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EXPLAINING THE CERTAINTY OF TERM REQUIREMENT IN LEASES:  
NOTHING LASTS FOREVER

Abstract:

This article explains the rule that leases have a certain term from the outset by placing the lease within the wider context of the system of estates in land. There are no perpetual estates in land. However, some uncertain terms risk creating genuinely perpetual estates, conflicting with the *nemo dat* principle. All leases for uncertain terms cause considerable difficulties if a superior estate comes to an end. The article shows that the common law addressed this difficulty, not entirely consistently, before 1925, but there are still real difficulties in the operation of escheat were uncertain terms to be permitted.

Keywords:

Land law; real property law; leases; term of years; estates; escheat; certainty of term

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EXPLAINING THE CERTAINTY OF TERM REQUIREMENT IN LEASES:

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The requirement that a valid term of years estate has a term which is certain from the outset is well-established. So are the criticisms of the rule.<sup>1</sup> In the recent Supreme Court case of *Mexfield Housing Co-Operative Ltd v Berrisford* the rule was strongly criticised.<sup>2</sup> The Justices cited Lord Browne-Wilkinson in *Prudential Assurance Co Ltd v London Residuary Body*, where the rule was described as “bizarre” and merely an “ancient and technical rule of law”,<sup>3</sup> a complaint exacerbated by Lord Neuberger’s observation that the rule has “no apparent practical justification”.<sup>4</sup> The application of the rule can easily be avoided by granting a lease for a certain term with an additional uncertain determining condition,<sup>5</sup> and seems to be particularly problematic in relation to periodic tenancies, where there is clearly no maximum duration for a tenant’s occupation of the premises.<sup>6</sup> Typically, the cases in which the certainty of term rule arises are ones in which the parties have deliberately tried to

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<sup>1</sup> The fullest expositions are S. Bright, “Uncertainty in leases – Is it a vice?” (1993) 13 *Legal Studies* 38 and K. Gray and S.F. Gray, *Elements of Land Law*, 5th ed. (Oxford 2008), 321-326.

<sup>2</sup> *Mexfield Housing Co-Operative Ltd v Berrisford* [2011] UKSC 52, [2012] 1 A.C. 955, at [34] (Lord Neuberger) and [115] (Lord Dyson).

<sup>3</sup> *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A.C. 386, at 396.

<sup>4</sup> *Mexfield* at [34].

<sup>5</sup> *Prudential Assurance* at 390. One risk here is in altering the nature of the proposed arrangement. While Lord Templeman suggested the parties could have created a five or ten year term determinable on the land being needed for road widening, it seems likely that the short-term arrangement envisaged by the parties was not intended to last even that long.

<sup>6</sup> *Mexfield* at [87]-[88] (Lady Hale).

enter into unusual arrangements,<sup>7</sup> or situations of poor conveyancing where the problem could easily have been avoided.<sup>8</sup> This article will show that the rule does have a plausible doctrinal underpinning, addressing issues which continue to be relevant, although they were more prominent earlier in the history of the common law. It also highlights practical difficulties from allowing the grant of uncertain terms, difficulties which have been hitherto overlooked.

Underlying the criticism of the certainty of term rule is the tension in the law of leases between the foundation of leases in contractual arrangements and their existence as property rights. From the perspective of contract, the certainty of term rule conflicts with the parties' contractual freedom, arbitrarily preventing people from entering into arrangements which they consider beneficial. This article seeks to place the certainty of term rule into a proprietary context. As Low notes, "It would be fanciful to suggest that a purely *contractual* lease of uncertain duration is illegal or otherwise contrary to public policy; all of the justifications for the fixed maximum duration rule are obviously directed at the lease as an *estate*".<sup>9</sup>

Contractual freedom is limited in the sphere of property rights. Most obviously, the *nemo dat* principle prevents someone giving away property rights which the donor does not have, whatever their contractual intentions. More specifically, parties may agree to create rights which they intend to be proprietary, but if those rights do not satisfy the requirements of one of the property rights recognised within the *numerus clausus*, any such grant will fail to create a property right. The parties are free to create contractual rights between themselves, and will do so, but these rights do not have proprietary effect. The certainty of term rule

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<sup>7</sup> *Say v Smith* (1563) Plowd 269; 75 ER 410 seems to fall into this category. The lease in question involved periodic payments to be made after each ten year period and was described as "perpetual". For problems with perpetual renewability and the statutory approach to the problem, see M. Pawlowski and J. Brown, "Perpetually renewable leases – a reappraisal" [2014] Conveyancer 482.

<sup>8</sup> *Prudential Assurance* is an example.

<sup>9</sup> K.F.K. Low, "Leases and the fixed maximum duration rule yet again, but with a twist" (2011) 127 L.Q.R. 31, at 35.

should be understood as tied to the place of leases within the common law of real property, rather than simply as a species of contract.

Maintaining the certainty of term rule has been described by Hansmann and Kraakman as a consequence of “a natural tendency toward doctrinal scholasticism among courts and legal scholars”.<sup>10</sup> It is thus apposite that it seems to be a consequence of the inclusion of the leasehold estate in the complicated medieval thought surrounding the wider system of estates in land. This article stresses that “our land law has its roots in the feudal past”.<sup>11</sup> While the rule does operate as a bar to contractual freedom, it does so as a consequence of the contracting parties trying to create proprietary rights which must fit within that wider system.

This explanation for the certainty of term rule does not mean that it remains justified in terms of policy or practicality. Basic property law rules can be avoided, exceptions can be made, the wider context may have changed such that the rule no longer applies. Despite its justification, there may be good reasons to amend or abolish the rule, or equally good reasons to maintain it. However, for the abolition of the rule to be doctrinally consistent, and to avoid some awkward consequences, wider changes affecting the system of estates in land will be required.

## I. PERPETUAL LEASES AND UNCERTAIN TERMS

An essential starting point is the observation made by Bright and Gray and Gray, that a lease for an uncertain term might last forever, imposing a potentially indefinite burden on the land.<sup>12</sup> The nature of a term of years as originating in contract weakens this objection. The owner in fee simple clearly has the power to subject himself, his heirs and assigns to long running obligations or to deprive himself and his heirs of the benefit of the property in perpetuity by transferring it

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<sup>10</sup> H. Hansmann and R. Kraakman, “Property, Contract, and Verification: the *Numerus Clausus* Problem and the Divisibility of Rights” (2002) 31 *Journal of Legal Studies* S373, at S403.

<sup>11</sup> M. Dixon, “The past, the present and the future of land registration” [2013] *Conveyancer* 463.

<sup>12</sup> Bright, “Uncertainty in leases”, p.49 (considering this to be a policy issue); Gray and Gray, *Elements of Land Law*, p.325 (identifying a possible conflict with the “perpetual” nature of the fee simple).

away. Why not allow potentially indefinite leasehold burdens over the fee simple estate? The certainty of term rule seems to be undermined by (and itself undermines) freedom of contract.<sup>13</sup> However, any lease which were to last forever would contravene the *nemo dat* principle as there are no estates at common law which last forever.<sup>14</sup> *Nemo dat* is a recognised limitation on freedom of contract, in that a non-owner cannot give ownership, even if that is what was agreed in the contract.<sup>15</sup>

For many leases with uncertain terms, this is the core of the problem addressed by the uncertain term rule. Rather than simply being an objection to terms which have only the potential to last forever, the rule prevents the creation of leaseholds where the estate might become genuinely perpetual, which is a consequence of the common law's approach to determinable estates.

If a grant of land were made "to X in fee simple until X marries", such a grant would be a determinable fee simple estate. If X marries, the estate determines automatically. If X dies unmarried, the determining event becomes impossible. The estate ceases to be a determinable fee, becoming a fee simple absolute.<sup>16</sup> The same applies if instead of a determinable fee, the estate is a fee simple upon condition subsequent.<sup>17</sup> If the condition becomes impossible, the estate becomes absolute.<sup>18</sup> In essence, if an estate's duration is to be determined by an uncertain event, if the uncertain event becomes impossible then the estate becomes perpetual.

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<sup>13</sup> Bright, "Uncertainty in leases", p.45.

<sup>14</sup> See below, text at nn.40-41. Uncertain or perpetual leases are possible if the lease is not granted out of a freehold estate, but directly by the Crown, see below n.78.

<sup>15</sup> There are, of course, exceptions to the *nemo dat* principle (see D. Sheehan, *The Principles of Personal Property Law* (Oxford 2011), 426-7), but *nemo dat* remains the explanatory principle here.

<sup>16</sup> *Re Leach* [1912] 2 Ch. 422 at 428-9. The case concerned equitable rights, but the logic is applicable to legal rights too. Challis considers this a general rule applicable to all estates (H.W. Challis, *The Law of Real Property: chiefly in relation to conveyancing*, 2nd ed. (London 1892), p.227).

<sup>17</sup> Distinguishing between the two types of estate is difficult, see C. Harpum, S. Bridge and M. Dixon (eds.), *Megarry and Wade, The Law of Real Property*, 8th ed. (London 2012), 64-65. The distinction is less important in relation to leasehold estates as the principal practical consequence (the requirement of entry to determine a conditional fee) does not apply in relation to leaseholds, see L.A. Goodeve, *The Modern Law of Real Property*, 5th ed., H.W. Elphinstone and F.T. Maw (eds.) (London 1906), p.195.

<sup>18</sup> *Darley v Langworthy* (1774) 3 Bro. PC 359; 1 E.R. 1369. A widow's life estate on condition that she continued to reside in the premises became absolute when it became impossible to fulfil the condition.

The same logic should also apply to leases for an uncertain term. If a hypothetically valid lease were granted “to X until X marries”, the determining condition for the lease might become impossible, as X may die unmarried. Given that no other term is specified for which the term of years estate will endure if X dies unmarried, it seems that the “lease” which has been granted is not subject to any term at all.<sup>19</sup> However, a grant of a lease cannot be made to last forever, as this would be the grant of a leasehold estate greater than any freehold estate held by the landlord and breach the *nemo dat* principle.<sup>20</sup> The law would either need to allow such leases to be valid until the determining condition becomes impossible (at which point the leasehold estate definitely contravenes the *nemo dat* principle) or simply regard such leases as void from the outset, which is the position taken in the certainty rule.

Understanding the rule as related to the common law’s approach to determinable estates addresses two of the concerns raised about the certainty of term requirement. The first is that the rule is easily avoided by granting a long lease subject to a determining condition.<sup>21</sup> If the certainty of term rule is directed, at least in part, to preventing the possibility of genuinely perpetual leasehold estates, then long but determinable leases avoid the mischief to which the rule is directed. A lease simply for an uncertain term might become perpetual and thereby contravene the *nemo dat* principle. A long lease subject to a determining condition cannot become a perpetual estate as a fixed maximum duration has been agreed.

The second criticism is its relationship to fetters on determining periodic tenancies by notice.<sup>22</sup> Fetters on notice for defined periods seem to be acceptable, but fetters which are temporally uncertain are not. For example, in *Breams Property Investment Co Ltd v Stroulger*, a quarterly periodic tenancy with a term that notice

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<sup>19</sup> If the approach to construction taken in *Bracton* were taken, this would be construed as a determinable freehold life estate (see below, text at nn.30-31).

<sup>20</sup> See below, text at nn.40-41.

<sup>21</sup> Bright, “Uncertainty in leases”, p.39.

<sup>22</sup> Bright, “Uncertainty in leases”, pp.41-2.

could not be given by the landlord for three years is acceptable and compatible with the certainty of term requirement.<sup>23</sup> However, a fetter on determining a periodic tenancy by notice which is temporally uncertain, such as that in *Berrisford* itself, falls foul of the certainty of term rule.<sup>24</sup>

The explanation for this distinction is found in the certainty of term requirement, once the nature of such restrictions is understood. As Lord Neuberger and Lady Hale observe, the restriction on the landlord's right to give notice in *Breams* "turned the quarterly tenancy into a three-year term terminable by the tenant on notice before that, to be followed by a normal quarterly tenancy after that".<sup>25</sup> This approach explains why an uncertain fetter on the right to determine by notice is unacceptable. A fetter on determination of a periodic tenancy creates two tenancies, a fixed term followed by a periodic tenancy.<sup>26</sup> The fixed term established by the fetter on notice is governed by all the usual rules about fixed term tenancies. If such a term is uncertain, it contravenes the certainty of term rule in the same way as any other non-periodic tenancy. The fact that the tenancy is to be followed by a periodic tenancy is irrelevant. As Lord Neuberger observed, once one accepts the certainty of term rule, this is "justified in principle, logical in theory".<sup>27</sup>

*Nemo dat* therefore explains why leases making reference to uncertain determining conditions or conditions for notice which may become impossible cannot be made. However, it does not explain why leases cannot be made by reference to determining conditions which, while uncertain, cannot become impossible. A grant of a lease "for the duration of the war" would seem to fall into this category. While the duration of a war is uncertain at the onset of hostilities and a conflict may persist for some time, the end of a war will never truly become

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<sup>23</sup> *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1.

<sup>24</sup> *Mexfield* at [33] (Lord Neuberger).

<sup>25</sup> *Mexfield* at [88] (Lady Hale). The same point is made by Lord Templeman in *Prudential Assurance v London Residuary Body* at 395.

<sup>26</sup> The possible formalities consequences of this reasoning were not raised in *Mexfield*. Lord Neuberger's description of the situation as "equivalent to" a fixed term tenancy avoids the problem (*Mexfield* at [55]).

<sup>27</sup> *Mexfield Housing Co-Operative Ltd v Berrisford* at [55].

impossible. It is always possible for a war to end by agreement or the destruction of one of the parties to it. As an explanation for the certainty of term rule, the general rules about determinable estates are inadequate, although may be relevant. Stronger justifications can be found.

## II. GRANTS OF LAND IN MEDIEVAL LAW

A particular difficulty in explaining the certainty of term rule is that it is so long established that cases on the issue recognise, rather than justify, its existence. This probably reflects, at least in part, long-established practice. Conveyances of land for certain periods can be seen in the mid-twelfth century, before the common law of real property began to develop under Henry II.<sup>28</sup> The earliest clear evidence of something like the certainty of term rule dates from the thirteenth century. According to the book known as *Bracton*, medieval English law recognised grants of land in fee, as a freehold life estate or for a “term certain”. This list excludes the possibility of an uncertain term, but any explanation for the exclusion, and the certainty of term rule, is lacking.<sup>29</sup>

*Bracton* does consider what would occur if land were granted without a certain term. In medieval law, identifying which right in land had been granted depended crucially upon the form of the grant when expressing the duration of the right. A grant made to X and X’s heirs would be a grant in fee, a grant to X for life would be a freehold life estate and a grant to X for a set time would be a grant for a term of years.<sup>30</sup> *Bracton* raises the issue of a grant of land which does not comply with any of those forms. According to *Bracton*, “[i]f the donor makes a gift...no mention made of the donee's heirs or that it is for his life, the thing so given will be a free tenement as long as the donee lives, for to give in this manner is the equivalent

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<sup>28</sup> J.M. Kaye, *Medieval English Conveyances* (Cambridge 2009), 254-255.

<sup>29</sup> E.g. S.E. Thorne (ed.), *Bracton on the law and customs of England* (Cambridge MA 1968), vol.2, p.92.

<sup>30</sup> It is made clear in *Bracton*, vol.2, p.57 that a grant for the term of life takes effect as a free tenement, unlike a term of years. Medieval law did sometimes use the language of lessor and lessee for life interests seemingly granted as term of years, but the estates were freehold (see T. Littleton, *Littleton’s Tenures in English*, E. Wambugh (ed.) (Washington D.C. 1903), §57 (p.25)).



of giving for life”.<sup>31</sup> This is immediately followed by, and contrasted to, a reference to the grant of land “for a term of years”. Any grant of land made without reference to a certain term or the grantee’s heirs would necessarily be a life estate.

This appears to be a question not of rules about certainty of term, but rather of construction. Any attempt to grant land without a specified duration would be construed as a grant for life. This makes sense as a matter of language. If I give land to X, I intend for X to have it. If I do not say that I wish for anyone else (X’s heirs) to have the land too, presumably I intended only for X to have the land, especially in a context where it was well-established that grants to a donee and his heirs needed to be made explicitly.

This approach to construction also makes sense within the remedial context of medieval law. The grant of a term of years was not the grant of a free tenement, unlike the grant of a fee simple or a freehold life estate.<sup>32</sup> In the fifteenth century it became clear that the grantee of a term of years received a different type of right over the land than the tenant in fee simple or for life. The latter were seised and had seisin, the former had only possession.<sup>33</sup> This explained why the grantee of a term of years did not have a “free tenement” and was not able to use the assize of novel disseisin nor any other real actions.<sup>34</sup> Except against his landlord’s successors in title, a tenant for term of years had only remedies in damages.<sup>35</sup> An approach to construction which found a freehold life estate was consequently one which favoured the grantee. It was only when the grantor made it clear that the grant in question was a worse right, the term of years, that the grantee was denied access to the real actions.<sup>36</sup>

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<sup>31</sup> *Bracton*, vol.2, p.92.

<sup>32</sup> *Bracton*, vol.2, p.92.

<sup>33</sup> The language of seisin was used more flexibly in earlier periods, see F.W. Maitland, “The Seisin of Chattels” (1885) 1 L.Q.R. 324.

<sup>34</sup> *Bracton*, vol.2, p.92.

<sup>35</sup> See Baker, *Introduction to English Legal History*, pp.299-301. The position changed from the late-fifteenth century.

<sup>36</sup> This paragraph suggests that the description of the “rule” applied by the Supreme Court in *Mexfield* at [49], [50] and [54] was mistaken in several respects. The Supreme Court held that there was a

It is not clear whether the rule originated as one of substance with the approach to construction outlined above being simply a consequence of it, or whether the approach to construction came first. Even if the rule was initially only one of construction, it would have substantive consequences. The interpretative approach found in *Bracton* would render it impossible to grant a lease for an uncertain term. The idea of an uncertain term of years would simply have been inconceivable and the common law would therefore only recognise grants of land for certain terms.

An explanation for the certainty of term rule based on construction has lost its force in modern law. The approach to construction of a grant “to X” found in *Bracton* no longer applies, as section 60(1) of the Law of Property Act 1925 means that the grant would be construed as one in fee simple, unless a contrary intention appeared by the conveyance.<sup>37</sup> The remedial basis for the *Bracton* construction has also been lost: the same actions have been used to recover freehold and leasehold land for centuries.

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common law rule that an attempt to grant a lease to a living human being for an uncertain period failed, but instead created a lease for life, which is now converted by the Law of Property Act 1925, s. 149(6) into a lease for ninety years, determinable on the tenant’s death. The statement of the common law rule in this process is flawed (for similar, but not identical criticism, see K.F.K. Low, “Certainty of Terms and Leases: Curiouser and Curiouser” (2012) 75(3) M.L.R. 401 at 404-406). First, *Bracton* considers that an attempt to create an uncertain term creates only a freehold life estate, not a term of years for life. The estate created is therefore not within section 149(6). Instead, it seems that that the conversion of uncertain terms to life estates was abolished as a consequence of the impossibility of creating freehold life estates in section 1 of the Law of Property Act 1925. Second, rather than a rule that a lease which failed for uncertainty could be a life estate, the actual rule of construction was that a grant for a certain term denied the possibility of a freehold, whether in fee or for life. Third, the reasoning in *Berrisford* focuses on livery of seisin simply as a “formality” requirement (ibid. at, e.g., [25] (Lord Neuberger), [89] (Lady Hale)) which could be abolished (ibid. at [41] (Lord Neuberger), referring impliedly to Real Property Act 1845, s. 3, requiring a deed in addition to livery of seisin and Law of Property Act 1925, s. 51, abolishing livery of seisin). As Kaye notes, in the medieval period, livery of seisin was needed to make it “clear that some sort of freehold was meant to be given” (Kaye, *Medieval English Conveyances*, p.241) and so was essential for the conferral of a freehold life estate. When one understands that seisin was a substantive right, one realises that the reasoning in the Supreme Court is like suggesting that giving possession in a lease is merely a “formality” requirement, rather than the conferral of an essential element of the estate itself. Further incisive historical criticism of the Supreme Court’s reasoning in *Mexfield* can be found in J. Roche, “Constitutional land law: *Mexfield* and the 40-shilling freehold” in W. Barr (ed.), *Modern Studies in Property Law: Vol 8* (Oxford 2015), ch. 16.

<sup>37</sup> In relation to wills, the rule was abolished by the Wills Act 1837, s. 28.

## II. UNCERTAIN TERMS AND ESTATES IN LAND

While an explanation based on construction no longer justifies the certainty of term rule, another aspect of medieval land law could provide an explanation for the requirement that a lease is for a certain term, an explanation which remains valid today. That is the nature of the rights which owners of land hold as owners of estates in land, rather than owners of the land itself. It is the system of estates in land which explains why a perpetual lease cannot be created. The argument of this section is that all estates in land are temporally limited. A perpetual term, or an uncertain term which may last forever, not only raises concerns about *nemo dat* as outlined above, but also causes considerable practical problems in relation to such limited estates.

### *The Temporary Nature of Estates in Land.*

The description of estates in land as “four-dimensional” clearly identifies the role of time in defining estates.<sup>38</sup> The temporal element is clear in estates for life and for leases for a certain term, but estates in fee are also so limited. While the fee simple estate has been described as the only perpetual estate known to the common law, this is incorrect.<sup>39</sup> The fee simple always was, and remains in English law, an estate which can end. The common law doctrine of estates recognises no perpetual rights in land. At best the fee simple estate is potentially perpetual, a crucially important distinction.

Medieval and early-modern lawyers understood this point very well. An attempt to grant land “forever” failed to convey a fee simple.<sup>40</sup> A fee simple was a grant of land “to X and his heirs”.<sup>41</sup> If X died without heirs, or his line of heirs ended at any point, the fee simple estate would end and the land escheat to the feudal lord,

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<sup>38</sup> *Newlon Housing Trust v Alsulaimen* [1999] 1 A.C. 313 at 317 per Lord Hoffmann.

<sup>39</sup> *Western Australia v Ward* [2002] HCA 28 at [432].

<sup>40</sup> There is a good demonstration of this difficulty in a commentary on *Littleton* by the Elizabethan lawyer William Fleetwood (British Library Manuscript Harley 5225, f.14).

<sup>41</sup> *Littleton* §1 (p.1).

now more or less invariably the Crown. A fee simple was therefore not an estate to be granted by the word “forever”. Escheat for want of heirs was abolished by the Administration of Estates Act 1925, which instead provides that if a person dies without any heir entitled to receive their estate, the Crown takes the property as *bona vacantia*.<sup>42</sup> However, escheat does still arise, principally in two contexts. The first is insolvency. If an individual’s trustee in bankruptcy or a company’s liquidator exercises his statutory power to disclaim the land, the land will escheat.<sup>43</sup> The second is the dissolution of a company.<sup>44</sup> If an English company is dissolved, the company’s property will pass to the Crown as *bona vacantia*.<sup>45</sup> The Crown may disclaim the property, at which point escheat occurs.<sup>46</sup> If a foreign company is dissolved, escheat occurs automatically.<sup>47</sup> The Explanatory Notes to the Land Registration Act 2002 observe that 300-500 cases of escheat occur every year, a figure which remains accurate.<sup>48</sup> The perpetual fee simple therefore remains unknown to the common law. As a consequence, the owner of land in fee simple cannot grant a perpetual right in land: *nemo dat quod non habet*.

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<sup>42</sup> Administration of Estates Act 1925, ss. 45(1)(d) and 46.

<sup>43</sup> Insolvency Act 1986, ss. 315 and 178, applied in *Scmlia Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793. It is arguable that this is not a form of escheat as temporal limitation, in that it is not a situation where the tenant in fee simple ceases to exist (F.W. Hardman, “The Law of Escheat” (1888) 4 L.Q.R. 318 at 326-7). Insolvency law was also unknown for much of English legal history.

<sup>44</sup> Coke’s extra-judicial view that a fee simple estate granted to a corporation does not escheat, but rather reverts to the grantor seems to have been rightly rejected by the Privy Council in *Armbrister v Lightbourn* [2012] UKPC 40; [2013] 1 P. & C.R. 17 at para.[41], following the strong criticism of that view in *Re Wells* [1933] Ch. 29, especially by Lawrence LJ at 54-55.

<sup>45</sup> Companies Act 2006, s. 1012.

<sup>46</sup> Companies Act 2006, s. 1013.

<sup>47</sup> *Re Wells* [1933] Ch. 29 at 54-55.

<sup>48</sup> Land Registration Act 2002, Explanatory Notes, at [133], confirmed as still accurate by the Crown Estate in an e-mail to the author, 31 January 2014. According to the Crown Estate, in the financial year 2012-13 there were 776 instances of escheat in England, Wales and Northern Ireland. This figure is higher than normal and affected by the use of escheat in personal insolvencies in Northern Ireland when the property in question was in negative equity. For an example of the application of escheat in a case of personal insolvency in Northern Ireland, see *Ulster Bank v Dynes* [2012] N.I.Ch. 29. The Crown Estate suspects that they do not learn of all dissolutions of foreign companies, such that the actual number of escheats may be higher than the figures given here, e-mail to the author, 31 January 2014.

The role of the *nemo dat* principle was recognised by the House of Lords in *Bruton v London & Quadrant Housing Trust*.<sup>49</sup> In that case, the House of Lords recognised that in relation to the Landlord and Tenant Act 1985, a “lease” existed between individuals in the relationship of landlord and tenant. This was the case despite the “landlord” having only a licence, and therefore no estate out of which a leasehold estate could be granted. The case remains controversial, precisely because commentators identify the case as one which breaches the *nemo dat* principle.<sup>50</sup> Nevertheless, Lord Hoffmann did acknowledge the *nemo dat* issue, observing that a “lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a ‘term of years absolute.’ This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*.”<sup>51</sup> The real criticism of commentators is therefore that Lord Hoffmann seemed to draw a distinction between the concept of a “lease” and a “leasehold estate”.<sup>52</sup> Both the House of Lords and academic writers recognise the importance of *nemo dat* when considering estates in land.<sup>53</sup> That *nemo dat* logic applies to prevent the creation of any genuinely perpetual rights in land.

### *Temporary Estates and Leaseholds*

The nature of estates as temporally limited and how this affects leaseholds is something the common law has addressed, especially before the Law of Property Act 1925 limited the available estates to the fee simple and term of years.

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<sup>49</sup> [2000] 1 A.C. 406.

<sup>50</sup> E.g. S. Bright, “Leases, exclusive possession and estates” (2000) 116 L.Q.R. 7, at 8.

<sup>51</sup> *Bruton* at 415.

<sup>52</sup> For criticism in this vein, see Bright, “Leases, exclusive possession”, p. 9 and Dixon, “The non-proprietary lease: the rise of the feudal phoenix” (2000) 59 C.L.J. 25, at 27-8. This type of distinction is not without precedent. In the mid-twentieth century, Megarry similarly distinguished between a “lease” and the “leasehold interest” (R.E. Megarry, *A Manual of the Law of Real Property*, revised impression (London 1949), 352).

<sup>53</sup> *Nemo dat* reasoning also lies behind Lord Templeman’s explanation for the proprietary effect of negative freehold covenants in *Rhone v Stephens* [1994] 2 A.C. 310.

Modern lawyers are still familiar with the problem of temporally limited estates in relation to the grant of subleases. A leaseholder cannot grant a sublease for longer than his own estate in the land. If he or she tries to do so, the principle in *Milmo v Carreras* applies and the grant of the sublease will take effect as a disposition of the head lease.<sup>54</sup> The operation of *Milmo v Carreras* looks like an application of *nemo dat* in the context of temporally limited property rights: the owner of the head lease cannot give more than he or she has, but the attempt to do so operates as a conveyance of all that the grantor does have.

The same problem was also addressed in relation to other estates in land before 1925, albeit never in an entirely consistent fashion. The relationship between different kinds of temporal estates caused difficulties. Term of years estates lasted for a period determined solely by the inexorable passage of time, but the duration of freehold estates depended upon human longevity and reproduction, and was consequently unpredictable.<sup>55</sup> To resolve that difficulty, the law could either simply bar term of years estates as inconsistent with freehold estates for life or in tail or allow the term of years, but have rules affecting how such leaseholds were affected by the end of the freehold estate. The first possibility would render leasehold estates impossible, but given that such grants were allowed, it is unsurprising that medieval law instead developed rules to accommodate the relationship between leaseholds and freehold estates. These rules allowed for the creation of leaseholds, but also prevented the freeholder in possession for the time being from burdening the land with leasehold estates in the event that the relevant freehold estate came to an end.

An owner of a freehold life estate was unable to create leases that endured beyond his death, unless a power to grant such rights had been expressly granted with the life estate. If such a lease was granted, it terminated on the death of the life

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<sup>54</sup> [1946] K.B. 306. The various “exceptions” to the rule all arise where the head lease may endure beyond the sub-tenancy, confirming that the underlying justification lies in the *nemo dat* principle (see A. Hill-Smith, “The principle in *Milmo v Carreras*: when the term of a sub-lease equals or exceeds that of the head lease” [2013] Conveyancer 509 at 510-511).

<sup>55</sup> As *Bracton* put it “though nothing is more certain than death nothing is more uncertain than the hour of death” (*Bracton*, vol.2, p.92).

tenant.<sup>56</sup> In cases of grants of land in fee tail, if a lease was granted and the fee tail determined before the lease ended, the lease was voidable by the reversioner.<sup>57</sup> The life estate and fee tail did not resolve the problem of leasehold estates enduring beyond the legal estate in precisely the same manner, but in both cases it is clear that a leasehold could not be relied upon to survive the end of the freehold estate. As a consequence, the freeholder in possession could not burden the reversioner with leasehold estates over the land, unless (in the case of life estates) the reversioner or his predecessor in title had expressly authorised such burdens.

This problem also seems to have been an issue for term of years estates granted out of a fee simple. The sixteenth century writer Antony Fitzherbert refers to a “doubt” about the availability of the writ *quare ejecit infra terminum* against a feudal lord taking land on escheat.<sup>58</sup> For Fitzherbert, it was uncertain whether a tenant had access to the *quare ejecit* writ used by leaseholders against the owner in fee simple.<sup>59</sup> If the tenant did not have access to that writ, then the tenant had no remedy against the lord claiming the land on escheat. In effect, the tenant’s term of years estate would cease to have legal effect. The “doubt” is unsurprisingly imprecise, but the leasehold estate being either void or voidable would be consistent with *quare ejecit* not being available. But if the writ were available, then it seems that a feudal tenant could bind the feudal lord with a contractual arrangement between the feudal tenant and a leasehold tenant. That is now the case in English law; cases from the eighteenth and nineteenth centuries establish that the term of years estate does survive the end of the fee simple estate by escheat.<sup>60</sup> This suggests a further explanation for the certainty of term requirement, one grounded in the doctrine of estates and addressing the problem of the freehold estate ending while the leasehold

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<sup>56</sup> *Smith v Widdlake* (1877) 3 C.P.D. 10.

<sup>57</sup> *Earl of Bedford’s Case* (1586) 7 Co.Rep. 7; 77 ER 421.

<sup>58</sup> A. Fitzherbert, *The New Natura Brevium of the Most Reverend Judge Mr Anthony Fitz-Herbert* (London: A. Strathan and W. Woodfall, 1794), vol.2, p.198 (first printed in 1534).

<sup>59</sup> *Quare eject infra terminum* was available for ejections of the tenant during the leasehold against the landlord, including successors in title of the original landlord.

<sup>60</sup> *Scmlla Properties* at 806-808.

estate persists. Unlike the approach to construction found in *Bracton*, this justification for the rule retains validity in modern English law, although it was more significant in medieval law.

Medieval English law was uncomfortable with the possibility of a feudal lord being effectively deprived of their rights to the land without their consent. Such a concern lay behind the statute *Quia Emptores Terrarum* 1290.<sup>61</sup> Grants into mortmain were an example of the problem, whereby a tenant in fee simple conveyed their land to an immortal corporation, preventing any possibility of escheat.<sup>62</sup> Grants in tail, which were grants in fee and consequently might never come to an end, also seem to have been problematic, with such grants generally not being capable of creating fee tail estates (rather than conditional fee simple estates) until the statute *de donis conditionalibus* was construed as requiring that conclusion.<sup>63</sup> The same concern could lie behind the certainty of term rule. If a perpetual term of years were granted and bound the lord on escheat of the fee simple, that would effectively deprive the feudal lord of any benefit from the escheat, just as it would probably render the value of wardship and other feudal incidents negligible, especially if the term of years were granted for a large initial payment, rather than regular rent. An uncertain term faces the same difficulties: if the determining condition never arises, then the leasehold estate will continue indefinitely, depriving the feudal lord of the benefits of his lordship.

Modern law is unconcerned with the benefits of feudal lordship of land.<sup>64</sup> However, the possibility of escheat continues to cause difficulties in relation to leasehold estates generally, and particularly hypothetical leasehold estates of uncertain duration. At present, if escheat occurs, interests which grant rights of possession of the land (such as leases and mortgages) survive the determination of

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<sup>61</sup> Baker, *Introduction to English Legal History*, p.242.

<sup>62</sup> Baker, *Introduction to English Legal History*, p.241.

<sup>63</sup> Baker, *Introduction to English Legal History*, pp.272-4.

<sup>64</sup> For the undermining and abolition of such rights, see Baker, *Introduction to English Legal History*, p.257.



the fee simple estate. These interests continue after escheat, but are time limited. If leases for an uncertain term were permitted, the owner in fee simple could potentially deny the Crown possession of the land in perpetuity. In itself this may seem fairly uncontroversial; the Crown obtains a windfall through escheat and if the Crown does not really obtain a benefit, but simply acts as a long-stop to ensure that someone has a superior right so that the landlord and tenant relationship is maintained, so be it.

However, the interaction of leases and escheat is complicated and doctrinally awkward. Potentially perpetual leases would render it even more so. When escheat occurs, the Crown's title comes into effect immediately, but no liability arises in relation to the land unless and until the Crown enters or brings proceedings in relation to the land.<sup>65</sup> Until such action is undertaken, there is neither privity of contract nor privity of estate between the lord and the tenant and so the normal leasehold covenants do not apply. This explains why the Crown Estate's position is that "[w]e are...not responsible for ownerless land or what happens to it. We will not manage, insure, repair or look after it. We do not have the usual responsibilities of a landowner."<sup>66</sup> The term of years estate which remains is consequently rather peculiar. The "landlord" is not liable under the landlord covenants, but equally will not enforce the tenant covenants either.<sup>67</sup> The operation of escheat therefore undermines the contractual obligations integrated into the leasehold estate and there is a serious risk that for a lease to exist in perpetuity or potentially in perpetuity would be to risk sterilising the use of the land in precisely the manner raised as problematic by Gray and Gray.<sup>68</sup>

A further difficulty arises in the administration of escheat. When escheat occurs, the Crown Estate will seek to grant a new fee simple estate to an

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<sup>65</sup> William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1766), vol.2, p.245; *Scmlla Properties* at 804-5.

<sup>66</sup> <http://www.thecrownestate.co.uk/our-business/faqs/escheats-faqs/> (accessed 25 May 2015).

<sup>67</sup> Hardman, "The Law of Escheat", p.329.

<sup>68</sup> Gray and Gray, *Elements of Land Law*, p.325.

“appropriate buyer”, which it identifies as someone with “a genuine interest in the future use or condition of the ownerless land, or [who] had an interest in the former owner (if it was a company or other similar organisation)”. This would be difficult were escheat land subject to a potentially indefinite leasehold estate. Presumably the tenant of the leasehold estate has a “genuine interest” in the future use of the land. But so might someone with an interest in any former owner. In the event of there being more than one possible appropriate buyer, there is little that can be done to resolve the situation. The Crown Estate simply states that it “may expect” possible appropriate buyers to discuss the matter between themselves. Furthermore, as the Crown Estate observes, even as the law currently stands, “[t]he complicated nature of this part of the law means that in case of doubt or possible risk, we may decide not to sell, even if there are appropriate buyers willing to pay best price.”<sup>69</sup> Quite how this would be resolved in situations of potentially perpetual leases is unknown, and allowing uncertain terms would add a further layer of complexity to the process.

### III. ABOLISHING THE CERTAINTY RULE

The explanations presented here for the certainty of term rule are not insurmountable. Even in medieval England Wonnacott identifies four distinct exceptions, albeit no longer applied: tenancies by statute merchant, statute staple and elegit, and leases granted to an executor to pay debts.<sup>70</sup> The first three gave a right to possession of a debtor’s land to creditors, as a means to raise money to pay

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<sup>69</sup> <http://www.thecrownestate.co.uk/our-business/faqs/escheats-faqs/> (accessed 25 May 2015). Quite what would constitute “best price” would also be problematic. While actuarial calculations can be used when valuing a life interest, it seems less likely that an actuary would be able to provide calculations about some of the uncertain terms which appear in the cases, such as requiring land for road-widening or the date of the Second World War ending.

<sup>70</sup> M. Wonnacott, *History of the Law of Landlord and Tenant* (Clark N.J. 2012), p.144. It is questionable whether these rights to land were always regarded as creating a lease situation or whether the language of “tenancy” should be thought of as reflecting the idea of feudal tenancy. For discussion about the complicated nature of the tenancy by statute merchant, see C. McNall, “The Nature of the Tenancy by Statute Merchant” (2002) 23 *Journal of Legal History* 37-44.

the outstanding debts. Once the debts were discharged, the right to possession came to an end. These three forms of “tenancy” were created by statute in the thirteenth and fourteenth centuries.<sup>71</sup> Leases for executors to pay debts, or raise a certain sum of money, were acknowledged as sufficiently certain in early-modern cases, seemingly as reflecting earlier practice.<sup>72</sup> Whether these terms truly were “uncertain” is open to question. All of these exceptions to the rule were for uncertain, but defined periods. Lawyers recognised the period as one which would definitely come to an end.<sup>73</sup> Land would yield an income and so could raise a specified sum of money. In relation to debts, the charging of any interest was unlawful until 1545, so there was no possibility of the debt growing.<sup>74</sup> The money raised from the land would, necessarily, discharge the debt eventually. While the term was not certain in the sense usually accepted, it would certainly come to an end.

Nevertheless, the grant of a truly perpetual lease has been made possible by statute in various jurisdictions and there is no reason to consider it impossible here.<sup>75</sup> Parliament could, of course, create and authorise such leases, doing something which looks “pretty odd” as a matter of doctrine.<sup>76</sup> Such was the case in *Wotherspoon v Canadian Pacific Ltd*, where the judges of the Supreme Court of Canada appeared

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<sup>71</sup> Tenancy by statute merchant in the Statute of Merchants 1285 (13 Edw.1.stat.3); tenancy by statute staple in the Statute of the Staple 1353 (27 Edw.3. stat.2, c.9) and tenancy by *elegit* in the Statute of Westminster II 1285 (13 Edw.1. c.18).

<sup>72</sup> For leases to pay debts: *Blamford v Blamford* (1615) 3 Bulstrode 98 at 100; 81 E.R. 84 at 86, *obiter per* Coke CJ. For leases to raise a certain sum of money, *Sir Andrew Corbet's Case* (1599) 4 Co.Rep. 81b at 81b-82a; 76 E.R. 1058 at 1059.

<sup>73</sup> For the tenancy by statute merchant, see Thomas Fitzwilliam's reading in 1466, referring to “the certainty of their term” (a reading on the Statute of Merton 1236 in S.E. Thorne (ed.), *Readings and Moots at the Inns of Court in the Fifteenth Century, vol.1* (London: Selden Society vol.71, 1952), p.44). In relation to executors, in *Sir Andrew Corbet's Case* ((1599) 4 Co.Rep. 81b at 81b-82a; 76 E.R. 1058 at 1059) there was discussion about the term coming to an end when the requisite sum has been raised, or would have been raised if the executors had collected it, preventing executors from extending the duration of the tenancy and showing that the end of the tenancy was seen as a predictable (and hence certain) event. Analogies are drawn to tenancy by *elegit* and statute merchant, to which the same rules seem to have applied (on which see McNall, “The Nature of the Tenancy”, p.41).

<sup>74</sup> Stat.37.Hen.8.c.9.

<sup>75</sup> E.g. Australia (*Fisher v Deputy Federal Commissioner of Land Tax (NSW)* (1915) 20 C.L.R. 242 at 248-9) and Canada (*Wotherspoon v Canadian Pacific Ltd* (1987) 39 D.L.R. (4<sup>th</sup>) 169 at 205-6).

<sup>76</sup> *City of London v Wood* (1701) 12 Mod. 669 at 687-688; 88 E.R. 1592 at 1602.

relieved that the statutory basis of a perpetual lease meant they were not required to place such leases within the established doctrinal structure.<sup>77</sup> If such a perpetual lease were acceptable, then it seems impossible to justify maintaining the certainty of term rule, which operates to bar potentially perpetual estates.

If the argument presented here is correct, the certainty of term rule has foundations in wider principles of property law and simple abolition would be doctrinally awkward.<sup>78</sup> A better approach would be to remove the doctrinal underpinning of the rule by recognising the fee simple as a genuinely perpetual estate in land with the corresponding abolition of the doctrine of escheat.<sup>79</sup> There would then be no inherent objection to a lease with an uncertain term, even a perpetual lease, based on the internal logic of the real property system.<sup>80</sup>

Despite its doctrinal logic, the current law of escheat causes problems akin to those of uncertainty of title. While a leaseholder of land subject to an escheat definitely does have title, it is in effect unenforceable, creating considerable practical uncertainty about the rights and obligations of the tenant. Such practical uncertainties about title and the relative rights of individuals to property are understandably not encouraged in English property law. Adverse possession of land and relativity of title for chattels both strive towards certainty, albeit in different ways.<sup>81</sup> Similarly, an adjudicator at the Land Registry has recognised that it is better that land should be “owned than left in limbo”.<sup>82</sup> As the Court of Appeal have

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<sup>77</sup> (1987) 39 D.L.R. (4<sup>th</sup>) 169 at 205.

<sup>78</sup> Australian perpetual leases are granted by the Crown, which does not grant them out of a fee simple estate.

<sup>79</sup> There may also be further benefits in such a change, see C. Harpum, “Does feudalism have a role in 21st century land law?” (2000) 23 *Amicus Curiae* 21, 23-25.

<sup>80</sup> This does not mean perpetual or uncertain terms would be desirable, simply that one objection to such terms would be overcome. Other objections, rooted in policy, would still remain.

<sup>81</sup> On adverse possession’s continuing justifications in registered land, see The Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document* (Law Com., No. 254, 1998), at 10.13-10.16.

<sup>82</sup> *Walker v Burton* [2012] EWHC 978 (Ch), at [16]. The quoted text is from a decision made by a deputy adjudicator to the Land Registry.

observed, “continuing uncertainty” is not desirable.<sup>83</sup> The current system of escheat causes a state of uncertainty in practice.

The Law Commission has described the current law of escheat as “indefensible” and in need of “fundamental reform”.<sup>84</sup> The effect of escheat on the certainty of term rule, about which there is considerable judicial dissatisfaction, gives another reason for doing so. The Law Commission had expressed a desire to review feudal land law, and in doing so would necessarily have considered escheat and by consequence the certainty of term rule. The Northern Irish Law Commission also proposed abolishing escheat.<sup>85</sup> However, reform of feudal land law is no longer part of the English Law Commission’s programme.<sup>86</sup>

Scots law abolished escheat over a decade ago and does not seem to have experienced problems as a result.<sup>87</sup> English practice in relation to land is already reducing the significance of escheat, both in the general rules and specific contexts. In theory, when escheat occurs, the fee simple estate comes to an end. This poses serious problems for registration of title, especially as subordinate interests on the

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<sup>83</sup> *Walker v Burton* [2013] EWCA Civ 1228, [2014] 1 P. & C.R. 9, at [102]. The High Court was more sceptical, but regarded the “limbo” point as a technical one about genuinely ownerless property ([2012] EWHC 978 (Ch), at [111]-[112]), rather than taking the approach of the Court of Appeal, that “limbo” referred to uncertainty about, rather than absence of, ownership of the land.

<sup>84</sup> The Law Commission, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com., No. 271, 2001), at 11.26 and 11.27.

<sup>85</sup> Northern Ireland Law Commission, *Consultation Paper Land Law* (NILC 2, 2009), at 2.17. Their final proposals, however, would not address the issue relating to certainty of term. Following concerns raised by the Treasury Solicitor, the Northern Ireland Law Commission proposed abolition of escheat in a manner which would continue to allow the Crown to continue to avoid liability in relation to leaseholds over escheat land (Northern Ireland Law Commission, *Report on Land Law* (NILC 8, 2010), at 2.10-2.13).

<sup>86</sup> Any reference to feudal land law is missing from the Law Commission’s twelfth programme (The Law Commission, *Twelfth Programme of Law Reform* (Law Com., No. 354, 2014)), following a decision in the eleventh programme that greater public benefit would flow from other projects (The Law Commission, *Eleventh Programme of Law Reform* (Law Com., No. 330, 2011), at 3.2-3.3). It seems that public benefit assessments can in fact defend the “indefensible”. For further discussion of continuing feudal elements in English land law and the difficulties of their interaction with land registration, see E. Nugee, “The feudal system and the Land Registration Acts” (2008) 124 L.Q.R. 586.

<sup>87</sup> Abolition of Feudal Tenure etc. (Scotland) 2000 ss.2 and 58. See the explanatory notes, paras.[24] and [189]. The Crown in Scotland has a prerogative right to *bona vacantia* which is expressly unaffected by the abolition of feudal tenure (s.58(2)(b)(i)). The relevant law is discussed in *Re The Scottish Environmental Protection Agency* [2013] C.S.I.H. 108, [104]-[109].

estate are not determined on escheat, but enter a curious limbo state.<sup>88</sup> The registration system accommodates these interests by not removing the relevant fee simple title from the register, despite its non-existence as a matter of orthodox property principles.<sup>89</sup>

Escheat remains possible when a trustee in bankruptcy or liquidator disclaims the land, when a foreign company is dissolved or when the Crown obtains land as *bona vacantia* from a dissolved company and then itself disclaims the land.<sup>90</sup> However, the Companies Act 2006 features provisions making the escheat of property obtained as *bona vacantia* from dissolved companies less likely. Under section 1017, anyone with an interest in the disclaimed property, or a liability in relation to it, may apply to the court for an order vesting the property in someone entitled to it or a person subject to such a liability on such conditions as the court thinks fit.<sup>91</sup> Special provision is made in section 1016 to ensure that any tenants or subtenants of disclaimed land are notified of the disclaimer, which does not take effect until such notice has been served, which enables such individuals to apply to the court under section 1017. A tenant can then apply to acquire the fee simple, rather than an escheat occurring.

These provisions reduce (but do not remove) the risk of an unowned fee simple reversion. In many respects they replicate current practice in escheat, as the Crown Estate seeks to grant a new fee simple by finding an appropriate buyer, but do so through a clear statutory and judicial process.<sup>92</sup> In the context of land held by

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<sup>88</sup> See above, text at nn.65-68.

<sup>89</sup> Authorised by Land Registration Act 2002, s. 82 (especially s.82(2)(b)) and implemented by Land Registration Rules 2003, r. 173(1).

<sup>90</sup> See above, nn.43-47.

<sup>91</sup> Companies Act 2006, s. 1017(4). Such conditions can include the payment of money, although it seems likely that if a fee simple were subject to a perpetual or potentially perpetual leasehold estate, any such payment would be very low.

<sup>92</sup> One of the benefits of escheat is that, like relativity of title, it avoids a possible proprietary vacuum. The current position, where the Crown Estate may decline to grant a new fee simple in difficult situations (see above, text at n.69) undermines this benefit. Replacing the role of the Crown Estate with the court seems likely to encourage resolution in such difficult situations, although it must be

the Crown as *bona vacantia* from dissolved British companies, the role of escheat has consequently been minimised. A modified version of this approach could work more generally. If the courts were to ensure that someone is vested with the property, the major benefit of escheat in insolvency and to the Crown, that it prevents liability for outstanding obligations is not lost, but neither does the property become truly ownerless.<sup>93</sup> Someone other than the insolvent person or the Crown will be vested with the land and the obligations. An addition to the Companies Act scheme, taken from the current practice in escheat, would also be useful: that the land could be given to someone with an interest in the former owner, where that former owner was a company.<sup>94</sup> This would prevent the transfer of land subject to onerous burdens to a company, for it then to pass to the Crown on the company's dissolution.<sup>95</sup> This approach would also accord with the attitude of the courts, as judges seem to try and avoid findings of *bona vacantia* and would rather someone hold the property.<sup>96</sup> If the court were to reallocate property as *bona vacantia*, rather than the land escheat, a principled and practical objection to perpetual or potentially perpetual leaseholds would itself come to an end.

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acknowledged that section 1017 of the Companies Act only states that a court “may” make a vesting order, so the court is not required to do so.

<sup>93</sup> Examples of situations where the Crown chooses to disclaim *bona vacantia* to avoid such liabilities include: property in negative equity, property subject to onerous covenants and contaminated land (see <https://www.gov.uk/government/publications/bona-vacantia-dissolved-companies-bvc1/bona-vacantia-dissolved-companies-bvc1#disclaimers> (accessed 25 May 2015)). All of these situations might also apply when a decision is made to disclaim in insolvency, e.g. *Ulster Bank v Dynes* [2012] N.I.Ch. 29 (property in negative equity) and J. Stephens, “Environmental considerations in pending insolvency proceedings” (2010) 5 Corporate Rescue and Insolvency 202 (contaminated land). My thanks to Riz Mokal for discussion on the contaminated land point.

<sup>94</sup> See above, text at n.69.

<sup>95</sup> This problem was noted in relation to forfeiture under the mortmain legislation by Earl Jowitt in *Attorney-General v Parsons* [1956] A.C. 421, 435.

<sup>96</sup> E.g. *Hanchett-Stamford v Attorney General* [2008] EWHC (Ch) 330, [2009] Ch. 173, at [37] and [47], where Lewison J rejected the view that the assets of an unincorporated association with only one surviving member were *bona vacantia* for the Crown, describing such a position as a “divesting” of the remaining member and invoking the guarantee of peaceful enjoyment of possession found in Article 1 of the First Protocol of the European Convention of Human Rights. In *Re DWS* [2001] Ch. 568, the majority of the Court of Appeal also avoided finding that property passed as *bona vacantia* under the Administration of Estates Act 1925. Interestingly, the only judge (Sedley LJ) to support a finding of *bona vacantia* did so seemingly on the premise that the Crown would make an ‘equitable’ payment to someone not entitled under the statute but otherwise deserving (paras. [39] and [41]).

#### IV. CONCLUSION

The rule against uncertain terms can be seen as based upon the place of leaseholds within the system of estates in land, especially the “fourth dimension” of such estates, as limited in time. To avoid problems, any attempt to allow uncertain leasehold estates needs to address this difficulty. Abolition of one of the last vestiges of feudalism in English land law, the escheat of freehold land, would ensure that a justification for the prohibition of uncertain or perpetual leasehold estates based upon the internal logic of the system of estates in land would end.

Whether this would be desirable as a matter of policy is a rather different question. Abolishing escheat would itself change the nature of the fee simple estate, but the nature of the freehold as reversion would also change dramatically if the freeholder might never regain physical possession of the land. English law is generally concerned about the separation of enjoyment of land from the legal ownership of it. Avoiding that situation is a continuing justification for adverse possession, even in registered land,<sup>97</sup> and section 153 of the Law of Property Act 1925 reflects it, with the potential for long leases to be enlarged into fee simple estates. Understanding the feudal underpinning of the certainty rule brings such issues to the fore, focusing on policy by freeing the law from feudalism.

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<sup>97</sup> The Law Commission, *Land Registration for the Twenty-First Century: A Consultative Document*, at 10.13 and 10.15.