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Irish rights of residence: the anatomy of a phantom

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Abstract

The present law on rights of residence relies heavily on a licence-based analysis resting in large part on the seminal work of Professor Harvey. However, since the 1970s, the law of licences, and in particular their proprietary effect, has been in retreat. This has left the licence approach exposed and rights of residence in need of a reappraisal.

Keywords: real property; rights of residence; licences.

Introduction

When rights of residence are granted, the intention of the grantor, the draftsperson and the grantee of the right, in the overwhelming number of cases, is that the grantee will have the occupation and use of the property for their lifetime but nothing more.

In a seminal article on the subject, 'Irish rights of residence – the anatomy of an hermaphrodite',[1] Professor Brian Harvey conducted a survey of the various methods of conceptualising rights of residence and settled on the licence as the most appropriate. By reason of developments in the law of licences since Professor Harvey's article, the licence analysis is now attended by considerable difficulty.

In what will be, in effect, a recapitulation of Professor Harvey's work, this article will examine some of the possible methods of conceptualisation, aside from the licence, that he considered and rejected. The article will then move to explain the difficulties with the licence analysis and how, as a consequence, rights of residence cannot be understood as licences. The article then looks at some further possible alternative analyses before concluding that a right of residence as it is generally understood is, in fact, a creature entirely unknown to the common law.

* MA (Oxon). The author gave a very confusing talk to the members of the South Derry Solicitors Association on this subject on which this article is hopefully an improvement. Thanks are due to the anonymous reviewers for their helpful comments.

1 (1970) Northern Ireland Legal Quarterly 389. As comprehensive a treatment of the subject as one could wish to find.

1 The problem

> Farmers' wills often contain a provision to the effect that the testator's widow is to have a right during her life to reside in the testator's farmhouse …[2]

The idea is simple (and popular):[3] A wants to give his house to B but wants C to be able to live there for the rest of her life. However, the only constraint that A wants to place on B's enjoyment is C's lifetime residence. An unschooled observer might conclude that it is both natural and perfectly reasonable for a person holding a dwelling to be able to specify who should be permitted to reside in the dwelling after his death. Even a property lawyer might intuitively say that if A has the fullest dominion over the dwelling recognised by the law, A should be able to carve up that interest in whatever way A pleases, including by specifying that C shall have the right to reside for her life in the property. The problem is that stating C has a right of residence only raises the question about what that label really means for all the various parties who may have an interest in the property; particularly the grantee of the right of residence and the devisee of the freehold, but also purchasers from either of them. In our law of property, certain property concepts and labels have become so well developed that the rights of the competing interest-holders have become sufficiently clear.[4] The difficulty with the right of residence is that this is not the case. But a yet more fundamental problem is that, when we attempt to fashion a concept which performs all the functions we demand of it, we find that the existing materials are insufficient for the task. Starkly put, not only is a right of residence vague, but it is also incompatible with the rest of the law of property.

2 The essential elements of a right of residence

Before we can examine how we can (or cannot) legally accommodate the elements of the right of residence we have to ask what those elements are. In other words: what do we expect of a right of residence? Statute is an obvious place to begin since that source allows us to see how the polity acting through the legislature has viewed rights of residence.

In registered land, the position is governed by section 47 of the Land Registration Act (Northern Ireland) 1970:

> Where:
>
> (a) a right of residence in or on any registered land, whether a general right of residence in or on that land or an exclusive right of residence in or on part of that land; or
>
> (b) a right to use a specified part of that land in conjunction with a right of residence referred to in paragraph (a);
>
> is granted by deed or by will, such right shall be deemed to be personal to the person beneficially entitled thereto and the grant made by such deed or will shall not operate to confer any right of ownership in relation to the land upon such person, but registration of any such right as a Schedule 6 burden shall make it binding upon the registered owner of the land and his successors in title.

In its relatively recent consultation paper, the Northern Ireland Law Commission (NILC) acknowledged the unsatisfactory state of the law, in particular with regard to rights of

2 *Report of the Committee on the Registration of Title to Land* (Cm 512, 1967); Harvey (n 1) 389. Of course, the desire to avail of this arrangement is not limited to farmers and their widows

3 10 per cent of all wills in Northern Ireland contain a right of residence: *Re JS (deceased)* [2018] NICh 20 at [1].

4 For example, the life interest, which we will encounter below as a concept containing some of the features of a right of residence, has ancient case law and whole statutes devoted to its comprehension.

residence in unregistered land, and recommended that the law in registered and unregistered land be harmonised.[5] In its proposed draft Bill, the Law Commission's report proposed that a right of residence should be binding on the successors in title of the grantor provided the right were registered in the Registry of Deeds:

> Notwithstanding the personal nature of … a person's right of residence, it is enforceable against the owner of, or holder of any interest in, the land and, subject to [registration in the Registry of Deeds], that owner's or holder's successors in title.[6]

Both statute and the Law Commission therefore recognise that a right of residence should: (i) bind the creator and his successors but (ii) be personal to the grantee. The latter condition can only mean that the right cannot be enjoyed by an assignee or alienee from the grantee.

At first glance it seems surprising to suggest that existing property law materials could not be arranged in such a way as to accommodate the result we desire. However, the right that we seek has two particular facets that coexist uneasily in any property concept presently known to the law: the holder of the right must be able to specifically enforce the right against the whole world and must, at the same time, hold a right that cannot be passed in any shape or form to another person.

The impetus to present a fully developed concept of the right of residence is arguably not so pressing in the case of registered land where statute can be relied upon. However, even in the case of registered land, there is still something of a problem: if we cannot conceptualise the right using existing materials, we are bound to accept that the right in registered land is *sui generis*. As with most aspects of the subject, Professor Harvey first identified this problem. His view was that even with the enactment of section 47, 'we are still unenlightened as to what the right is in law'. In a perhaps generous appraisal of section 47, Professor Harvey mused on whether 'luggage-labels' on concepts were altogether necessary.[7] The problem with eschewing existing labels and innovating is that one is obliged to be extremely detailed about the new right being fabricated. Section 47 is clear about the two particular facets that we have mentioned above, but it is otherwise silent as to how the right might fit in with, or draw from, recognised property law ideas.

Having sketched the problems, we now turn to the concepts which Professor Harvey explored as possible solutions.

3 The possibilities: lien

The first is a lien.[8] This presents a practical problem for the court, namely in valuing the right of residence.[9] But a more fundamental problem with the lien analysis was recognised in Northern Ireland by Lord Lowry's Committee on the Registration of Title to Land in 1967. As noted by Harvey, the committee's report was very doubtful about the ability to buy out the right of residence:

5 NILC, *Land Law Consultation Paper* (NILC 2, 2009) at 4.19.

6 NILC, *Report on Land Law* (NILC 8, 2010) at 157 (draft Bill, cl 18(2)).

7 Harvey (n 1) 406.

8 Using language lifted directly from *Kelaghan v Daly* [1913] 2 IR 328 at 330 (Boyd J), in the Republic of Ireland, statute has laid down that in registered land a right of residence is 'a right in the nature of a lien for money's worth in or over the land': Registration of Title Act 1964, section 81.

9 See Professor Wylie's discussion of Lavan J's decision in *Johnston v Horace* [1993] ILRM 91: J C W Wylie, *Irish Land Law* (4th edn, Bloomsbury 2010) 20.21.

> We do not think that a farmer-testator would normally intend to give his son the right to put his (the testator's) widow out of the farmhouse on payment to her of a sum of money, even if fixed by a court of law as fair and reasonable.[10]

This is a recognition of the first of the incompatible facets we noted above: the ability of the grantee to specifically enjoy the right against the devisee (and, by extension, any successor of his; in other words, against all the world). A right of buy-out is therefore not consistent with the essential elements of the right of residence, as we have described them above. Moreover, the lien is a variant of security, and security is held to ensure the performance of some other, primary, obligation due to the holder: a lien is a safeguard against default on the primary obligation.[11] In the case of the right of residence, the right, if viewed as a lien, would be held to ensure performance of the payment of the value of the right. This obviously makes very little sense when we have identified the right to reside as the primary duty to be upheld. A further problem with the lien analysis is that a lien only arises where the owner of the lien holds the subject property prior to the creation of the primary obligation. In many cases the grantee of the right will have residence prior to the time of the coming into force of the right (most usually after the death of the grantor); but, equally, they may never have set foot on the land at any time.

While there are instances of apparent liens which do not depend on prior possession, Professor Ben McFarlane has persuasively argued that these are not liens in the true sense. The primary instance where prior possession is not a condition is the lien held by the purchaser over the subject land for the return of his purchase money. In the course of considering the possibility of such a lien, Professor Wylie perceptively observes that this 'lien': (i) arises by virtue of the operation of equity rather than by virtue of the transaction between the parties and (ii) takes effect as a charge.[12] For McFarlane, the logical conclusion of these observations is that the result is an equitable charge and that the terminology of lien is misplaced.[13] Harvey expressively said that calling a right of residence a right in the nature of a lien was like calling a cat 'an animal in the nature of a dog'.[14] Harvey also considered whether the right was an annuity or money charge and discounted both possibilities largely on the same bases that the lien was found wanting: (i) difficulty in valuing the charge for redemption purposes and (ii) a fundamental inconsistency between, on the one hand, what the law generally envisages by security and, on the other, the essential elements of the right of residence.[15]

4 The possibilities: life interest

The second distinct possibility is a life interest, but as Lord Denning MR pointed out in *Binions v Evans*,[16] such a characterisation would give the holder of the right the wide powers (most obviously, that of sale) of a life tenant under the Settled Land Acts. Girvan J adopted the same reasoning in *Jones v Jones*:

> Even if a person is given an exclusive right to reside in specified premises as opposed to a general right to reside in circumstances where others may also reside in the premises this in my view falls short of creating a life interest for the

10 Harvey (n 1) 405.

11 Ben McFarlane, *The Structure of Property Law* (Hart 2008) 591.

12 Wylie (n 9) 12.16.

13 McFarlane(n 11) 622.

14 Harvey (n 1) 411

15 Ibid.

16 [1972] Ch 359

> purposes of the Settled Land Acts 1882–1890 since the beneficiary of the right has a limited right to be on the premises and the right has none of the other incidents of a life interest capable of creating a life interest for the purposes of the Settled Land Acts.[17]

This is an instance of the other incompatible facet of the right: it cannot be transferred in any way. In *Jones*, the risk identified was the ability of the grantee of the right being permitted to sell the fee simple as a life tenant pursuant to the statutory power of sale; but even the transfer of the barest right to reside, if recognised, could impose a complete stranger upon the devisee of the fee simple and would undoubtedly be at odds with the intentions of the testator.

5 The possibilities: trust

The third option is to rely on a trust. Harvey was of the view that a trust could not be relied on for four main reasons:[18] (i) the trust was too vague to enforce;[19] (ii) in cases of non-exclusive rights of residence, equity would not assist the grantee;[20] (iii) the 1970 Act had expressly withheld any form of property interest from the grantee;[21] and (iv) any situation where the devisee is trustee for the grantee for the latter's life is very difficult to distinguish from a life interest and that conceptualisation has just been rejected.

Only the last two of these objections are submitted to be fatal to the possibility of a right of residence taking effect under a trust. The vagueness principle has its classic expression in *Morice v Bishop of Durham* in which a bequest in trust for 'such objects of benevolence and liberality as the trustee in his own discretion shall most approve' failed for want of certainty.[22] The deficiency there related to the objects of the legacy and that cannot be a bar to enforcement where the grantee of the right of residence is named. In reality, objections (i) and (ii) are expressions of the same concern, namely that there is a predisposition against specifically enforcing interests that depend on the court's constant supervision. This objection gained some support from Lord Hoffmann in *Co-operative Insurance v Argyll Stores Ltd* where his Lordship's foremost concern was the:

> … possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order …[23]

This is not a rule of law, however, and, for example in *Brownfield Restoration Ireland Ltd v Wicklow CC*, Humphreys J rejected the advance of the *Argyll Stores* case by a polluter anxious to avoid specific relief:

> … this is something of a polluter's argument. Do not require us to remove the waste as it will involve the court having to supervise.[24]

With respect to the concern raised in *Argyll Stores,* it is submitted that courts, perhaps especially in Ireland, are vastly experienced at (arguably, weary of) regulating land usage by persons proximate to one another in space. The particular problem presented by rights of residence is whether that supervisory jurisdiction can extend to requiring people to

17 [2001] NI 244, 254.

18 Harvey (n 1) 412–413.

19 *Morice v Bishop of Durham* (1805) 10 Ves Jr 522; 32 ER 947.

20 *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233, 250 (Megarry J).

21 At section 47: 'shall not operate to confer any right of ownership'. The Registration of Title Act 1964 makes similar provision at section 81: 'shall not operate to create any equitable estate in the land'.

22 (1805) 10 Ves Jun 522; 32 ER 947. See Harvey (n 1) 412.

23 [1998] AC 1 at 12. The facts of *Argyll Stores* concern the specific performance of an ongoing covenant in a lease.

24 [2017] IEHC 456.

'live peaceably under the same roof'[25] in the case of a non-exclusive grant. If this is a valid objection, though, it would effectively undermine the efficacy of all non-exclusive grants where the property does not lend itself to some form of physical partition. The 1970 Act, though, is explicit that 'general' (i.e. non-exclusive) grants are enforceable in the registered system and the objection is difficult to maintain in the face of this enactment. Furthermore, developments in family law mean that the courts are familiar with those situations where two parties have occupation rights under the same roof. The courts in Northern Ireland have power under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 to 'regulate the occupation of the dwelling-house by either or both parties'.[26]

In fact, if rights of residence were recognised as taking effect under a trust, the occupation order scheme contained in the 1998 Order would, in most cases, govern rights of residence. By Article 11, an occupation order can be sought by any person entitled to occupy a dwelling-house by virtue of a beneficial estate provided: (a) the dwelling is or has been the home of that person and the person from whom occupancy is claimed and (b) those two persons are related.[27]

Objections (iii) and (iv) both address the same, significant concern, already noted: that the grantee of the right cannot effect its transfer. In *Bank of Ireland v O'Donnell*,[28] the defendant bankrupts argued that their alleged right of residence in property (part registered, part unregistered)[29] did not vest in the Official Assignee as 'property' within the terms of section 44 of the Bankruptcy Act 1988. Similarly to section 47 of the 1970 Act, section 81 of the Registration of Title Act 1964 provided that a right of residence 'shall not operate to create any equitable estate in the land'. Costello J rejected the bankrupts' argument in strident terms:

> It is absolutely incontestable that a right of residence, such as is asserted by the defendants in their defence and counterclaim in these proceedings, is an interest in property.[30]

However, while the durability of the statutory right against the devisee and her successors begins to make the right look as if it is proprietary, true proprietary status is ultimately

25 From Goddard LJ (as he then was) in *Thompson v Park* [1944] KB 408 at 409. Chancery lawyers may place greater faith in Megarry J's endorsement of this statement in *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233, 250.

26 Article 11(3)(d). See, for instance, *E v E* [1995] 1 FLR 224, where the English Court of Appeal (applying the ouster jurisdiction under the Domestic Violence and Matrimonial Proceedings Act 1976) permitted a husband to continue residing with his wife even in spite of her allegations of attempted rape.

27 This might, inadvertently, be a useful development in providing a statutory scheme which would be particularly helpful in the regulation of non-exclusive grants. It might be the case that the legislation hoped for by this article would have to provide for a custom-made scheme to regulate non-exclusive grants.

28 [2015] IEHC 640.

29 See another instalment of the saga: [2014] IESC 77, [9].

30 [2015] IEHC 640, [34]. Insolvency decisions are not always the most reliable sources of general determinations on the law of property. As an example, the proprietary effect of the chattel lease derived from *Bristol Airport plc v Powdrill* [1990] Ch 744 has been called into question: William Swadling, 'The proprietary effect of a hire of goods in Norman Palmer and Ewan McKendrick (eds), *Interests in Goods* (Lloyd's of London Press 1998).

denied in the statutory prohibition on any transfer[31] which prohibition, as we have argued above, must be an essential feature of the right in unregistered as well as registered land.

The prohibition on transfer is also incompatible with rights under a life interest since, as we noted above, a life tenant has statutory powers of sale under the Settled Land Acts. It is also difficult to conceive of other entitlements under a trust which would not attract the provisions of the Settled Land Acts. One possible option might be for the court to construe the interest of the grantee of a right of residence as an interest under a protective trust. Protective trusts are exceptions to the rule against inalienability and permit a settlor to give property to A for life but upon purported alienation by A to pass to B.[32] This aligns exactly with our view of the right of residence, and we might thus conceptualise a right of residence as a gift to the devisee on protective trust for the grantee of the right with remainder to the devisee and a limitation over to the devisee in the event of an attempted alienation. While the protective trust comes within a whisker of providing us with the framework of an inalienable life interest, ultimately the type of trust we wish to construct would fall within the terms of section 2(1) of the Settled Land Act 1882, which provides:

> Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

As Wylie explains, a protective trust falls outside the definition of a settlement if the interest of the person entitled upon alienation is merely the possibility of a reverter (and thus not an estate or interest in land).[33] But if the right of residence is to function as we want it to, the person entitled on alienation is also entitled upon the death of the

31 An anonymous reviewer helpfully pointed out the assertive nature of this statement. Is the power of transfer, then, an essential facet of property? In the case of the fee, the right of alienation has been fundamental since Quia Emptores. But this does not really assist us in answering the more general question. For that, we begin by observing that 'our property is nothing but those goods, whose constant possession is establish'd by the laws of society': David Hume, *A Treatise of Human Nature*, L A Selby-Bigge and P H Nidditch (eds) (Clarendon Press 1978[1739]) 491. McFarlane (n 11), at 139, notes a function of this: property is an arbitrary concept, and we cannot work out whether something is property from first principles. In James Penner's thesis, *The Idea of Property in Law* (Oxford 1997), property is intrinsically bound up with rights of use and exclusion (70). The right of alienation is a necessary element of property because (90) parting with it by gift to persons one cares about is part of one's own use. Selling, however, does not engage this use interest because one's own use is deemed to be exhausted upon receipt of the consideration. At 102, Penner takes the view that certain restrictions on alienability are consistent with property. The matter is one of degree, and the motivation behind the restriction is important. Topically, he suggests that a temporary ban on the transfer of land to quell an infectious disease would not alter the status of the land as property. However, 'very general restrictions on the scope of property use' would begin the call into question the very status of the relevant thing. In making this point, though, Penner seems to concede that property status owes something to the versatility of the thing in question. If that is the case, we might be persuaded that property status diminishes in line with the freedom to convert an item of property into something else that might be of greater use or value to the alienor. Turning back to rights of residence there is, in fact, only one possible purchaser of a right of residence, as we generally understand it, and that is the holder of the fee simple who might wish to buy it out. Meanwhile, any effort to alienate a right of residence to any other person is completely impossible: the right simply evaporates upon the attempt.

32 D J Hayton et al (eds), *Underhill and Hayton: Law of Trusts and Trustees* (19th edn, LexisNexis 2017) 11.68. In technical terms, A has a determinable life estate: Wylie (n 9) 9.87.

33 Wylie (n 9) 8.22.

beneficial owner (the grantee of the right of residence) and a settlement, with all it involves, necessarily follows by reason of the breadth of section 2(1) of the 1882 Act.

Having rejected the trust, Harvey settled upon the licence as the answer, and this approach has received weighty judicial endorsement in Northern Ireland (see below). We are therefore going to subject the licence-based theory to closer analysis than has been the case for the other possible solutions. This will involve a detailed look at what precisely is happening when a right of residence is granted.

6 The licence-based theory

In *Jones v Jones*,[34] by agreement made in 1983 and registered in 1985, a father made an *inter vivos* transfer of his holdings to his son, the first defendant, and in return reserved a right of residence in the family dwelling house for himself and his wife, the plaintiff, for their respective lives. From the time of the agreement until 1998, the plaintiff enjoyed exclusive occupation in the dwelling. In 1998, the plaintiff was admitted to hospital and eventually to a residential care home. Once in residential care, the plaintiff found that she was experiencing difficulty in obtaining readmittance to the dwelling, her son withholding the keys. Initially, to counter the alleged interference of his siblings, the son argued that the plaintiff had an exclusive right of residence. However, the son later changed tack completely when he admitted his own son and daughter-in-law, the second and third defendants, as occupants of the dwelling. All defendants now argued that the plaintiff only had such rights of residence as were consistent with the rights of the new occupants. The plaintiff sought declaratory relief that she was entitled to a right of residence during her lifetime and that the defendants should be restrained from obstructing her access to the premises. The defendants argued that a right of residence was an established legal term with a precise meaning; in the absence of words of exclusivity, this right was to be interpreted as a general rather than an exclusive right; a general right of residence did not entitle the plaintiff to exclusive occupation. Girvan J rejected these submissions:

> In fact the term 'right of residence' is not a legal term with a clear and precise meaning (as is demonstrable from an analysis of the authorities). An analysis of the Irish case law shows a considerable variation in the way in which the parties express a right of residence which is being conferred or reserved.[35]

Drawing on Professor Harvey's article, his Lordship concluded that rights of residence were a species of licence:

> The right of residence in favour of the deceased and the plaintiff reserved by the agreement can fairly be viewed as a form of contractual licence reserved by and granted back to the plaintiff and her husband. In reality it was an integral part of the agreement for the transfer of land to William by the deceased. During the lifetime of the deceased and the plaintiff it was an irrevocable contractual licence to reside in the premises which the court would protect by injunction or specific performance if appropriate.[36]

The conclusion that the right of residence is best conceptualised as a licence seems now to have ossified. In *Re JS (deceased)*, McBride J recently held:

> In line with *Jones* and the views expressed by Professor Harvey I am satisfied that a right of residence is upon a proper analysis a contractual licence.[37]

34 [2001] NI 244.

35 Ibid 256.

36 Ibid.

37 [2018] NICh 20, [55]. It is difficult to criticise this conclusion in view of the fact that it was supported by previous authority and academic writing.

In order to assess this conclusion, we are obliged to look at difficulties in the licence-based theory as it applies between the grantor (and his successors in title) and grantee. We will encounter further difficulties when we assess the relationship of grantee and a purchaser of the fee simple.

7 Licences: grantor and grantee

In *Jones*, the right of residence lay in a contract between the father and son.[38] The wife and mother was able to benefit from the consideration passing from her husband to her son by virtue of section 5 of the Law Reform (Husband and Wife) Act (Northern Ireland) 1964.[39] On the facts of that case, the identification of the relationship between the son and mother as contractual licensor and licensee respectively was accurate.[40] But, more generally, as we will now attempt to show, we cannot say that all rights of residence can be so categorised. A right granted by will, for example, is very likely to be gratuitous and by that analysis, if a licence, revocable. We need to break this reasoning down somewhat by examining the gratuitous and revocable nature of the right granted.

As Girvan J said in *Jones*, licences come in several different forms, but for the moment we need to compare the contractual and bare varieties. As his Lordship stated:

> A contractual licence which derives its force from some contract express or implied differs from a bare licence in that it is not granted voluntarily but is founded on valuable consideration moving from the licensee.[41]

A beneficiary under a will gives no consideration for the gift to him. This does not normally present any issues since donees under a will are able to compel the personal representatives to effect a transfer of the gift to them.[42] But the status of the right of residence is thrown into stark relief when we consider that property passed by will is subject to all the usual incidences of that property. As an obvious example, the interest under the bequest of a term of years will determine on the expiry of the term.[43] The devisee of an estate *per autre vie* takes a right which is, factually, potentially less secure yet.

A gratuitous licence arising *inter vivos* is liable to be determined at will. In *Binions v Evans*,[44] Lord Denning MR commented on the case of *Buck v Howarth*:

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38 The right was also contractual in another important judgment of Girvan J's on this subject, *Re Walker's Application* [1999] NI 84.

39 See now the Contracts (Rights of Third Parties) Act 1999.

40 As was the conclusion that, since the right had been registered as a Schedule 6 burden as contemplated by section 47 of the 1970 Act, the second and third defendants were also bound by it. However, absent this specific provision, the 1970 Act does not make licences binding. A licence cannot assume a proprietary nature as the right of a person in actual occupation under paragraph 15 of Schedule 5 to the Act because that paragraph is directed at rights which are proprietary at common law (and would thus bind a purchaser of unregistered land) but which would not otherwise bind a registered purchaser under the registered scheme: see the discussion of Schedule 3 to the Land Registration Act 2002 in E Cooke, S Bridge and M Dixon, *Megarry & Wade: The Law of Real Property* (9th edn, Sweet & Maxwell 2019) 6-097.

41 *Jones* (n 17) 255

42 The particular rights of the beneficiaries is an area of dispute in itself. Following *Commissioner of Stamp Duties v Livingston* [1965] AC 694, beneficiaries have, at the very least, a chose in action to compel the proper administration of the estate. In fact, devisees in both jurisdictions in Ireland have the benefit of a trust which was expressly disapproved of in *Livingston*: Succession Act 1965, section 10(3); Administration of Estates Act (Northern Ireland) 1955, section 2(3).

43 And, as pointed out in *Williams on Wills* (10th edn, LexisNexis 2018) 8.1, may be liable to determine sooner on the operation of an option or power of re-entry.

44 [1972] Ch 359 at 366.

> … where a man, for no consideration, gave another permission to stay in a cottage until he died, it was held to be no lease but only a tenancy at will. Today it would be considered a bare licence, with no contractual right at all to stay there.[45]

Megarry & Wade: Law of Real Property says the following:

> A bare licence is a licence which is not supported by any contract, and includes a gratuitous permission to enter a house or cross a field … A bare licence can be revoked at any time … Even a licence granted by deed may be revocable, provided there is no covenant not to revoke it … A revocable licence is automatically determined by the death of the licensor or the assignment of the land.[46]

A testamentary right of residence does not fit neatly into this framework of the licence. We have asserted that an essential element of a right of residence is that a grant of the right from a testator (T)[47] to a grantee (A) confers on A the right to reside in the subject property for her life, and testators and draftspeople work on that assumption. But if T's grant of an *inter vivos* licence to A would cease on T's death, it is not clear how we explain a licence from T to A which only *commences* on T's death and apparently endures for A's *lifetime*. If T could have terminated the licence at any time during his own lifetime, it is not apparent by what licence-based means A can require T's estate to recognise a lifetime licence in favour of A.

It might be tempting to say that the right obtains its durability by way of a transfer under seal combined with a covenant not to revoke (implied, if necessary). However, a will is not a deed. A deed is a document of title,[48] but a will is only the document of title of the executors. For the beneficiaries, the will gives an ultimate (contingent) right to title, but it is not title itself: *Commissioner of Stamp Duties v Livingston*.[49] The devisee of a legal estate requires an assent in writing;[50] the legatee of personalty obtains the assent of the executors in their acquiescence in the legatee's enjoyment of the property.[51] Therefore, it would be difficult to argue that the durable right of residence comes to the legatee by way of construing the will itself as a deed granting a right of residence together with an implied covenant against revocation.

We are now going to bypass, for a moment, consideration of the relationship between the grantee of the right and the devisee of the fee simple. Rather, we are going to assess the durability of the licence as against a purchaser of the fee simple. This will also allow us to draw some conclusions about the relationship between the grantee and the devisee.

8 Licences: grantee and purchaser

We commence this study by observing two comments from academics. This is Professor Martin Dixon:

> Something is either a licence, or it is not. If it is a licence, it may be irrevocable by reason of equitable remedies, but it can bind no-one but the licensor.[52]

45 [1947] 1 All ER 342.

46 Cooke et al (n 40) 33-003.

47 But it could equally be an i*nter vivos* grant.

48 Real Property Act 1845.

49 [1965] AC 694. Even the trusts imposed by section 10(3) of the Succession Act 1965 and section 2(3) of the Administration of Estates (Northern Ireland) Act 1955 only exist for the persons 'by law entitled thereto' and those persons could, but *need not*, be the legatees under the will.

50 Administration of Estates (Northern Ireland) Act 1955, section 34(4).

51 R Kerridge, *Parry & Kerridge: The Law of Succession* (13th edn, Sweet & Maxwell 2016) 23–36.

52 Martin Dixon, 'Developments in estoppel and trusts of land' [2015] Conveyancer and Property Lawyer 469, 473.

And this is Professor Ben McFarlane:

> Indeed, relying on two House of Lords authorities, *Ashburn Anstalt* plainly contradicts [the] contention that such a licence is a property right and hence *prima facie* binding on a transferee of the land. This clear refusal to confer proprietary status on licences of land has been consistently confirmed in subsequent cases …[53]

At one point, there was a judicial move towards recognising that a licence would bind a transferee of the grantor unless the transferee were a purchaser for value without notice. The most famous examples of these cases tend to involve Lord Denning MR, but there is actually a reasonably weighty line of authority going back to cases such as *De Mattos v Gibson*[54] and the decision of the Privy Council in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd*.[55] In these cases there is a contractual right to use an object (in the two given cases, a ship); the owner then sells the object to a new owner (sometimes expressly subject to the right of the user) and the holder of the contractual right asserts his right of use against the new owner. The new owner argues that he is not bound by his predecessor's personal obligations. In both *De Mattos* and *Lord Strathcona*, the arguments of the user (charterers) were successful, Lord Shaw in the latter case stating that:

> Equity would grant an injunction to compel one who obtains a grant *sub conditione* from violating the condition of his purchase to the prejudice of the original contractor.[56]

Such were the older cases. In *Errington v Errington*, a son and daughter-in-law went into possession of a house and were promised by the father that if they paid the mortgage, he would convey the house to them. Denning LJ (as then) concluded that the couple were licensees with a contractual right to remain.

> As such they have no right at law to remain, but only in equity, and equitable rights now prevail … This infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice.[57]

In *Binions v Evans*,[58] the owners of a cottage made the following compact with the occupant:

> The landlords, in order to provide a temporary home for the tenant … hereby agree to permit the tenant to reside in and occupy all that cottage and garden … as tenant at will of them free of rent for the remainder of her life or until determined as hereinafter provided …

In the English Court of Appeal, Lord Denning analysed this right and rejected the notion of a tenancy at will since the interest granted was to last for the life of the grantee. A life estate was also rejected on the grounds (noted above) that no one intended that the grantee should have the wide powers of a life tenant under the Settled Land Acts. Lord Denning concluded that the grantee had a contractual right to reside which was probably an equitable interest *ab initio* but certainly became one when the owners of the cottage sold the superior interest and the purchasers, who had taken the property expressly

53 Ben Macfarlane, 'A reply to Mr Watt' [2003] Conveyancer and Property Lawyer 473.

54 (1849) 4 DeG & J 276.

55 [1926] AC 108.

56 [1926] AC 108, 120.

57 [1952] 1 KB 290 (CA), 298–299.

58 [1972] Ch 359.

subject to the rights of the grantee and had paid a reduced price accordingly, attempted to evict her. His Lordship's conclusion was:

> When the landlords sold the cottage to a purchaser 'subject to' her rights under the agreement, the purchaser took the cottage on a constructive trust to permit the defendant to reside there during her life, or as long as she might desire. The courts will not allow the purchaser to go back on that trust.

In *Ashburn Anstalt v Arnold*,[59] however, the English Court of Appeal reined in this expansive doctrine, adopting the dissenting reasoning of Russell LJ in *National Provincial Bank Ltd v Hastings Car Mart Ltd*:[60]

> … on *Errington v Errington* … I find it not easy to see, on authority, how that which has a purely contractual basis between A and B is, though on all hands it is agreed that it is not to be regarded as conferring any estate or interest in property on B, nevertheless to be treated as producing the equivalent result against a purchaser C, simply because an injunction would be granted to restrain A from breaking his contract while he is still in a position to carry it out.

It is that reasoning which is endorsed in the two academic opinions already noted.

In *Ashburn Anstalt*, the Court of Appeal left open the possibility that the contractual licence could be enforced through a constructive trust. That would only arise, though, where the conscience of the holder of the fee simple was affected. The overriding concern was for the certainty of title to land, expressed in the statement that it was not 'desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials'.[61] The decision in *Binions v Evans* was not expressly disapproved of but, as explained, what was felt to be of importance was not that the purchaser had notice of the licence, but that he had paid a reduced amount. That latter conduct made it unconscionable to attempt to ignore the licence.

All the cases we have referred to involve the clash between a *contractual* licensee and a transferee for value from the grantor of the licence. The present state of judicial and academic opinion is that a contractual licence is not enforceable against any person other than the grantor. That does not auger well for the grantee of a gratuitous right of residence since, if her right is merely classified as a licence, it cannot prevail against a purchaser, even one with notice of the right,[62] unless (following *Binions*) some further unconscionable conduct can be found.

9 Licences: grantee and devisee

We can now offer some conclusions about the right of the grantee against the devisee of the fee simple. The devisee may be the grantor's successor in title to the fee simple and, on one view, no better placed than his predecessor. However, the devisee is still a person other than the grantor, and, on the basis of the current law of licences, he is not bound by the licence.

If it is the case, as has been argued above, that T's estate is not bound to recognise a bare licence in favour of the grantee, it is difficult to see by what purely licence-based theory the devisee could be bound. Even at the high-water mark of judicial support for

59 [1989] Ch 1.

60 [1964] Ch 665, 698. Lord Denning MR was in the majority whose decision was overturned by the House of Lords.

61 [1989] Ch 1, 25–26.

62 'But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter': [1989] Ch 1, 26.

the licence holder, there was no suggestion that a bare licence was anything other than revocable at will.[63]

10 Licence by estoppel

When we consider the licence by estoppel, the matter is much more nuanced. A licence by estoppel arises where a person acts to his detriment in response to a representation from the holder of the superior interest that a licence will be granted.[64] Instances where a testator assures someone, usually a close relative, that they will be provided for in the aftermath of the testator's death are legion. The court could choose to order that the testator's estate is bound by the representations and give the representee the licence they expected to receive.

We might attempt to construct an argument that every testamentary right of residence raises an estoppel, but if we did so we would have to expand innovatively on how estoppels are presently understood. Admittedly, there will be considerable factual overlap between rights of residence and estoppel licences in many cases. But, equally, there will be cases where the legatee of the right of residence has received no assurances at all during the testator's lifetime. If a testator bequeaths a right of residence to, say, a relative living in England with whom she has had no contact for years, that right is presently understood to be as good a right of residence as any other. However, in that case the strength of the right of residence cannot depend on the unconscionability of the testator since, firstly, there is no representation; secondly, there is unlikely to be any detrimental reliance on the part of the legatee; and, thirdly, if the right of residence is frustrated, that is likely to be at the behest of the devisee of the fee simple and not the testator's estate.

Similarly, if we shift the focus to the actions of the devisee of the fee simple, the *Binions v Evans* constructive trust cannot bind him without further legal innovation. It will be recalled that in *Binions* the purchasers of the freehold were bound by the licence because they had given less than the market rate in return for an undertaking to respect the licence. The vendors had, in effect, paid the purchasers to respect the licence. The imposition of the constructive trust was really the court's response to the inability of the resident to enforce the agreement made for her benefit.[65] The devisee of the fee simple subject to a right of residence is guilty of no such unconscionability since he has at no stage given any undertaking or assurance that he will respect the right of residence.

A yet further problem is that, *assuming* an estoppel licence comes into existence, its durability against persons other than the grantor is not at all certain. This is because asking whether estoppel licences bind third parties is a category mistake. Ben McFarlane puts it like this:

> Asking if a type of right is capable of binding third parties, i.e. if it is proprietary, is a sensible and significant enquiry. However, asking the same of a means of acquiring rights is mistaken and misleading … The answer depends of course on whether the particular means of acquiring rights has led in a particular case to the acquisition of a proprietary right. If so, it is that proprietary right which is capable of binding a third party. Yet, largely due to the confusion between licences and rights arising through estoppel, the question 'do estoppels bind third parties?' is often put.[66]

63 See for example, Hodson LJ's short concurring judgment in *Errington* (n 57) 301, where he confronts the ineffectiveness of a bare licence (revocable) and goes on to find the existence of a contractual licence.

64 Other representations could lead to the award of a licence.

65 For which there were two reasons: the licensee was not in privity and the vendors' agreement with the purchasers lacked formality.

66 Ben McFarlane, 'Proprietary estoppel and third parties after the Land Registration Act 2002' [2003] 62 Cambridge Law Journal 661, 679

For McFarlane, any durability which flows from the estoppel depends on the recognition that the right-holder has a proprietary interest; a class from which licences, by definition, are excluded.[67]

In *Inwards v Baker*,[68] a son was encouraged to build on his father's land in the expectation that he would be permitted to live there as long as he wished. He did so and lived in the resulting dwelling until the father died. The father did nothing else to safeguard the son's interests, and upon the father's death his will provided for the land to pass to persons other than the son. In the English Court of Appeal, Lord Denning MR said:

> It is quite plain from those authorities that if the owner of land requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.[69]

His Lordship concluded his short judgment by saying:

> I am quite clear in this case it can be satisfied by holding that the defendant can remain there as long as he desires to use it as his home.[70]

McFarlane denies that there is anything particularly significant, or binding, about the conjunction of the licence with the 'equity'. Rather, the significant feature is the proprietary interest which the court settles upon as satisfying the equity that has arisen. It is that property right which is the true source of the right of the estoppel licensee. In the *Inwards* case, McFarlane's view (the court did not express a view on the precise category of the remedy) is that the son actually took an equitable lease.[71]

If this analysis is accurate, then it is fatal to the existence of a stand-alone proprietary licence.

11 Licences: conclusions

Of all the resolutions to the problem posed by the right of residence, the licence theory was the most auspicious, and Harvey's reliance on it was understandable. That theory, however, has been exposed as the proprietary theory of licences has retreated from its furthest advances in Lord Denning's day.

12 Further possibilities: election

Williams on Wills describes the application of the testamentary doctrine of approbation and reprobation in this way:

> Thus, if the testator gives to A property which in fact belongs to B and by the same will makes a gift to B, then B will not be allowed to take such gift unless he undertakes to give effect to the gift to A or, in the usual phrase, he is prepared to carry into effect the whole of the testator's dispositions.[72]

It was explained by Lord Cairns LC in *Codrington v Codrington* as meaning that a person named in a will:

67 'However, it is not the licence which binds the third party, as the licence is simply a personal permission from A': ibid 676.

68 [1965] 1 All ER 446.

69 Ibid 448.

70 Ibid 449.

71 McFarlane (n 11) 515.

72 *Williams on Wills* (n 43) 42.1.

> … cannot accept a benefit under the instrument without at the same time conforming to all its provisions, and renouncing every right inconsistent with them.[73]

Approbate and reprobate are Scottish terms identical to the doctrine of election more familiar in England and Ireland,[74] and that latter term will be used for the remainder of this article. Maitland addresses the objection that the doctrine should only apply where T is mistaken about his ownership of A's property which he has given to B. But the doctrine is not so refined, and the blanket application is to avoid a difficult enquiry into T's state of mind.[75] Anyhow, as Maitland says, 'such is the principle'.[76]

Applied to the present problem, it is much less unjust then in the standard case where A has to give up property (or compensate B) which may never have belonged to T at all in order to obtain her own benefit under the will.

In the case of the right of residence, put simply, we oblige the devisee of the fee simple (A) to recognise the right of B as a condition of taking the devise. We could regard this as a type of estoppel, but of a particular kind. The only conduct of A's to which the doctrine responds is her refusal to adhere to T's intentions.

This solution is not a new one and was, in fact, proposed by Professor Harvey. He concluded that the principle that one could not approbate and reprobate 'could equally well be expressed as "he who approbates is *estopped* from reprobating"'.[77]

Election provides an explanation as to why the devisee is bound to respect the right of residence. The problem is that the recognition of an estoppel under the doctrine of election is not a solution of itself because, as we discussed above, an estoppel requires fulfilment in some remedy known to the law, ranging from a mere monetary award to the grant of a fee simple. We are in the process of showing that no such right, interest or concept performs all the functions we would wish for a right of residence. For example, an estoppel licence poses rather than answers questions of durability. If the right of residence which putatively binds the devisee of the fee simple is a bare licence, why must the devisee (still less a purchaser from him) put up with it? The answer provided by election is that it is the condition attached to his gift. But the devisee's retort will be, 'yes, it is a condition but that condition takes the form of a bare licence which, by definition, I am not bound by'.

13 Further possibilities: lease

Finally (more accurately, as an afterthought), we turn to the lease, but we find almost immediately that it will not serve. While covenants prohibiting assignment (therefore fulfilling the requirement that the right be personal to the grantee) are known to the law, a lease for the life of a tenant is no longer capable of being created.[78] Furthermore, the hallmark of a lease is exclusive possession, and this is, obviously, incompatible with non-exclusive rights of residence where the right is to reside along with, rather than instead of, the devisee. Further still, by section 3 of the Landlord and Tenant Law Amendment

73 (1875) LR 7 HL 854, 861–862.

74 F W Maitland, *Equity* (1st edn, Cambridge University Press 1909) chapter XVIII.

75 Ibid 227.

76 Ibid 225–227.

77 Harvey (n 1) 419 (original emphasis).

78 Property (Northern Ireland) Order 1997, Article 37(1). Under the Settled Land Act 1882, a tenant for years determinable on life, 'holding merely under a lease at a rent', was expressly disqualified from exercising the powers of the tenant for life: see section 58(1)(iv).

(Ireland) Act 1860, an Irish lease requires rent, whereas a right of residence must be capable of being enjoyed gratuitously.[79] We cannot therefore manufacture the right of residence we seek from the raw materials of the lease.

Conclusion

If the analysis provided above is correct, then the results of the foregoing enquiry are disquieting and perhaps surprising: outside statute, rights of residence cannot be accommodated within the current framework of the law of real property. There are two major consequences. Firstly, the statutory right in registered land is *sui generis*.[80] Secondly, in unregistered land, we are entirely dependent upon statutory intervention to close a significant lacuna. A court might presently be able to use the licence to fulfil the election-based estoppel we noted above that would oblige a grantee of the fee simple to observe the right of residence. To that extent, the licence could act as a stop-gap mechanism by which to conceptualise the relationship between those two persons. However, as we have attempted to show, if that licence also binds the transferee of the fee simple, it ceases to be any type of licence currently recognised by the law.

79 The right of residence need not be gratuitous, but if we seek a general conceptualisation of the right it must be capable of encompassing gratuitous rights and a lease will not serve.

80 A conclusion reached with some reluctance since it means that, whether the draftsperson intended so or not, section 47 virtually codifies the right.