The Fee Tail: Putting Us Out of its Misery

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Introduction

The fee tail is one of the three estates known to our law of real property. It is "wretchedly complicated"[1] yet serves no real purpose. In its recent *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law*,[2] the Law Reform Commission has provisionally recommended its abolition as part of a wider package of land law reforms. Although few would disagree with the principle of getting rid of the fee tail, there are a number of practical matters to be considered in terms of deciding how best to usher it out of our legal system. These questions are addressed in this article.

The Fee Tail: Lest We Forget (Or Have Forgotten)[3]

Created in 1285 by the Statute *De Donis Conditionalibus*, the fee tail is an estate which passes, under the ancient rules of heirship, to the direct descendants of the original tenant in tail. It comes to an end when (and if) these direct descendants die out. The idea of the estate was, at a time when ownership of land was the source of all wealth and social standing, to allow the landed classes to ensure that their land would remain in the family throughout future generations. Each tenant in tail was able to dispose of no more than a life estate in the land, so that the profligacy of one's heirs could lead to no more than a temporary interruption in the family's enjoyment of its lands. It is possible to create a fee tail male (which would pass only to male heirs) and a fee tail special (which would pass to the heirs of two named persons, who might or might not be married at the time of the creation of the estate). By the fifteenth century, the courts had modified the estate in an ingenious manner, which managed to balance the desire to make land marketable with the nobility's obsession with keeping their land in the family. A tenant in tail, making use of collusive court actions known as "fines and recoveries", could in some circumstances turn his fee tail into a fee simple. This could be conveyed to a third party or, if the tenant in tail utilised a conveyance to his own use (which would be executed by the Statute of Uses (Ireland) 1634), the enlarged estate could be retained in his own hands. If the tenant in tail was not in possession of the land, he had to get the agreement of the person in possession under a prior freehold estate (now referred to as "the protector of the settlement"). If this consent was not forthcoming, all the tenant in tail could convey was an unmarketable "base fee", an estate which (although now in the hands of a purchaser) would terminate on the death of the last descendant of the original tenant in tail. The approach developed by the courts was put on a statutory footing by the Fines and

[1] Land Law Working Party *Survey of the Land Law of Northern Ireland* (HMSO, 1971) p.16.

[2] LRC CP 34-2004 (October 2004).

[3] For textbook treatments of the fee tail, see Wylie *Irish Land Law* (3rd ed., Butterworths, Dublin, 1997) pp.243–258; Lyall *Land Law in Ireland* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 2000) pp.221–241; Coughlan *Property Law* (2nd ed., Gill & Macmillan, Dublin, 1998) pp.28–32; Pearce and Mee *Land Law* (2nd ed., Round Hall Sweet & Maxwell, Dublin, 2000) pp.63–67.

Recoveries (Ireland) Act 1834. While the fee tail was for centuries an essential element in family settlements, it has now lost virtually all practical value. It carries significant disadvantages from a taxation point of view[4] and does not appear to achieve anything significant which cannot be achieved through the employment of the mechanism of a trust.

The Case for Reform

In 1989, the Law Reform Commission ("the LRC") considered whether or not to recommend the abolition of the fee tail and, rather surprisingly, decided against making such a recommendation. Following the receipt of "certain submissions", the LRC concluded that "[t]he fee tail estate is not causing any harm and, although it is rarely used, we feel that some people may wish to avail of it from time to time."[5] It is intriguing to think that, in 1989, there was still what might somewhat loosely be termed a "pro-fee tail lobby". It does seem clear, though, that the LRC was mistaken in believing that the fee tail was "not causing any harm". As the LRC itself explained in a later Report on another topic (published in 2000, by which time the LRC was clearly taking a more robust approach):

> "One of the basic tenets of law reform is to simplify. Or to put it another way, complexity carries disadvantages. And the more complicated a particular law is, the more strongly it has to be justified by reference to the importance of the functions which it serves."[6]

These comments state with admirable succinctness the argument against the retention of complicated vestiges of the past in a modern system of land law. The rules surrounding the fee tail (including the ancient rules of heirship), and its possible conversion into a fee simple under the Fines and Recoveries (Ireland) Act 1834, are extremely complex and this complexity is out of all proportion with the practical utility of the estate.

It is true that, as Laffoy J. noted in a recent extrajudicial contribution,[7] the fee tail estate has not unduly troubled the courts in recent years and, as she points out, its abolition would not significantly reduce the administration of the High Court. However, one cannot entirely agree with the learned judge's suggestion that its abolition "would be of little practical significance".[8] It does not follow from the fact that the fee tail itself is of virtually no practical significance that its abolition would achieve nothing. As former students of the law themselves, lawyers are perhaps inclined to underplay the significance of wasted demoralising effort expended by students in trying to grasp our archaic system of land law. It is probably not an exaggeration (although it may be surprising to some established practitioners) to suggest that there must be 1,000 students of Irish land law at

[4] See *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004), p.48 n.85 (referring to Capital Gains Tax liability).
[5] *Report on Land Law and Conveyancing Law (1): General Proposals* (LRC 30-1989), p.6.
[6] *Report on the Rule Against Perpetuities and Cognate Rules* (LRC 62-2000), p.47.
[7] See p.8 of a paper entitled "Reflections on the Current Irish Conveyancing System" delivered at the LRC's *Conference on Modernising Land and Conveyancing Law,* Dublin, November 25, 2004.
[8] *ibid.*

any given time (taking into account *inter alia* university students and those studying for Blackhall Place entrance examinations). If one allows for, say, a one hour lecture on the fee tail plus a further period studying the area and subsequently revising for examination purposes, one comes fairly conservatively to a total of a few thousand hours per year. If one multiplies this annual effort by the number of years for which the fee tail has outlived its practical significance, one comes to a total of many tens of thousands of hours of wasted effort on the part of intelligent people. In fact, the damage caused by archaisms in our law goes much further than this. Consider the hard-pressed solicitor who wants her client to accept that things are not as simple as the client thinks and that she cannot magically bring his sale to a conclusion that afternoon. Her argument is not helped by the fact that our land law is, indisputably, full of pointless remnants of feudal times and ancient statutes such as *De Donis Conditionalibus* 1285 (of which the client may have heard from one of the 1,000 property law students mentioned earlier). Clients may like to believe that the law is made unnecessarily complex by lawyers to further their own interests. It is only if we purge our law of unnecessarily complexity that we can expect those affected by it to take a somewhat less cynical attitude to it.

If one accepts, as most probably do, that it is worth the trouble to get rid of the fee tail, then the only remaining questions are practical ones. These questions are addressed in what follows.

Prohibition of the Future Creation of Fees Tail

As a matter of principle, there is little difficulty with the LRC's proposal that the future creation of fees tail be prohibited.[9] The Consultation Paper does not spell out the method by which it would be proposed to accomplish this but presumably the approach would be to state that any limitation which would in the past have led to the creation of a fee tail will now lead to the creation of a fee simple. This is the approach taken by the Northern Ireland Land Law Working Group in respect of its proposal to abolish the fee tail in Northern Ireland.[10]

Proposed Treatment of Existing Fees Tail

More complex issues arise in relation to the treatment of existing fees tail. The provisional recommendation in the Consultation Paper is as follows:

[9] *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004), p.48.

[10] See *Final Report of the Land Law Working Group* (HMSO, 1990) Volume 3 pp.407–409. The draft legislation put forward by the Land Law Working Group (see s.6(1)) goes on to state that the fee simple in question will take effect "to the exclusion of all estates or interests limited to take effect after the determination of the fee tail estate, but not of estates or interests limited to take effect in defeasance of the fee tail estate which would be valid if limited to take effect in defeasance of a fee simple". A similar clause is included in the draft provision relating to the conversion of existing fees tail into fees simple (see text to n.16 below for the wording of this draft provision). Contrast s.16 of the New Zealand Law of Property Act 1952, which (in the same context) provides that the fee simple will take effect to the exclusion "of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail." For discussion of this minor difference in approach (in respect of interests limited to take effect in defeasance of the fee tail estate), see Land Law Working Party *Survey of the Land Law of Northern Ireland* (HMSO, 1971) p.16.

> "As regards existing fees tail, given the extensive powers to bar the entail contained in the *Fines and Recoveries (Ireland) Act 1834*, it is recommended that the new legislation should bring about an automatic barring of the entail, with the same result as the tenant in tail could produce by executing a fully effective disentailing deed under that Act."[11]

This recommendation is not elaborated upon, with no explanation being given as to what is meant by "the same result as the tenant in tail could produce by executing a fully effective disentailing deed under that Act." Does a "fully effective" deed simply mean one which has been properly drafted and is enrolled as required by the Fines and Recoveries (Ireland) Act 1834, with the result that only a base fee will be created if, under the existing law, a consent is needed from the protector?[12] Or is it intended to suggest that the "automatic" barring of the entail can create a fee simple remainder in favour of the former tenant in tail, even if under the old law a consent would have been required from the protector to achieve this? On reflection, it appears that the second interpretation is the appropriate one, since the aim appears to be to simplify the law by automatically converting all existing fees tail into fees simple. This view is confirmed by a comment in a footnote to the relevant part of the Consultation Paper suggesting that the LRC's proposal was what had been recommended by the Northern Ireland Land Law Working Group in 1990.[13] An examination of the relevant Northern Irish proposals shows that the intention in that jurisdiction was to convert existing fees tail into fees simple.

The reference in the Consultation Paper to the Northern Irish proposals indicates that the LRC is likely to look to those proposals when it comes to drafting a provision to implement the conversion of existing fees tail. This would be natural given that Professor Wylie, Principal Legal Researcher on the Consultation Paper, was also a member of the group which drew up the Northern Irish proposals.[14] It will therefore be useful to look, in the next section, at the draft legislation which was proposed for Northern Ireland in respect of the conversion of existing fees tail into fees simple.

The Northern Irish Proposal in Respect of Existing Fees Tail

The proposed Northern Irish wording is based on s.16 of the New Zealand Law of Property Act 1952[15] and is as follows:

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[11] *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004), pp.48–49.

[12] Under the statutory scheme, the protector of the settlement is the person, if any, in possession of the land under a prior freehold estate (*e.g.* if F is in possession under a life estate and upon his death the fee tail of S will vest in possession, then F will be the protector of the settlement). There is also provision in the Fines and Recoveries Act 1834 for the appointment of a special protector (see s.30).

[13] See p.49 n.87, citing *Final Report of the Land Law Working Group* (HMSO, 1990) Vol. 1 para.2.1.28 and Vol. 3 pp.406–407. See the next section for detailed discussion of the Northern Irish proposals.

[14] See Consultation Paper, p.31. Professor Wylie was a member of both the Land Law Working Group, which was responsible for the three volume *Final Report of the Land Law Working Group* (HMSO, 1990), and of the earlier Land Law Working Party, which undertook the *Survey of the Land Law of Northern Ireland* (HMSO, 1971). In fact, the Northern Ireland proposals on the fee tail originated in the *Survey* and were adopted, with only very minor changes, in the *Final Report* of twenty years later.

[15] See *Survey of the Land Law of Northern Ireland* (HMSO, 1971) p.16.

> "Where immediately before the commencement of this Order, any person was entitled to a fee tail estate (legal or equitable) in possession, reversion or remainder in any land, that person becomes entitled, on that commencement, to an estate in fee simple absolute in possession or an equitable fee simple, as the case may be, in that land to the exclusion of all estates or interests limited to take effect after the determination of the fee tail estate, but not of estates or interests limited to take effect in defeasance of the fee tail estate which would be valid if limited to take effect in defeasance of a fee simple."[16]

It is later clarified in the draft legislation that there is an exclusion for the estate of a tenant in tail after possibility of issue extinct.[17] This is clearly necessary. The term "tenant in tail after possibility of issue extinct" refers to the case where there was a fee tail special which was to pass to the descendants of two named people, one of whom has died so that there is now no possibility of the fee tail continuing beyond the current holder. Such a tenant in tail has effectively only got a life estate and is not permitted under the current legislation to bar the entail.[18] There would be no justification for new legislation operating to convert this person's life estate into a fee simple at the expense of those with subsequent interests.[19]

An aspect of the Northern Ireland draft legislation which is at first sight puzzling is the stipulation that any person entitled to a fee tail "in possession, reversion or remainder" becomes entitled to a "fee simple absolute *in possession*". One might be inclined to read this as indicating that an existing fee tail which was not held in possession (*i.e.* was held

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[16] See *Final Report of the Land Law Working Group* (HMSO, 1990) Vol. 3 p.407, (s.6(2) of the draft Property Order). This draft provision concludes with a clause identical to that discussed in n.10 above (in respect of the defeasance of interests limited to take effect after the fee tail estate etc). It is clarified in s.6(3) of the draft Order that the legislation would also apply to base fees and determinable base fees. A base fee is the estate resulting when a tenant in tail executes a disentailing assurance without the consent of the protector of the settlement. A determinable base fee is "an estate in fee voidable or determinable upon the entry of the issue in tail". It arises in rare cases where there has been a failure to enrol a disentailing assurance in the Central Office of the High Court within the six month time period stipulated in the Fines and Recoveries (Ireland) Act 1834.

[17] See *Final Report of the Land Law Working Group* (HMSO, 1990) Vol. 3 p.407, (s.6(3) of the draft Property Order).

[18] See Fines and Recoveries (Ireland) Act 1834, s.15.

[19] Note that the Northern Ireland Land Law Working Group decided against the inclusion of a further exception to cover "unbarrable entails". See *Final Report of the Land Law Working Group* (HMSO, 1990) Vol. 1 pp.59–60. Such an exception was included in the English legislation abolishing the fee tail (see Trusts of Land and Appointment of Trustees Act 1996, Sch.1 para.5(1)). It covers "rare cases where entailed estates were settled by Act of Parliament on successful military commanders (Marlborough and Wellington) by a grateful nation, and secondly under a Act of Henry VIII (34 and 35 Hy VIII c 20, 1543) which rendered unbarrable any entail where the reversion was in the Crown" (see *Final Report*, Vol. 1, pp.59–60). The Land Law Working Group concluded that there were no parallels to these unbarrable entails in Northern Ireland and also that it was reasonable to discount the possibility of any having been created by a private Act of Parliament. Therefore the Land Law Working Group, departing from the recommendation of the Land Law Working Party some twenty years previously (see *Survey of the Land Law of Northern Ireland* (HMSO, 1971) p.17), decided against the inclusion of an exception for unbarrable entails. Its reasoning seems equally applicable in this jurisdiction.

in "reversion or remainder") would be converted into a fee simple in possession, thus eliminating not only estates and interests subsequent to the fee tail but also extinguishing estates *prior* to the fee tail. However, in converting an existing fee tail to a fee simple, there would be no grounds for extinguishing any prior interests (such as a prior life estate held by the protector of the settlement). Only subsequent interests should be extinguished (as under the current law), giving the former tenant in tail a fee simple remainder rather than a fee simple in possession. It is true that in practice, where a fee tail was being barred by the tenant in tail in agreement with the protector, the protector would often have surrendered his life estate to the former tenant in tail with a view to facilitating the creation of a new settlement. However, this was clearly dependent on the protector being willing to part with his interest and it provides no justification for taking the protector's life estate from him without compensation as part of a statutory scheme to eliminate existing fees tail. Such a step would be unconstitutional (as an arbitrary interference with property rights)[20] and, furthermore, would be unnecessary to the legislative aim of simplifying the law by getting rid of the fee tail estate. On closer inspection, however, it appears that the Northern Irish draft provision does not, in fact, aim to eliminate interests prior to an existing fee tail. The explanation for the Northern Irish wording is that, as an aspect of its broader reform scheme, the Land Law Working Group proposed that only two types of legal estate should be recognised in Northern Ireland: a fee simple absolute in possession and a leasehold estate.[21] Thus, the reference in the draft Northern Irish legislation to converting an existing legal fee tail to a "fee simple absolute in possession" does not aim at extinguishing prior interests but merely reflects a more general aspect of the proposed Northern Ireland reform scheme whereby a life estate would exist only in equity (behind a legal fee simple absolute in possession).[22] A similar approach to life estates has been provisionally proposed by the LRC for this jurisdiction[23] and obviously the resolution of this issue will impact on the appropriate wording of the provision in respect of the elimination of existing fees tail. In whatever way the provision is worded, it should ensure that interests prior to an existing fee tail are unaffected by the conversion of that fee tail into a fee simple.

Another possible issue with the Northern Irish wording is that (as does the New Zealand section upon which it is based) it refers to the conversion of all fees tail into fees simple, not just those held in possession. It is worth considering how this would work in relation to a series of fees tail. It should be borne in mind that, where fees tail were created, it would have been normal for them to be created in a series. To take a simplified example, one might have seen conveyances "to Father for life, then to Son Number 1 in fee tail, then to Son Number 2 in Fee Tail, then to Son Number 3 in fee tail, remainder to B in fee simple." This made sense because it was possible that one line of the family would die out and it would be then wished for the ownership of the property to switch to another branch of the family in fee tail. Given the possibility of a series of fees tail over a particular piece of land, can one safely state that every fee tail (even if it is not held in

[20] See n.26 below.
[21] See *Final Report of the Land Law Working Group* (HMSO, 1990) Vol. 1, para.2.1.1 *et seq*.
[22] Contrast the wording of the New Zealand Law of Property Act 1952, s.16 (upon which the Northern Ireland proposal was modelled: see n.15 above) which refers simply to conversion of an existing fee tail to an "estate in fee simple (legal or equitable, as the case may be)", with no reference to the creation of a fee simple in possession.
[23] See the Consultation Paper, pp.49–50.

possession) is converted into a fee simple? Essentially, what one wants is for the subsequent fees tail to be extinguished by the expansion into a fee simple of the first in the series of fees tail (which is what would happen under the current law if the tenant in tail under the first fee tail successfully barred the entail). It seems that the Northern Irish wording accomplishes the task in an acceptable manner, since the conversion of an existing fee tail into a fee simple is to take place at the expense of any interests subsequent to the fee tail. Thus it would seem that, while the legislation would in principle convert each individual fee tail into a fee simple, the fees simple which were created out of the later fees tail would instantly be extinguished by the conversion of the earliest fee tail in the sequence into a fee simple to take effect at the expense of all subsequent interests. It may seem a little wasteful (albeit of purely theoretical energy) to convert all the fees tail in a sequence into fees simple when all except one of these new fees simple will instantly be extinguished. However, there would seem to be no harm caused by this inelegance in the working of the draft legislation.

A Constitutional Problem

From the point of view of simplifying the law, it is obviously attractive to try to achieve the elimination of all fees tail—the estate could then be consigned immediately to legal history. However, it may not be possible to achieve this at once. It is at least worth noting that in England and Wales, where there is no written constitution to contend with, the fee tail was abolished on a prospective basis only in the Trusts of Land and Appointment of Trustees Act 1996.[24] There seems to be a constitutional problem with converting an existing fee tail which is not held in possession into a fee simple. There is no suggestion in the Law Reform Commission's Consultation Paper of an exception for fees tail not held in possession and it seems clear that such an important exception would have been mentioned if it had been contemplated. The idea in the Consultation Paper appears to be that, "given the extensive powers to bar the entail contained in the *Fines and Recoveries (Ireland) Act 1834*",[25] it is permissible to eliminate all fees tail immediately.Thus, the problem which will be outlined in this section is not merely one with the Northern Irish method of implementing the conversion of fees tail but one which centrally affects the LRC's provisional proposal as it is laid out in the Consultation Paper. This is not to suggest, however, that the problem (if one is persuaded that it exists) cannot be remedied if one takes a slightly more patient approach to eliminating the fee tail from our law.

The problem mentioned above is as follows. Under the existing law, interests subsequent to the fee tail cannot be extinguished unless the protector of the settlement gives his or her consent. Automatically turning a fee tail, not held in possession, into a fee simple remainder would involve the destruction of existing property rights without compensation and with no justification other than the fact that it would be tidier to eliminate those interests. This would appear to infringe the constitutional protection for property rights.[26] The suggestion that the automatic barring of such entails would be unconstitutional is different to suggesting that the Fines and Recoveries (Ireland) Act

[24] Sch.1 para.5(1).

[25] See Consultation Paper, pp.48–49.

[26] See Art.40.3.2 and Art.43. For discussion of the relevant jurisprudence, see Hogan and Whyte *JM Kelly: The Irish Constitution* (Butterworths, Dublin, 2003) p.1969 *et seq*.

1834 could be unconstitutional.[27] At the time that the Fines and Recoveries (Ireland) Act was passed, it was already clear that an interest subsequent to a fee tail was liable to be extinguished on a basis established by the courts since the fifteenth century and later enshrined in the Act. Therefore, at the time of its creation, any interest subsequent to a fee tail was already liable to be extinguished on these terms and this, therefore, was *ab initio* an essential aspect of the property right of any person holding such an interest. However, in the case of the provisionally proposed scheme for the abolition of fees tail (as it appears from the brief statement in the Consultation Paper), interests subsequent to a fee tail would now be destroyed on a new basis. A protection they enjoyed at the time of their creation (the fact that they could not be destroyed during the currency of the protectorship without the consent of the protector) would now be removed without compensation. While interests subsequent to a fee tail are, under the existing law, rather fragile and liable to be defeated comparatively easily, this does not appear to justify eliminating them entirely.

We do not have information on the full range of fee tail arrangements which still persist in the Irish situation. There are presumably relatively few left in existence, though the fact that some disentailing assurances continue to be enrolled each year (as pointed out in a recent paper by Laffoy J.)[28] shows that the fee tail is not extinct. Presumably, only a fraction of the full population of fees tail would be barred in any given year and it is at least conceivable that, in some cases, the fee tail would have been barred with a view to a resettlement (since the normal practice in the past was for a fee tail to have been barred once a generation and the land then resettled). It is possible to conceive of a case where the automatic barring of all fees tail would destroy a valuable property right without compensation. Imagine if a grantor had created a settlement, along the lines of "to myself for life, then to my son in fee tail, then to my brother in fee simple remainder". The grantor, holding a life estate, is still alive and is the protector of the settlement. His son has had no children. The son cannot bar the entail and extinguish the brother's interest unless his father consents. The father refuses to do so and, as it happens, the son is seriously ill and likely to predecease his father. Here, an automatic conversion of the son's interest to a fee simple would deprive the grantor's brother of a valuable interest (which is likely to turn into a fee simple in the property). One might well believe that such problem cases are unlikely to exist or would be very rare. But if fees tail not held in possession are so rare, why would one want to court constitutional difficulties (which could potentially drag down an entire reform Bill) in order to eliminate them immediately?

A Proposed Solution

Given the possibility of constitutional problems, it seems simpler to adopt the following solution. As well as providing that no new fees tail could be created, one could provide

[27] cf. Lyall *Land Law in Ireland* (2nd ed., Sweet & Maxwell, Dublin 2000) p.236.

[28] See "Reflections on the Current Irish Conveyancing System" delivered at the LRC's *Conference on Modernising Land and Conveyancing Law* Dublin, November 25, 2004. The statistics given by Laffoy J. at p.8 (supplied by the Central Office of the High Court) show that over the five years from 1999–2003, eleven disentailing assurances were enrolled—an average of a little over two per year (an increase on the numbers in the preceding four years).

that all[29] fees tail *in possession* will be converted automatically into fees simple in possession. Furthermore, one would provide that, in the future, as soon as a fee tail falls into possession it too will be converted automatically into a fee simple in possession. The advantage of this proposal is that the legislation achieves nothing which could not be accomplished by the tenant in tail under the current legislation (as against the previously criticised alternative of automatically converting fees tail not held in possession, in circumstances where this option would not have been available to the tenant in tail under current law). Under the proposal advanced in this paragraph, the complete elimination of fees tail might not be achieved immediately but the last few remaining fees tail would be mopped up relatively quickly. The longest a fee tail could survive, under this proposal, would essentially be the duration of a protectorship (which would be the lifetime of the person holding a prior life estate). However, if the assumption in the Consultation Paper is correct, and any existing fees tail were created decades ago,[30] then any existing protectors would be relatively old already and the end of the fee tail would come quickly anyway. A more conservative approach, of course, would be to follow the English line[31] and abolish the fee tail on a prospective basis only but the foregoing suggestion is offered as a means of speeding up the demise of the fee tail in the spirit of the discussion in the Consultation Paper.

Conclusion

As part of the comprehensive modernisation of our land law envisaged by the LRC, the provisionally proposed abolition of the fee tail is to be greatly welcomed. However, it is important to ensure that, as a parting curse, the unloved estate does not leave us with some confusion to remember it by. This article has identified and attempted to clarify a number of issues which must be considered in drafting a provision to eliminate the estate from our law. It has been pointed out that the immediate conversion of all existing fees tail into fees simple might well be unconstitutional and it has been suggested that the solution lies in immediately converting only fees tail in possession and treating any remaining fees tail as converted as soon as they fall into possession. This would involve conceding that the fee tail could not be eliminated in one swoop but one would be at least sure that the task would be accomplished in a constitutional (as well as reasonably expeditious) manner.

[29] Subject to an exception in relation to the tenant in tail after possibility of issue extinct. See text to and following n.17 above.
[30] See p.48 of the Consultation Paper.
[31] See text to n.24 above.