Limitation (Northern Ireland) Order 1989 permits a constructive trustee to run a title adverse to the beneficiary of the constructive trust: see Article 2(3).

The effect on adverse possession

Another possible source of confusion, which arises from the fact that titles are relative, lies in the position of the squatter in possession pending the expiry of the limitation period. The Law Commission recommended that the doctrine of adverse possession continue in force largely as at the present in both registered and unregistered land.⁸⁹ There was, however, no attempt to account for the status of the squatter in possession prior to the expiry of the limitation period. At present, in unregistered freehold land, a squatter in that position has a fee simple absolute in possession.⁹⁰ 'There is thus no absurdity in speaking of two or more adverse estates in the land, for their validity is relative.'⁹¹ The Law Commission might respond that this *is* absurd but it is not clear that its proposals adequately deal with this situation.

The squatter's legal fee simple is of practical importance for three reasons. Firstly it means that her rights bind purchasers from the paper title holder against whom the squatter commences possession. The clock is not re-set each time the land is sold. This is the case in both registered and unregistered land.⁹²

Secondly, it allows the squatter to pass this title to another squatter. This allows successive squatters to accumulate the necessary period of possession for the purposes of the statutory time limit. This often happens where a testator (T) who is also a squatter on some land devises all his real property to A. T and A can add their time in possession together to bar O. If T has no title it is not clear that T and A could achieve this unless one or other of them had themselves possessed for the full statutory period.⁹³ Therefore, unless a squatter has some transmissible interest, the ability of successive squatters to bar O may be brought into doubt. The Law Commission has already endorsed the utility of adverse possession⁹⁴ but, unless squatters are to hold some form of transmissible title, the efficacy of the doctrine would be undermined.

Thirdly, the squatter's title allows him to maintain an action against a subsequent squatter.⁹⁵ If this were not so, a second squatter could, with impunity, dispossess the first simply by going onto the land if the squatter left it vacant for a short time.⁹⁶ If the right to

89 NILC 8 (2010) para 12.3ff. The major change is that, on the expiry of the limitation period, the title which has been barred is transferred to the squatter. See draft Bill, cl 110.

90 *Megarry and Wade* (n 3) para 4-008; *Rosenberg v Cook* (1881) 8 QBD 162, 165 per Jessel MR. The Law Commission's treatment of the squatter prior to the expiry of the limitation period is ambiguous. In the Supplementary Consultation Paper (NILC 3 (2010) para 2.10), a squatter is described as 'a person who initially has no title to the land in question'. The paper then goes on to state that title can be 'obtained' after adverse possession for the requisite period. It should be conceded that para 2.10 aims to provide only a summary but, to the extent that it suggests that there is no title at all until the limitation period has run, it is submitted that it is in error.

91 *Megarry and Wade* (n 3) para 4-009.

92 Under LRA(NI) 1970, Schedule 5, pt I, para 14, 'Rights acquired, or in the course of being acquired, consequent on the Limitation (Northern Ireland) Order 1989' bind even a purchaser for value of registered land; this reflects the position in unregistered land where the squatter's possessory title is a legal estate which, on the classical rules of conveyancing, binds even a purchaser for value.

93 Time cannot accumulate were T abandons and A takes possession: Limitation (Northern Ireland) Order 1989, Schedule 1, para 8(3). Where one squatter dispossesses a prior squatter and there is no break in possession, the position is perhaps unclear: *Jourdan and Radley-Gardner* (n 53) 6-53 to 6-56.

94 NILC 8 (2010) para 12.2.

95 *Asher v Whitlock* (1865) LR 1 QB 1.

96 This is the situation given by Cockburn CJ in *Asher* (ibid 5) who asks what would happen if the second squatter 'had obtained possession without force, by simply walking in at the open door in the absence of the then possessor, and were to say to him, "You have no more title than I have, my possession is as good as yours"'.⁹⁷

lawfully evict persons in possession were held only by the holder of the paper title, this would tend to render as common any land abandoned in fact by that holder. In certain circumstances it would be difficult for any person to establish title by adverse possession. As squatters often attract little sympathy, some might ask whether this was particularly unjust. The short answer is that the Law Commission recommends the retention of adverse possession. The slightly longer answer is that not every squatter is wholly without some justifiable claim to the land he possesses. Particularly in cases where land is held by an intestate whose successors are also intestate, the possession in fact of a family member is of great assistance in establishing a marketable title if the family land is ultimately to be sold.⁹⁷ The full answer would call for a complete justification of the doctrine of adverse possession, which is outside the scope of this essay.

What bearing do the Law Commission's proposals have on the squatter in possession? Clause 3 of the draft Bill designates as 'owner' of unregistered land the person in whom, on or after the commencement of the proposed Act, 'the fee simple in possession . . . is vested'. As the law presently stands, this would include a squatter in possession. Clause 5(2) of the draft Bill provides that a legal interest subsisting before the commencement of the proposed Act will, after the commencement, 'exist, concurrently with or be subject to, any other legal interest in the same land in the same manner as it could have done before [commencement]'. That raises the possibility of there being two owners which would represent a very serious dilution of the concept of 'ownership' recommended by the Law Commission. It might be argued that the abolition, at the commencement of the proposed Act, of the concept of estates (cl 1(1)) would prevent this from happening. Clause 5(2) is, after all, expressly subject to other provisions of the draft Bill. But then either (i) the squatter is in danger of having a better claim to 'ownership' (as she is in possession) than the holder of the paper title (and this is most unlikely to be desired) or (ii) the squatter has no rights (which would destroy any number of possessory titles and interfere to a seemingly unintended extent with the doctrine of adverse possession) or (iii) the squatter's rights take effect as equitable interests.

If (iii), then the position is that the paper title holder is trustee for his squatter.⁹⁸ For the squatter her position would be, arguably, weaker than at present. In the draft Bill equitable rights are liable to be overreached on a sale by the 'owner'.⁹⁹ The clock is thus liable to being re-set on each sale as it is not at present. This is possibly prevented by cl 47(4) which preserves the equitable rights of an occupier but only where the occupation would have been obvious from a reasonably careful inspection at the time of the conveyance unless the purchaser otherwise knows of the right.¹⁰⁰

The following comments can be made about the application of cl 47 to a squatter. Firstly, from cl 47 it seems clear that the equitable rights being discussed are those which come within the LRA(NI) 1970, Schedule 5, pt I, para 15.¹⁰¹ However, the specific provision in Schedule 5 of provision for the squatter's rights at pt I, para 14, makes it reasonably clear that the equitable rights in para 15 do not encompass the squatter's interest.¹⁰² Assuming (strictly for present purposes) that the squatter's rights could take

97 Especially where the successive possession of certain family members may in fact accord with the wishes of their predecessors who neglected to make these wishes known in any legally enforceable manner.

98 Cf. Land Registration Act 1925, s 75(1) (since repealed).

99 Cl 47(1).

100 See *Ulster Bank v Shanks* [1982] NI 143.

101 Cl 47(3)(b)(iii) in fact amends para 15 and applies it to unregistered land.

102 The exclusion of the squatter's interest from those equitable rights is entirely in keeping with the historical position that the squatter's interest is a legal one.

effect as equitable interests under cl 47, there is then the problem created by the provision that a purchaser who fails to discover the adverse possession on a reasonably careful inspection of the property takes free of the squatter's interest. This is highly innovative because at present only (i) action, (ii) dispossession of the squatter or (iii) cessation of possession by the squatter can stop time running. Clause 47 would seem to introduce the doctrine of notice. Notice is to some extent already present in adverse possession because, to be adverse, possession must be sufficiently obvious to allow the paper title holder to become aware of his right to recover the land by action. However, possession need not be continuous.¹⁰³ Periodic possession which presently qualifies as possession for adverse possession purposes might not constitute reasonably obvious occupation at the time of the conveyance, for example, in the case of grazing.

If there is a problem, one solution might simply be to give the squatter in unregistered land shorn of the doctrine of estates the same rights she presently has in registered land. However, the authorities in England support the view that in registered land the squatter in the process of accruing the necessary time in possession to apply to be registered has a fee simple estate.¹⁰⁴ It is submitted that the same analysis would apply in Northern Ireland; while the interest which the squatter has in registered land might not be expressly referred to as an estate in the LRA(NI) 1970, Schedule 5, pt I, para 14 assumes a doctrine of estates. If this submission were not accepted, a return to elementary principles shows that the 'rights' (however one chooses to conceptualise them) of the squatter in registered land are clearly as capable of transmission as they are in unregistered land and they also endure against purchasers in the same way as legal interests do. If they are not called legal estates, they certainly look very like them;¹⁰⁵ as would any prospective analogous provisions in estate-free unregistered land.

Accommodation of relativity of title outside the doctrine of estates

The concept is entirely recognised within Penner's theory:

But in the case of land in particular, which lasts forever and may see various changes in occupation, documented and remembered facts may not only work to support or deny one claim of ownership but may do so in respect of several claims. The common law properly recognises the uncertainty of that history, and thus the reality of this practice, by abjuring the abstraction of absolute title and embracing the abstraction of relative title.¹⁰⁶

For Penner, the common law's recognition of relative titles is fully compatible with the idea of ownership that he holds. He says simply that one can own something and at the same time have a title that is adverse to one's ownership. That the law will ultimately decide on which title is best only proves that it supports absolute ownership.

¹⁰³ *Bligh v Martin* [1968] 1 WLR 804 at 811.

¹⁰⁴ See Land Registration Act 2002, Schedule 6, para 9(1). S Jourdan, *Adverse Possession* (1st edn LexisNexis 2003) 21–55, stated that a squatter in registered land has 'an independent, unregistered possessory title created and evidenced by his possession'. In the 2nd edn (Jourdan and Radley-Gardner (n 53)), the commentary (at 22–67) on Schedule 6, para 9(1) is that it: 'expressly provides that the squatter's unregistered freehold estate, created and evidenced by his possession of the land is extinguished when he is registered as proprietor of the registered estate'. See the discussion in C Jessel, 'Concurrent Fees Simple and the LRA 2002' (2014) 130 *Law Quarterly Review* 587 at 600. See also n 92 above.

¹⁰⁵ *Megarry and Wade* (n 3) 3–035ff give two fundamental characteristics of legal estates: the right of alienation (*inter vivos* or testamentary) and the right to everything in and over land. While she is in possession, the squatter's rights even in registered land, display these characteristics.

¹⁰⁶ Penner (n 30) 149.

Ben McFarlane argues that the term 'relativity of title' is unhelpful. He prefers to concentrate on the essence of that which is represented by relativity.¹⁰⁷ He concludes that 'title' merely means that a party has a valid claim to ownership and goes on to observe that more than one valid claim is permissible for any given item of property or parcel of land. Valid claims to ownership are determined by a tie-breaker: a fundamental rule of property law that a pre-existing property right binds all persons who cannot produce a legally recognised defence to the pre-existing right.¹⁰⁸ McFarlane is prepared to use the term 'ownership' but that would seem to be open to the very objections he raises to the term 'relativity of title': it presents an incomplete picture.¹⁰⁹

Summarising McFarlane's analysis in the proposition that multiple valid claims to ownership are possible but must be resolved by a tie-breaker, the question is whether McFarlane's analysis can survive outside a doctrine of estates? The answer is that it can exist in any system that recognises more than one valid claim to ownership provided some means of adjudicating between the claims is provided for. It could therefore exist quite happily with Penner's theory whose definition of 'ownership' can accommodate a person other than the owner who has an adverse title and whom the law will assist in all manner of ways (as, for example, we have seen with the squatter).

Subscription to the views of either Penner or McFarlane in no way involves an abandonment of the doctrine of estates. Both their approaches on the matter of relativity of title (and they are virtually identical) really only require that (i) more than one title to land be possible at one time and (ii) there be some means of adjudicating between claims. Any system that contained these elements could accommodate the concept of relativity of title; it would not need to be the present doctrine of estates.

The problem for the Law Commission is that, as has already been argued, its proposals seem to deny that there can be more than one 'owner' and furthermore make insufficient provision for any alternative mechanism to accommodate any title (or anything fulfilling the function currently performed by title) other than the owner's. The Law Commission's scheme therefore fails to provide the minimum elements necessary to accommodate the concept of relativity of title; a concept which this essay has argued is desirable. If this argument is correct, then legislators acting on the Law Commission's recommendations have two options: (i) they can ask the Law Commission to devise some new system which provides for relativity of title; or (ii) they can retain the present doctrine of estates and channel the resources that would have been expended on (i) into some more worthy endeavour.

Conclusion

Estates and tenure are prime targets for the reformer because they are easy to characterise as anachronisms. However, time has denuded them of their idiosyncratic qualities. As they exist today, they serve the important function of allowing us to address the two important questions that will remain even if the Law Commission's proposals are enacted, namely: what do you have and how long do you have it for?

107 Ben McFarlane, *The Structure of Property Law* (Hart 2008) 146.

108 With respect, it is not clear that this analysis is fundamentally different from the statement above that title to land is never more than a right which is better than someone else's.

109 McFarlane (n 107) 342 acknowledges that it is strictly correct to say that ownership in land is not possible. However, he notes that as freehold gives the 'immediate exclusive control of a thing forever', ownership and freehold are largely synonymous. But the burden of this essay has been to show that 'exclusive control' is rarely, if ever, possible in the case of land.

The continued notion of holding land of the Crown – or the state if preferred – speaks eloquently of the fact that landholding is a form of property subject to a vast range of competing interests. The truth at the heart of the doctrine of tenure, that there can be no such thing as absolute ownership, is worthy of preservation if we value a concept of landholding that accurately reflects the practical day-to-day reality. The preceding demonstration of the limits of so-called absolute titles should cause the present proposals, which ignore this state of affairs, to be viewed with caution. Furthermore, there are consequences following from the proposed changes which have perhaps not been anticipated. For all these reasons, the maintenance of a little anachronism might be worthwhile, indeed essential.