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Discussion Paper No 125



Discussion Paper on Land Registration: Void and Voidable Titles

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Abbreviations

Alberta Law Reform Institute, *Land Recording and Registration Act*

Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69, 1993)

BGB

Bürgerliches Gesetzbuch (German Civil Code)

Gordon, *Scottish Land Law*

W M Gordon, *Scottish Land Law* (2nd edn, 1999)

Henry Report

Scottish Home and Health Department, *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (1969, Cmnd 4137)

Joint Land Titles Committee, *Renovating the Foundation*

Joint Land Titles Committee for Alberta, British Columbia, Manitoba, The Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and Yukon, *Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1990)

Law Com No 271

Law Commission and H M Land Registry, *Land Registration for the Twenty-first Century: A Conveyancing Revolution* (Law Com No 271, 2001)

Mapp, *Torrens' Elusive Title*

Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (Alberta Law Review, University of Alberta, 1978)

Raff, *German Real Property Law*

Murray J Raff, *German Real Property Law and the Conclusive Land Register* (PhD thesis, University of Melbourne, 1999)

Registration of Title Practice Book

Ian Davis and Alistair Rennie (eds), *Registration of Title Practice Book* (2nd edn, 2000)

Reid, *Property*

Kenneth G C Reid *et al*, *The Law of Property in Scotland* (1996) (being a revised reprint of the relevant part of *The Laws of Scotland: Stair Memorial Encyclopaedia* vol 18 (1993))

Reid Report

Scottish Home and Health Department, *Registration of Title to Land in Scotland* (1963, Cmnd 2032; chaired by Lord Reid)

Ruoff and Roper, *Registered Conveyancing*

T B F Ruoff, R B Roper, E J Pryer, C J West, R Fearnley and J Donaldson, *Ruoff & Roper on the Law and Practice of Registered Conveyancing* (2002)

Torrens, *Registration of Title*

Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties dealing, illustrated by Copies of the Books and Forms in use in the Lands Titles Office* (Adelaide, 1859).

Part 1 Introduction

Background

1.1 The Land Register for Scotland was set up under the Land Registration (Scotland) Act 1979 as a replacement for the Register of Sasines, which had been in use since 1617. The new register was brought into operation gradually, county by county, and since 1 April 2003 has applied throughout Scotland.¹ Nonetheless the title to a great deal of land is still held on the Register of Sasines, and certain types of deed continue to be registered there rather than in the Land Register.² In the long term, however, the Register of Sasines will be wholly superseded by the Land Register.

1.2 The change of register marked a change of registration system. The Register of Sasines was, and is, a register of deeds or, more accurately, a register of copies of deeds. The Land Register is a register of title, with the ambitious aim of recording, not the deed itself, but its legal effect, and the legal effect of all previous relevant deeds.³ The result is a guaranteed statement as to title in the form of a title sheet for each registered property, making it a simple matter to discover the ownership of land and the encumbrances to which it is subject.

1.3 The 1979 Act has now been in force for more than 20 years, and, at the suggestion of the Keeper of the Registers of Scotland, a review of the Act was included as part of our *Sixth Programme of Law Reform*.⁴ This was partly a response to the inevitable problems experienced in the operation of a new system. Partly, too, it was in recognition of difficulties with the legislation itself, some considered in a growing body of case law, others identified but not yet solved. Both matters are discussed further in part 2 of this paper. An altogether more positive reason was the desire to take a fresh view of the legislation in the light of the digital era and the intention in Scotland, as elsewhere, to move towards a system of registration which is paperless, electronic and automated.

1.4 The present paper marks the beginning of our review. It focuses on certain fundamental issues as to the operation and effect of land registration. A subsequent paper will explore a series of more specific issues. Inevitably, the approach taken to some of the matters in the second paper will depend on decisions reached in relation to this first paper.

Classification of systems of registration

1.5 At the outset something should be said about the variety of systems of land registration which are found in the world today, and about the manner in which they may

¹ The final counties to switch to the Land Register were Banff, Moray, Ross and Cromarty, Caithness, Sutherland, and Orkney and Shetland. See The Land Registration (Scotland) Act 1979 (Commencement No 16) Order 2002, SSI 2002/432.

² 1979 Act s 2. Even after a county is operational for the 1979 Act a title usually switches registers only on a transfer for value. Whether that should remain the rule will be considered in our second discussion paper.

³ For the difference between registration of deeds and registration of title, see paras 1.7 and 1.8 below.

⁴ Scottish Law Commission, *Sixth Programme of Law Reform* (Scot Law Com No 176, 2000) paras 2.13–2.17.

be classified.⁵ At least four criteria can be used for the purposes of classification although, as will be seen, the results may often overlap.

1.6 **Constitution or publicity.** In Scotland, registration is usually constitutive of real rights in land, with the result that publicity and constitution coincide. Without registration there can be no ownership of land, and the date of registration is the date on which the real right is acquired.⁶ Most, but not all, subordinate real rights are in the same position. This rule holds true both for the Register of Sasines and the Land Register. Different approaches are, of course, possible. In some countries – France, for example – ownership passes earlier, on conclusion of the contract, and the function of registration is merely to publicise an event which has already taken place. In Scotland too constitution may sometimes precede registration. A floating charge is created on delivery of the deed and not when, later, it comes to be registered in the Companies Register.⁷ An equivalent rule operates in respect of so-called "overriding interests".⁸ Thus if a servitude, created by positive prescription and confirmed by court declarator, is noted on the Land Register,⁹ the purpose is merely to publicise a right which was created previously and by other means. In jurisdictions which make a distinction between law and equity, the pattern is often for registration to mark the creation of the legal right, an equitable right having come into existence on some earlier event such as conclusion of contract.

1.7 **Registration of deeds or registration of title.** A fundamental division is between systems which merely register deeds and systems which go further by entering on the register the legal result to which the deed is thought to give rise. The former leaves interpretation of deeds to the parties, the latter appropriates it to the registrar. Take the case of transfer of ownership which, under Scots law, is effected by registration of a disposition. A deeds register, like the Register of Sasines, records a copy of the disposition, leaving its legal effect to be determined by others. A register of titles, like the Land Register, evaluates the disposition, determines its validity, and, having concluded that it is sufficient to transfer ownership, gives it effect by entering the name of the grantee on the Register as owner of the land. The difference is particularly important when it comes to subsequent transactions. A person buying land on a deeds register can verify the seller's title only by examining a sequence of prior deeds; but if the land is on a register of title it is only necessary to check that the seller is the person listed on the register as owner.

1.8 What is true of ownership is true also of subordinate real rights such as heritable securities or real burdens. A real right which requires registration for its constitution will, under a system of registration of title, be listed in the unique title sheet which is made up for each parcel of land. Its existence and extent can then be discovered at a glance. Under a system of registration of deeds it is necessary first of all to locate the deed in question, and then to consider its effect. It may be added that both systems face the difficulty that some real rights can be created without registration.

⁵ For a general survey, see S R Simpson, *Land Law and Registration* (1976).

⁶ *Young v Leith* (1847) 9 D 932 affd (1848) 2 Ross LC 103; *Sharp v Thomson* 1997 SC (HL) 66; Abolition of Feudal Tenure etc (Scotland) Act 2000 s 4.

⁷ Scottish Law Commission, Discussion Paper on *Registration of Rights in Security by Companies* (Scot Law Com DP No 121, 2002) para 2.3. A provisional proposal of that paper is that registration should in the future be constitutive: see paras 2.6–2.11.

⁸ Defined in the 1979 Act, s 28(1). Briefly, an overriding interest is a real right in land which is constituted without registration.

⁹ 1979 Act s 6(4).

1.9 **Positive system or negative system.** A "positive" system confers the right in question by the very act of registration, and without regard to the validity of the underlying title. Thus the registration of a conveyance which is forged or granted *a non domino* confers ownership in just the same way as registration of a conveyance which was granted by the true owner and properly executed. Title flows from the register and the register, by definition, cannot be wrong. At worst, a title on a positive register is voidable, that is to say, subsistent but challengeable. It cannot be void. A positive system is thus one which turns void titles into voidable titles. Conversely, it holds nothing for titles which are good already; and, since most titles are good, it does not usually matter whether a registration system is positive or negative. A "negative" system operates within the normal rules of the law of property. Registration, although usually necessary, is not a sufficient step for the creation of a real right. There must also be a valid deed granted by a person with title to grant. Title thus flows from the register only in the sense that registration marks the final stage in the process of transfer; and the registration of a conveyance which is forged or granted *a non domino* confers no right at all. Void titles, in short, are not cured by the act of registration.

1.10 In Scotland it has now come to be accepted, after initial doubts, that the Land Register operates a positive system of land registration. The Register of Sasines uses a negative system.

1.11 **Bijuralism or monojuralism.** A negative system, as just mentioned, operates within the normal rules of the law of property. At first sight a positive system does not. To confer ownership on the basis of, for example, a forged conveyance is to apply wholly new rules to the acquisition of real rights. Yet, unless a positive system is to be confiscatory in nature, it must also have regard to the underlying law of property. For if ownership passes on a forged conveyance, some redress is required for the person thus deprived of property. Either the property must be returned or compensation paid: in the language of the 1979 Act there must either be rectification or indemnity.¹⁰ The question of whether redress is due, however, can only be determined by the application of the ordinary rules of property law. In other words, there must be "a comparison between the effect of the [registration] statute and the effect of the law which would apply if the statute were not in force".¹¹ This means that a positive system has no choice but to work with two different laws of property. In the first instance the position is governed by the special rules of the positive system. These provide, among other things, that the person who is registered as owner *is* as a matter of law the owner. But in the event of a dispute the position must then be re-analysed using the ordinary rules of property law. Who, under that law, would be owner? And if the answer is different from that given by registration law, the register is, in that sense at least, "inaccurate", and questions of rectification and indemnity arise. A system which operates with two different laws of property may be described as "bijural". A negative system, which employs only the ordinary law of property, may be called "monojural".

1.12 **Interactions.** As just mentioned, a positive system of registration is likely to be bijural and a negative system monojural. The other criteria, however, do not match so

¹⁰ Typically in Torrens systems the property cannot be returned and so compensation is paid. In the Scottish and English systems the question of which remedy is available is determined largely by whether the acquirer is a proprietor in possession. See further part 4.

¹¹ Alberta Law Reform Institute, *Land Recording and Registration Act* vol 1 p 53. See also D J Hayton, *Registered Land* (3rd edn, 1981) p 169: "Thus where, say, land has actually been registered for 50 years one can treat the land hypothetically as if it had been unregistered throughout the period, and if unregistered land principles produce as estate owner someone different from the registered proprietor then rectification is possible."

readily. Normally, but not invariably,¹² registration of title is constitutive in effect, while registration of deeds may either be constitutive or non-constitutive. Registration of deeds is necessarily negative in character. Registration of title is often positive – as in the Torrens system, today the dominant model in the English-speaking world, or in the systems operational in England and Scotland. But registration of title may also be negative, for an immediate conferral of right is not the only way in which to achieve a transparent register and a guaranteed title. Thus the influential German system protects a *bona fide* acquirer from defects in the register at the time of acquisition but not from those in his own deed, even after it has been registered.¹³ As a result, registration does not always lead to ownership. Until a controversial decision of the Privy Council in 1967¹⁴ many countries with Torrens titles operated a functionally equivalent scheme in which the "indefeasibility" of title achieved by registration was "deferred" until the next transaction down the line.¹⁵ There are other possibilities also.¹⁶ One issue raised by the present paper is whether Scotland should change from a system of registration of title which is constitutive and, apparently, positive to a system of registration of title which is constitutive and negative.¹⁷

The move towards registration of title

1.13 **England and Australia.** In the English-speaking world the origins of registration of title lie in two statutes of the mid-nineteenth century – the Real Property Act of 1861¹⁸ in South Australia and the Land Registry Act of 1862 in England. The former was an immediate success, and was rapidly exported to other states and territories in Australia, to New Zealand, to the prairie provinces and territories of Canada, to parts of the United States of America, and ultimately to a number of other territories of the British Empire. The system came to be known by the name of its first architect and proselytiser, Robert Torrens, who was registrar-general of deeds for South Australia. The English Act, by contrast, was a failure and was soon replaced, by Acts of 1875 and 1897,¹⁹ and finally by the Land Registration Act of 1925, which remained in force until 2003.²⁰ The influence of the English model was correspondingly more modest, although a number of jurisdictions came to adopt versions of it, including Ireland, Nova Scotia, Ontario and, in 1979, Scotland.

1.14 Naturally the copies were by no means identical to the original or indeed to one another. Nonetheless the most striking thing about all systems of registration of title, whether on the Torrens or English model, is their essential similarity.²¹ This is expressed in the three principles first identified, and named, by Theodore Ruoff of the English Land

¹² Alberta Law Reform Institute, *Land Recording and Registration Act* vol 1 p 45.

¹³ § 892 BGB.

¹⁴ *Frazer v Walker* [1967] 1 AC 569, a case decided on appeal from New Zealand. The position in Australia was held to be the same in *Breskvar v Wall* (1971) 126 CLR 376. See further paras 3.22 ff.

¹⁵ Paras 3.24–3.26.

¹⁶ The idea of certification of title recommended by a minority of the members of the Reid Committee also comes close, in some respects, to a negative system of registration of title. See Reid Report paras 129–45.

¹⁷ See part 5.

¹⁸ Replacing the Real Property Act 1860, which in turn replaced the original Torrens statute, the Real Property Act 1858.

¹⁹ Land Transfer Acts 1875 and 1897.

²⁰ When it was replaced by the Land Registration Act 2002.

²¹ P O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in E Cooke (ed), *Modern Studies in Property Law* vol II (2003) 81.

Registry in 1952 in a series of articles entitled "An Englishman Looks at the Torrens System".²²

"The first of these is the *mirror* principle under which the register book reflects all facts material to an owner's title to land ... [T]he information that is shown is deemed to be both complete and accurate ... Secondly, there is the *curtain* principle²³ which emphasises that so far as a proposing purchaser is concerned, the register book is the sole source of information about the legal title so that he neither need nor may look behind it ... The third principle is the *insurance* principle which, whilst upholding the correctness of the register book declares that if through human frailty a flaw appears in the mirror of title, anyone thereby suffering loss will be put in the same position, so far as money can do it, as if the reflection were a true one."

1.15 The main point of difference concerns the effect of inaccuracy in the Register – of, in Ruoff's metaphor, flaws in the mirror of title. Typically a Torrens system forbids the correction of significant error. Under the English model a registered proprietor must first take possession before protection is secured, while a proprietor not in possession and from whom the property is taken away has a claim for state indemnity.²⁴

1.16 That the systems should be broadly similar is unsurprising. They were devised at much the same time and against the background of a similar law of property, and there was plainly a degree of mutual influence. For example the first Torrens statute, of 1858, was affected to some extent by the report of the Royal Commission in 1857²⁵ which recommended the introduction of registration of title in England.²⁶

1.17 More important are the indications of common parentage.²⁷ The idea of registration of title long pre-dates both Torrens and the English Royal Commission. Already by the seventeenth century, systems of registration of title could be found in cities in Germany and Austria, building on registers from an earlier period.²⁸ Torrens, it is true, claimed that his system was modelled on nothing more than "the principles which regulate the transfer of shipping property" which he had encountered during a previous career in the Customs Service.²⁹ But modern research has shown a key influence to have been the system of land registration in operation in Hamburg and which was mediated by a Hamburg lawyer

²² (1952) 26 ALJ 118, subsequently reprinted in 1957 as a book of the same name (where the passage quoted appears on pp 16-17). And see also M M Park and I P Williamson, "An Englishman looks at the Torrens system: Another look 50 years on" (2003) 77 ALJ 117.

²³ Also sometimes known as the "top title" principle on the basis that only the top title (ie, in Scottish parlance, the title sheet/land certificate) need be consulted. See Ivan L Head, "The Torrens System in Alberta: a Dream in Operation" (1957) 35 Canadian Bar Review 1, 9. Torrens contrasted the "independent title" of registration of title with the "dependent title" of unregistered conveyancing: see Torrens, *Registration of Title* pp 8-9.

²⁴ Paras 4.9ff. Under the Torrens system indemnity is paid only to the person who loses out following the registration of an acquirer: see Torrens, *Registration of Title* p 9.

²⁵ *Report of the Commissioners Appointed to Consider the Subject of the Registration of Title with Reference to the Sale and Transfer of Land* (1857, C. 2215).

²⁶ Mapp, *Torrens' Elusive Title* para 1.5, summarising D J Whalan, "The Origins of the Torrens System and its Introduction into New Zealand", in Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 1, 5-9.

²⁷ P O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in E Cooke (ed), *Modern Studies in Property Law* vol II (2003) 81, 98: "It would not be surprising if English researchers were to find that the English and Torrens systems, far from being independent inventions, are the offspring of a common but unacknowledged German parent."

²⁸ In Hamburg, for example, the crucial moment seems to have been the establishment in 1659 of a *Hauptbuch* which consolidated, property by property, the information contained in the *Erbebuch* and *Rentebuch*. The development is traced in Murray J Raff, *German Real Property Law and the Conclusive Land Register* (PhD thesis, University of Melbourne, 1999) pp 106 ff. We are very grateful to Dr Raff for making a copy of this important thesis available.

²⁹ Torrens, *Registration of Title* preface and pp 9-10.

resident in South Australia, Dr Ulrich Hübbe.³⁰ In England too there is evidence of Germanic influence. In 1896, for example, an "exhaustive and alluring"³¹ report was made to Parliament by the Assistant-Registrar of the Land Register (Fortescue Brickdale) on *The Systems of Registration of Title in Germany and Austria-Hungary*.³² The system subsequently introduced to England by the Land Transfer Act of 1897 was, a Scottish commentator noted, "established to the greatest extent on the same lines as those which obtain on the Continent of Europe and in the Colonies".³³ Even today, both the Torrens and the English (and Scottish) systems bear a family resemblance to the system in operation in Germany, although there has been little in the way of direct contact.³⁴ But whereas the Torrens/English branch is positive in nature, the German branch is negative.³⁵ We return to this important difference in part 5.

1.18 **Scotland.** With the establishment of the General Register of Sasines in 1617³⁶ Scotland became one of the first countries to have a national register for land.³⁷ Originally a mere repository of copy deeds, the Register came to confer priority³⁸ and ultimately was accepted as constitutive of real rights.³⁹ It was indexed by property, by means of search sheets, in the late nineteenth century and computerised in the late twentieth. But despite the evident success of the Register of Sasines, Scotland was not immune from the enthusiasm for registration of title engendered by developments in England, Australia, and elsewhere. The Register of Sasines might be efficient and secure, but it could also be represented as cumbersome and expensive. Registration of title offered the prospect of easy conveyancing and hence of cheap conveyancing. Already in the 1890s the Professor of Conveyancing at Edinburgh University was lecturing his students on the merits of the Torrens system, which he had examined during a visit to Manitoba, and of the system found in Germany and Austria-Hungary.⁴⁰ In 1904 Glasgow Corporation issued a pamphlet advocating registration of title and urging town and county councils throughout Scotland to pass resolutions and make representations to Parliament in its support. A contemporary note in *Juridical Review* set out the arguments in favour of registration of title:⁴¹

³⁰ The most recent research is by Dr Raff, *German Real Property Law* pp 21 ff.

³¹ (1904) 16 JR 316.

³² Parliamentary Papers, 1896, C 8139.

³³ J S Sturrock, "Registration of Title and Scottish Conveyancing" (1908-09) 20 JR 1, 3.

³⁴ As Dr Raff notes of the Torrens system (*German Real Property Law* pp 60-1): "The surprising aspect is not that the system has been named the Torrens System rather than the Hübbe System, but rather that by the end of the 19th century the strong influence of German real property jurisprudence had been virtually forgotten ... and that the Australian courts drew exclusively upon English general law and equitable principles in the interpretation of it, rather than seriously contemplating the nature of the legal transplant which it had received and evaluating the companion principles [the *Juratypen*] in the Hamburg legal system, and later the German legal system, when dealing with the problems which arose following its implementation."

³⁵ For positive and negative systems, see paras 1.9 and 1.10.

³⁶ Registration Act 1617 (c 16).

³⁷ The controlling study is L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942). See also G H Crichton, "The Introduction of Registration of Titles to Land in Scotland" (1922) 38 LQR 469.

³⁸ Real Rights Act 1693 (c 22).

³⁹ *Young v Leith* (1847) 9 D 932 affd (1848) 2 Ross LC 103.

⁴⁰ J P Wood, *Lectures on Conveyancing* (1903) chs 5 and 6. The account of Germany and Austria-Hungary was based on Fortescue Brickdale's report mentioned earlier. Wood's conclusion, given in his preface, was that: "I suppose that nowhere is there to be found a better system of land titles by registration of deeds. But I am clear that the time has now come when this system should give place to the more excellent plan of registration of title."

⁴¹ "Land Transfer Reform in Scotland" (1904) 16 JR 316, 317. The author is not named but the reference to "mortgage" suggests that it was not a lawyer trained in Scotland.

"On all hands it is admitted that in point of simplicity, security, and cheapness, it is the ideal mode of dealing with the problem of land transfer. It avoids the wearisome examination of a whole progress of titles on the occasion of every transaction in land, and renders the transference of land as simple and expeditious a matter as the transference of property in ships or of stocks and shares; it gives the purchaser or mortgagee an indisputable title guaranteed by the Government; and it reduces expense to a minimum."

Other contributions to the ensuing debate were less credulous.⁴²

1.19 In response to this growing interest a Royal Commission was set up in 1906 under the chairmanship of Lord Dunedin to enquire into "the expediency of instituting in Scotland a system of registration of title" but it failed to reach agreement and issued no fewer than four separate reports.⁴³ Thereafter the idea of registration of title lapsed to be revived only in the 1940s.⁴⁴ A committee on the topic set up by the Secretary of State for Scotland in 1948 ceased work on the death of its chairman, Lord Macmillan, but in due course a second committee was appointed under Lord Reid and reported in 1963.⁴⁵ This committee too was divided but a clear majority supported the introduction of registration of title. In the event this proved decisive. The Reid Committee was followed by a second committee under Professor G L F Henry to review the technical aspects of the proposed new system.⁴⁶ A further ten years then elapsed between the report of the Henry Committee and the passing, in 1979, of the Land Registration (Scotland) Act. Further consideration of this Act may be postponed until part 2.

1.20 The arguments which found favour with the majority of the Reid Committee were much the same as those which had been aired half a century earlier. The Register of Sasines was "a practical system which works well".⁴⁷ But registration of title eliminated "the need to re-examine the validity of the title for each transaction" and was accordingly simpler and cheaper to operate.⁴⁸ If it could be introduced in such a way as to "prevent dislocation or substantial practical difficulties during the transitional period" then the change was worth making.⁴⁹ In the Committee's view such dislocation could reasonably be avoided.

1.21 It is instructive to set these arguments against Ruoff's three principles mentioned earlier.⁵⁰ For Scotland the overwhelming advantage of registration of title was, and remains, the curtain principle – the principle which permits reliance on the top title (the title

⁴² David Murray, Review of J E Hogg, *The Australian Torrens System*, in (1905) 17 JR 166; J S Sturrock, "Registration of Title and Scottish Conveyancing" (1908-9) 20 JR 1.

⁴³ *Reports by the Royal Commission on Registration of Title in Scotland* (1910, Cd 5316).

⁴⁴ In a foreword to L Ockrent, *Land Rights: An Enquiry into the History of Registration for Publication in Scotland* (1942), Dr E M Wedderburn DKS commented that: "From time to time suggestions are made that the time is ripe for the introduction in this country of a system of registration of title in place of a system of registration of deeds. One view is that our present system is now so simple and affords such security in all transactions relating to land that nothing further is required. The other view is that the high state of development reached by our system of registration has prepared the way for the introduction of Registration of Title, without disturbance to our conveyancing system and without much cost, and that transfer of interests in land would be greatly simplified thereby." See also T B Smith, "Registration of Title to Land" 1948 SLT (News) 67.

⁴⁵ Scottish Home and Health Department, *Registration of Title to Land in Scotland* (1963, Cmnd 2032) ("Reid Report").

⁴⁶ Scottish Home and Health Department, *Scheme for the Introduction and Operation of Registration of Title to Land in Scotland* (1969, Cmnd 4137) ("Henry Report").

⁴⁷ Reid Report para 57.

⁴⁸ Reid Report para 149.

⁴⁹ Reid Report para 64.

⁵⁰ Para 1.14.

sheet/land certificate) without the need to examine the deeds on which that title is based. In any reform of the 1979 Act it will be important above all to retain the integrity of that principle. The insurance principle, by contrast, is psychologically useful without being much invoked in practice.⁵¹ Finally, the mirror principle can be seen as a feature of all systems of land registration and not merely of those which employ registration of title. It has two aspects: the information shown on the register must be complete and the information must be accurate. Both were substantially true of the Register of Sasines. In view of the fact that most real rights to land can be created only by registration, it follows that an examination of the Register of Sasines will disclose all such rights; and insofar as there are exceptions to this rule – servitudes constituted by prescription, short leases, and the like – these exceptions apply equally to the Land Register. "Overriding interest" was a new name in 1979⁵² but it was not a new concept. And if the Register of Sasines is complete, or virtually so, it is also extremely accurate. Indeed the very fact that it is so much less ambitious than the Land Register – that it copies deeds rather than seeks to explain them – means that it is also the more accurate of the two. From a Scottish perspective, accuracy is less a product of registration of title than a casualty of it;⁵³ and in this awkward fact lies one of the challenges of law reform.

Comparative law

1.22 In developing proposals for reform we have made a special study of the Torrens system and of the systems of land registration in Germany and in England and Wales.⁵⁴ We have also been assisted by the many papers produced by law reform agencies throughout the Commonwealth. For convenience they are listed in Appendix 1. Particular help was found in the far-reaching, and as yet unimplemented, *Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada* (1993),⁵⁵ and in the parallel *Proposals* adapting that Act to the province of Alberta.⁵⁶ It seems hardly necessary to add, however, that land registration in Scotland is different in important respects from the system in operation in any other country, and that the problems, and the range of possible solutions, are by no means the same.

⁵¹ It is wholly absent from the German system, although there is liability for negligence on the part of staff at the register.

⁵² An "overriding interest" is, broadly, a real right in land constituted otherwise than by registration: see Land Registration (Scotland) Act 1979 s 28(1).

⁵³ See eg paras 2. 26–2.31.

⁵⁴ The Reid Committee saw the English system as its main model, and in important respects the 1979 Act is a copy of the English Land Registration Act of 1925. The Reid Report (para 66) notes further that: "We also received some evidence about the South African system, but conditions there are so different that we have not thought it necessary to consider that system in detail. For the same reason we have not investigated the Torrens system or any of the systems in use in Europe." No doubt this explains statements such as (para 114): "It is an essential condition of any system of registration of title that the title should be guaranteed by the State." The Henry Committee looked at the English system and at the Torrens system in Western Australia and New Zealand, but avoided European systems on the basis that "our task was to devise a system suitable to the law and practice of conveyancing in Scotland": see Henry Report para 6. The failure to look at any civil law jurisdictions has been criticised: see Robert Sutherland, "Reform of Land Law in Scotland" p 25 (paper presented at the Institute of Advanced Legal Studies on 4 July 1978; available on www.sites.ecosse.net/robsuth).

⁵⁵ By a Joint Land Titles Committee comprising representatives of the Governments of Alberta, British Columbia, Manitoba, the Council of Maritime Premiers, Northwest Territories, Ontario, Saskatchewan and the Yukon, and of the law reform agencies of the prairie provinces and British Columbia. The *Proposals* were first published in July 1990 and revised in March 1993.

⁵⁶ Alberta Law Reform Institute, *Proposals for a Land Recording and Registration Act for Alberta* (Report No 69, 1993). The intellectual basis of the *Proposals* may be found in Thomas W Mapp, *Torrens' Elusive Title: Basic Legal Principles of an Efficient Torrens' System* (Alberta Law Review, 1978).

Our proposals in summary

1.23 The most important of our provisional proposals can be summarised in this way. As under the present law, a *bona fide* acquirer should be able to rely on the Register, supported by a state guarantee. Usually this would mean that, if the seller was shown on the Register as owner, the acquirer would receive ownership in turn. If, however, the seller (or a predecessor of the seller) had not been in possession for a prescribed period (such as a year), the acquirer's entitlement would be to state compensation ("indemnity") and the property would remain with the "true" owner.⁵⁷ In this way a "true" owner who had retained possession would not suffer the loss of his property. The requirement of a seller in possession would replace the existing requirement of a buyer ("proprietor") in possession. Furthermore, and following the present law, an acquirer should be protected not only in respect of errors on the Register ("Register error") but also in respect of errors – forgery, for example – which affect the current transaction ("transactional error"). But in such a case the entitlement would be to indemnity and not to the property.⁵⁸ Protection against error would require good faith on the part of the acquirer rather than, as at present, the mere absence of fraud or carelessness.⁵⁹ Subject to what has just been said, and in the interests of simplicity and legal coherence, the question of whether registration confers a real right should be determined by the ordinary law of property. There should, in other words, be a move from what may be a "positive" system of registration under the current law in the direction of a "negative" system.⁶⁰ Finally, positive prescription, excluded in most cases by the 1979 Act, should be reintroduced as a means of cutting off future challenges to the title of the acquirer.⁶¹ The proposals are listed in full in part 8, and this is followed by a summary, with an example, of their intended effect.

Which Parliament?

1.24 Legislation to give effect to our proposals would be within the legislative competence of the Scottish Parliament.⁶² The law of land registration is not a reserved matter.⁶³ Further, our proposals are informed by a concern to avoid any suggestion of a breach of the European Convention on Human Rights.⁶⁴

Acknowledgements

1.25 Registers of Scotland gave the services of a senior member of staff⁶⁵ to work as part of our team, prepared a comprehensive review of the law and practice of land registration, and provided help in many other ways. Without such unstinting assistance and support this project could scarcely have been attempted. We owe a particular debt to Alistair Rennie, the Deputy Keeper, and to Ian Davis, Director of Legal Services. Helpful comments on the Registers' review were provided by Professor A J McDonald and by a working party of the Law Society of Scotland's conveyancing committee. Professor Peter Butt of the University of Sydney put his expertise on the Torrens system at our disposal and answered patiently our

⁵⁷ Paras 4.29–4.52.

⁵⁸ Paras 3.19 ff.

⁵⁹ Paras 7.1–7.20.

⁶⁰ Part 5.

⁶¹ Paras 3.4–3.11.

⁶² For which see Scotland Act 1998 s 29.

⁶³ Reserved matters are listed in sch 5 of the 1998 Act.

⁶⁴ Para 5.33.

⁶⁵ Mr Martin Corbett.

many questions. Dr Alexandra Köth of the University of Mannheim gave guidance in relation to land registration in Germany, while Mr W H Hurlburt QC of the Alberta Law Reform Institute explained the background to the proposed Model Recording and Registration Act for the Provinces and Territories of Canada and provided us with further materials. To all these we express our thanks. At an early stage we sought the views of legal practitioners, both by a note in the *Journal of the Law Society of Scotland*⁶⁶ and by direct approaches to some 400 law firms. A list of those who responded is given in Appendix 2 to this paper. We are most grateful to them as well as to the many others who answered our queries or helped in a variety of ways.⁶⁷ Finally, we acknowledge with gratitude the assistance of a small advisory group which read this paper in draft and made a number of helpful suggestions.⁶⁸ As well as being a member of that group, Professor George Gretton of the University of Edinburgh acted as a consultant throughout the preparation of this paper.

⁶⁶ Published in the issue for October 2001.

⁶⁷ Ross G Anderson, Max-Planck-Institut für ausländisches und internationales Privatrecht, Hamburg; Stephane Bachand, Law Commission of Canada; David Biklen, Connecticut Law Revision Commission; Cheung Lai-ching, Hong Kong Land Registry; John Cannel, New Jersey Law Revision Commission; Arthur Close, British Columbia Law Institute; Christopher Curran, Department of Justice, Newfoundland and Labrador; Jenny Gawlik, Tasmania Law Reform Institute; Peter Hennessy, Attorney General's Department, New South Wales; Siv Elisabeth Hveberg, Oslo District Court; Heather Kay, Law Reform Commission of Western Australia; Jacqueline Kitchen, New Zealand Law Commission; Land Titles Office, New South Wales; Thomas Leung, Law Reform Commission of Hong Kong; Messrs Mallesons Stephen Jaques, Sydney; National Archives of Scotland; Mark O'Riordan, Irish Law Reform Commission; Suzanne Pelletier, Manitoba Law Reform Commission; Dr Murray Raff, University of Victoria; Norman Siebrasse, University of New Brunswick; Nathaniel Sterling, California Law Revision Commission; Mr Robert Sutherland; Professor N R Whitty, University of Edinburgh; Faith Woodford, Department of Justice, Northern Territories, Australia.

⁶⁸ The group comprised: Professor Stewart Brymer, University of Dundee and Messrs Thorntons; Professor George Gretton, University of Edinburgh; Professor Roderick Paisley, University of Aberdeen; and Professor Robert Rennie, University of Glasgow and Messrs Harper Macleod.

Part 2 The Current Law: Exposition and Analysis

THE 1979 ACT

Introduction

2.1 It seems necessary to give a brief account of the current law. The bill making provision for registration of title in Scotland was introduced to Parliament in 1978, was passed the following year, and first came into effect, for the county of Renfrew only, in 1981. Since then registration of title has gradually been extended throughout Scotland and as of 1 April 2003 is in force in respect of the whole country. Much of the preliminary work for the legislation had been carried out by the Henry Committee some ten years' earlier, and that Committee's report included what was in substance a draft bill.¹ In the event, however, the Land Registration (Scotland) Act 1979 made less use of the work of the Henry Committee than might have been expected.

The Land Register of Scotland

2.2 The 1979 Act set up a new register, known as the Land Register of Scotland. Like the Register of Sasines, it is a public register. Unlike that register it is a register, not of deeds, but of "interests in land" – or in other words of real rights in land.² The Land Register is under the management and control of the Keeper of the Registers of Scotland.³

2.3 Up until the present time the arrangement of the Register has been complicated by the continuing existence of the feudal system, with its multiple tiers of ownership (*dominium*). The feudal system, however, is set to be abolished on 28 November 2004,⁴ and for the purposes of this paper abolition is assumed already to have taken place. Following feudal abolition, there will usually be one, and only one, title sheet for each parcel of land.⁵ Only where land is subject to a long lease will a second title sheet exist, in respect of that leasehold interest.

2.4 For any given parcel of land the title sheet is made up on "first registration", that is to say, on the first occasion on which a title to the land is registered in the Land Register.⁶ Normally this occurs when, following the application of the Act to the county in question, the land is transferred for valuable consideration.⁷ The title sheet is held in electronic form and comprises four sections, covering property, proprietorship, charges, and burdens.⁸ The

¹ Para 1.19.

² 1979 Act s 1.

³ 1979 Act s 1(2).

⁴ Abolition of Feudal Tenure etc (Scotland) Act 2000 s 1.

⁵ But note that a separate tenement, such as minerals or salmon fishings, is treated as separate "land" for this purpose.

⁶ 1979 Act s 6(1).

⁷ For other cases, see 1979 Act s 2(1).

⁸ Land Registration (Scotland) Rules 1980, SI 1980/1413, part II.

property section describes the land by means of an Ordnance Map of appropriate scale and also by a short verbal description.⁹ Parts and pertinents are listed where known, including, in some cases, the right to enforce real burdens and servitudes in respect of other land. The proprietorship section gives the name and address of the owner, the date on which ownership was acquired, and the price paid. Heritable securities are listed in the charges section, and real burdens and servitudes, in full text, in the burdens section. The official copy of the title sheet, which is given to the registered owner, is known as a "land certificate".¹⁰

2.5 The preparation of a title sheet is a highly skilled task, requiring a painstaking examination of the Sasine deeds as well as a consideration of other matters such as the state of possession. But assuming the task to be properly done, the title should not need to be examined again. For the title sheet supersedes the prior deeds; Ruoff's "curtain" is drawn to block out the underlying title;¹¹ and from the title sheet alone an inquirer can determine the ownership of the land, its boundaries, and the encumbrances to which it is subject.

Registration

2.6 Almost always, registration is triggered by the presentation of a deed. Yet in registration theory it is not the deed itself which is registered but rather the right of which the deed is the source.¹² Thus, and assuming a title sheet to be already in existence, registration is completed, in respect of a disposition, by changing the name in the proprietorship section from the grantor to the grantee, while a standard security is registered by entering short particulars of the right in the charges section.

2.7 As has been the case for several hundred years, the primary function of registration is to complete a process which began with the execution and delivery of the deed. For as a matter of general law, but subject to the exceptions mentioned later,¹³ real rights in land can only be created by registration. In this respect at least there is no difference between the role of the Land Register and the Register of Sasines. But registration in the former has two further effects which are wholly absent from registration in the latter.

2.8 The first arises from the "positive" nature of the Scottish system of registration of title mentioned earlier.¹⁴ A void deed is not improved by registration in the Register of Sasines, and no title is thereby conferred. But in the case of the Land Register a void deed leads to a voidable title, that is to say, to a title which is good unless or until it is set aside. The defect in the deed is thus cured, at least for the time being.

2.9 The second effect is a development of a rule already mentioned. If a real right in land can be created only by registration, it follows that the existence of such rights must always be disclosed by a search of the register (whether the Land Register or Register of Sasines). Registration of title elevates a consequence into a principle while at the same time creating conditions under which it might not be fulfilled. The principle is the declaration, in

⁹ For descriptions, see further *Registration of Title Practice Book* ch 4.

¹⁰ 1979 Act s 5(2).

¹¹ Para 1.14.

¹² Note, however, that not all deeds and documents which can be registered lead to real rights. See eg a notice under s 33 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 reserving the right to claim compensation for loss of a development value burden.

¹³ Para 2.10.

¹⁴ Paras 1.9 and 1.10.

section 3(1)(a) of the 1979 Act, that registration in the Land Register confers a real right "subject only to the effect of any matter entered in the title sheet of that interest under section 6 of this Act so far as adverse to the interest or that person's entitlement to it".¹⁵ The possibility that it might not be fulfilled is the possibility that real rights might not, after all, appear on the Register. Primarily this is a problem of first registration, for in making up a title sheet a real right (such as a real burden or a heritable security) might occasionally be missed and so not be carried forward from the Register of Sasines to the Land Register. After first registration the risk is deletion and not omission, so that, for example, a security might be removed following the registration of a forged discharge. Cases like these are rare in practice. Where they occur, however, the principle in section 3(1)(a) prevails, with the result that the omitted right is extinguished.¹⁶

Overriding interests

2.10 Some real rights in land – most notably short leases and, insofar as they affect the servient tenement, servitudes – are or may be constituted by possession and not by registration. In the 1979 Act these are known as "overriding interests" – interests or rights which "override" the registered title.¹⁷ The real right under a floating charge is likewise an overriding interest, created merely by crystallisation of the charge following the appointment of a liquidator or receiver to the debtor company. The Act does not allow overriding interests to be "registered" as such because they are already real rights;¹⁸ but, with some exceptions, they may be "noted" on the Register, thus giving a fuller picture of the state of the title.¹⁹ An overriding interest is valid whether noted or not,²⁰ and in practice servitudes in particular are often not included on the Register.

Rectification

2.11 **Grounds.** If the Register contains an error – an "inaccuracy" in the language of the 1979 Act – then it may be possible to have it corrected or "rectified".²¹ Inaccuracies, where they occur, are quite often the result of bijuralism,²² of a conflict between the special rules of land registration and the ordinary rules of the law of property. In such a case the special rules prevail, at least in the first instance, for that is the whole point of a positive system of registration of title. But in view of the fact that the ordinary rules would have produced a different result, the Register is then deemed to be inaccurate.²³

¹⁵ Or to any overriding interest, discussed in the next paragraph.

¹⁶ The remedy of its holder is then indemnity under s 12(1)(b). See eg *Keeper of the Registers of Scotland v M R S Hamilton Ltd* 1999 SC 116 (omission of leasehold casualties).

¹⁷ 1979 Act s 28(1). The term was copied from England. The Reid Committee preferred the more Scottish-sounding "unrecorded interests" (Reid Report para 109) but, as the Henry Committee pointed out (Henry Report para 45 note 1), this overlooks the fact that some of the interests in question might be recorded in the Register of Sasines or noted on the Land Register.

¹⁸ The position in regard to servitudes is, however, more complex than this statement allows, and will be reviewed in our second paper.

¹⁹ 1979 Act s 6(4).

²⁰ 1979 Act s 3(1)(a). As a matter of the general law, this is because they are real rights.

²¹ 1979 Act s 9. For errors, see paras 2.26 ff.

²² For which see para 1.11.

²³ See eg the Reid Report para 114: "... if a person other than the registered title holder later proves to have a better title under the ordinary law ..."; *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122, 140 G per Lord President Hope: "... an entry is inaccurate if it appears that at the time it was made or in the light of subsequent events it ought not to have been made. If the deed which has been reduced was one which has been accepted by the Keeper as evidence of the title which he has been asked to register, it must follow that there is an inaccuracy on the register."

2.12 An example, mentioned earlier, is the removal of a heritable security following a forged discharge. According to the special rules of land registration, the security is extinguished.²⁴ According to the ordinary law of property, the security remains good because a forged discharge is of no effect. These conflicting results are resolved by saying (i) that the security is discharged (ii) but the Register is inaccurate and may be rectified (iii) whereupon the security will be restored (although not retrospectively).

2.13 A second, and more common, example is where a person is registered as owner of too much land.²⁵ The rules of land registration confer ownership, because the 1979 Act operates a positive system;²⁶ but the rules of property law treat the title as *a non domino* in respect of the additional land and hence as void. The resolution is as before. The person registered as owner *is* the owner, but the Register is inaccurate to that extent and so vulnerable to rectification.

2.14 Not all inaccuracies turn on bijuralism. Some are inaccuracies within the rules of land registration itself. That is usually true, for example, of clerical error, or of inaccuracy caused by supervening events such as the death of the registered proprietor or the extinction of a right by negative prescription. An error in the noting of an overriding interest falls into the same category. Thus suppose, for example, that a servitude is wrongly noted in the burdens section. The entry of an overriding interest is neutral in effect: unlike registration, the mere "noting" of a right does not infuse it with validity. The entry, therefore, is simply wrong, both under the general law of property (for no servitude had in fact been created) and under the internal rules of land registration.

2.15 The 1979 Act makes no distinction between bijural inaccuracies and inaccuracies arising in some other way. The result is that the elaborate defences mounted by the Act against rectification on account of bijuralism and described below apply, as it were by accident, to errors of an altogether more innocuous kind.

2.16 **Defences.** As in the Torrens system, an inaccuracy can always be rectified if it was caused by the fraud of the registered proprietor; and to fraud the 1979 Act, following the English Act of 1925, adds "carelessness".²⁷ Rectification is also allowed where indemnity was excluded by the Keeper at the time when the title was registered, and in one or two other cases.²⁸ Otherwise the availability of rectification turns on possession. It is not permitted where it would prejudice a proprietor in possession. Otherwise rectification is freely available. The Act defines neither "proprietor" nor "possession", but it has been held that a heritable creditor is not a proprietor in this sense, and that possession may include civil possession.²⁹ The standard case of a proprietor in possession is thus an owner who is in actual occupation of the land; but a tenant under a registered lease is also probably a "proprietor", and the possession can be civil as well as natural. The overall effect of these complex provisions is that a registered owner (or tenant) who takes possession and has not been at fault (ie fraudulent or careless) is usually invulnerable to rectification. In this way the gains of registration – the rights acquired as a result of the positive system – are duly

²⁴ Presumably as a result of the 1979 Act s 3(1)(c), although the provision is obscure.

²⁵ eg *M R S Hamilton v Keeper of the Registers of Scotland* 1999 SLT 829.

²⁶ 1979 Act s 3(1)(a).

²⁷ As to the meaning of these terms, see Part 7.

²⁸ 1979 Act s 9(3)(a).

²⁹ *Kaur v Singh* 1999 SC 180.

preserved. A person who has lost rights as a result must make do with state compensation ("indemnity").

Indemnity

2.17 The 1979 Act operates a system of state compensation, funded in practice by the registration fee. Unlike in some other countries, however, no part of the fee is marked out as the indemnity premium, far less are applicants given the choice of opting out of the state scheme. No separate fund is maintained by the Register and a liability under the scheme is ultimately a state responsibility.³⁰

2.18 The main purpose of the scheme is to compensate those who lose rights as a result of the positive system of registration of title.³¹ For if a void deed is transformed by registration into a good one, the result is not only a gain but also a matching loss. In *Kaur v Singh*,³² for example, the pursuer's signature was forged in a disposition granted in favour of the defender. On registration ownership passed from the pursuer to the defender, notwithstanding the forgery; and, while the Register was inaccurate, rectification was prevented by the fact that the defender was a proprietor in possession. In those circumstances the pursuer was entitled to payment of indemnity in respect of her loss.

2.19 Indemnity is also paid in the much rarer case where rectification is allowed rather than refused.³³ An example is *Dougar Properties Ltd v Keeper of the Registers of Scotland*³⁴ where, rectification having proceeded against a registered proprietor (owing to the fact that he was not in possession), indemnity was then payable.

2.20 Sometimes no indemnity is due. The inaccuracy being rectified (or, as the case may be, not rectified) might be too innocuous to cause loss. Or the very ground on which rectification is allowed might also be a ground on which indemnity is withheld, most notably where the registered proprietor was fraudulent or careless.³⁵ The Act lists numerous other exceptions to the principle of indemnity.³⁶ Furthermore, at the time of registration the Keeper can exclude indemnity in respect of anything appearing in, or omitted from, the title sheet, and is likely to do so if the underlying title is so deficient that a claim may reasonably be anticipated.³⁷ The effect of exclusion is not only the withdrawal of indemnity but also, as already mentioned, that the Register can be rectified even against a proprietor in possession.³⁸ Unless or until rectification takes place, however, the positive system of registration of title means that the right in question is duly conferred.

³⁰ 1979 Act s 24.

³¹ 1979 Act s 12(1)(b).

³² 1999 SC 180, 2000 SLT 1323.

³³ 1979 Act s 12(1)(a). Indemnity is also due, under paras (c) and (d), in respect of the loss or destruction of any document while lodged with the Keeper, and in respect of errors or omissions in any land or charge certificate or in information given by the Keeper in writing.

³⁴ 1999 SC 513.

³⁵ 1979 Act ss 9(3)(a)(iii), 12(3)(n), 13(4).

³⁶ 1979 Act s 12(3), discussed in detail in *Registration of Title Practice Book* paras 7.18 ff.

³⁷ 1979 Act s 12(2).

³⁸ 1979 Act s 9(3)(a)(iv).

Ways of entering the register

2.21 Entry to the Register of Sasines is only possible by means of registration. The position of the Land Register is different: as well as registration³⁹ an entry can be made on the Register as a result of rectification,⁴⁰ by noting (of overriding interests),⁴¹ and by the making up and maintenance of a title sheet (generally on first registration).⁴² This complex picture is a necessary consequence of a positive system of registration of title. For if registration always confers real rights, then other methods of entry are needed for cases where a real right would be an inappropriate result. And if a title gained under a positive system is to be retained, rectification must be restricted and, for that reason, elevated into a separate method of entering (and leaving) the Register. A difficulty with this method of organisation – exposed by the prolonged litigation in *Short's Tr*⁴³ – is that the same circumstances may allow entry by more than one method, with a difference in result which is impossible to justify.

SOME DIFFICULTIES

Evaluation

2.22 In the form introduced by the 1979 Act registration of title is, for the most part, a sophisticated and attractive system, which represents a considerable advance on the system of registration of deeds it replaces. As more and more land comes on to the new Register, its merits will become increasingly apparent. Given the magnitude of the change, however, it is hardly surprising that the introduction of registration of title has not been entirely smooth. Three difficulties in particular are mentioned below.

The first difficulty: flawed legislation

2.23 It is fashionable to complain of the low quality of legislation on land registration. There has, for example, been frequent criticism of the "customary prolixity and diffuseness" of the Torrens legislation found in many jurisdictions of Australia, Canada and elsewhere.⁴⁴ A leading commentator had this to say of the legislation in force in Alberta:⁴⁵

"One might logically assume that the fundamental objectives and elements of a system created by statute could be determined through inductive reasoning from the statute itself. Why not start with the sections of the Alberta Act, and from these provisions move from the specific to the general; determine the problems of the system, their solutions, the inherent elements of the system required for those solutions, the basic strategy of the system, and finally its general objective? Unfortunately, on the basis of over 100 years of complex litigation concerning the meaning of various key provisions of the Alberta Act and of similar statutes, the author believes that the inductive method is not feasible. The multitude of cases

³⁹ 1979 Act ss 2, 3.

⁴⁰ 1979 Act s 9.

⁴¹ 1979 Act s 6(4).

⁴² 1979 Act s 6(1).

⁴³ *Short's Tr v Chung* 1991 SLT 472; *Short's Tr v Keeper of the Registers of Scotland* 1996 SC(HL) 14; *Short's Tr v Chung (No 2)* 1999 SC 471. For a discussion, see para 6.10.

⁴⁴ Ivan L Head, "The Torrens System in Alberta: A Dream in Operation" (1957) 35 Canadian Bar Review 1, 16.

⁴⁵ Mapp, *Torrens' Elusive Title* p 59. Admirable replacement legislation was prepared by the Alberta Law Reform Institute in 1993 but has not so far been enacted. See Alberta Law Reform Institute, *Land Recording and Registration Act*.

evidence not only problems which had to be resolved, but scores of related problems left unresolved. In seeking solutions, the courts have been faced with statutes which frequently either contain ambiguous and inconsistent provisions, or are devoid of relevant provisions."

Likewise in England and Wales⁴⁶

"The Land Registration Act [1925] has been the subject of much criticism. It is 'of exceptionally low quality', 'burdened with much more difficulty and technicality than seems necessary', 'complicated and obscure'.⁴⁷ It can put 'difficulties and pitfalls in the way of comparatively simple transactions which would not have arisen with unregistered land'.⁴⁸ It is 'badly drafted with much confusing nomenclature' and 'it has become apparent that the flabby legislation needs to be knocked into radically fitter form'.⁴⁹

Partly for these reasons⁵⁰ it has recently been replaced, by the Land Registration Act 2002.

2.24 In Scotland the 1979 Act – the child, to some extent, of the English Act of 1925 – has not fared much better. It has, admittedly, the merit of brevity, only 22 sections being used to introduce an entirely new system of land registration. But the result has not generally won approval. "Nobody", said Lord Jauncey in a leading case, "could accuse the Act of being well drafted".⁵¹ In Professor Gretton's view⁵²

"The Land Registration (Scotland) Act 1979 has all the intellectual sharpness of a mashed potato. However, it would be unfair to place all the blame on the draftsman. The draftsman did a job badly which could not be done well. The scheme which he had to implement was overambitious and underresearched."

2.25 Two problems in particular with the 1979 Act may be mentioned here. One is a tendency to operate at too high a level of generality, with the result that a provision, conceived with one situation in mind, operates perforce in other situations for which it was not intended. The results may then be unattractive and illogical. The provisions on registration, rectification and indemnity all exemplify this tendency to some degree.⁵³ Secondly, except in respect of the most basic matters, the legislation seems suspended in a conceptual vacuum, free from considerations both of policy and of theory.⁵⁴ If there were

⁴⁶ Law Commission, *Property Law: Fourth Report on Land Registration* (Law Com No 173, 1988) para 2.1.

⁴⁷ The passage is now found in para 6-004 of R Megarry and W Wade, *The Law of Real Property* (6th edn, by Charles Harpum, 2000).

⁴⁸ *Re White Rose Cottage* [1965] Ch 940, 952 per Harman LJ.

⁴⁹ DJ Hayton, *Registered Land* (3rd edn, 1981) p 3.

⁵⁰ Law Com No 271 para 1.15(2).

⁵¹ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14, 26I. But this should be set alongside the comment of Lord President Rodger in *MRS Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271, 275C: "The draftsmanship of the Act has attracted some well-known and oft-quoted criticism of the highest authority ... In my view, with this particular statute as with other legislation, the court must guard against directing at the draftsman criticism which, if appropriate at all, may more properly be directed elsewhere. The drafting of the provisions in a statute may be perfectly clear, but still ministers and officials may not have fully thought through the underlying policy or else they may not have accurately foretold all its effect. Such hazards are a frequent concomitant of reforming legislation."

⁵² Commenting on *Kaur v Singh*: see 1997 SCLR 1075, 1085. See also a series of articles by K G C Reid in (1984) 29 JLSS 171, 212, 260, with accompanying replies by the Keeper of the Registers of Scotland.

⁵³ An example involving rectification was mentioned at para 2.15 above.

⁵⁴ Much the same complaint has been made in respect of the (former) legislation in England. Thus DJ Hayton, *Registered Land* (3rd edn, 1981) p 2: "[I]n scrutinising this mass of legislation it is difficult to put one's finger on exactly what the general principles are, since the legislation nowhere sets out any guiding framework. As a result of the failure to spell out fundamental notions of registered conveyancing there is a particular danger in being misled by the treatment of individual sections and rules apart from the total framework."

reasons of legal policy for the form taken by particular provisions, then they are largely absent from the reports which gave rise to the legislation. As has been observed, "[i]t is remarkable that in the discussion elaborated in the Report the Reid Committee were preoccupied by practicalities, with the mechanism of the Register, and gave no central place to the underlying theory of the law, to the primary purpose of registration as the constitution of real rights".⁵⁵ Although, therefore, the effect of the Act is to propose a new system, not merely of land registration but of property law itself, the nature of that system is nowhere articulated and can be inferred only with difficulty from the language of the Act.⁵⁶

The second difficulty: the incidence of error

2.26 **First registration.** Initially the task of first registration, of converting a mass of Sasine deeds into a single, concise title sheet, may have been under-estimated.⁵⁷ Deeds, when subject to close examination, have a tendency to disclose novel and uncertain rights, or defects which have lain unnoticed or forgotten about. Difficult decisions must then be made, and justified and defended, if necessary in court, against the background of legislation which may be unhelpful or unsatisfactory. Furthermore, the Keeper cannot be sure that he has the full facts at his disposal. Over time experience may lead to a change of practice, as for example with servitudes,⁵⁸ or natural water boundaries.⁵⁹

2.27 The fact that the Register is plan-based and tied to the Ordnance Map – highly desirable as this is – is a further source of difficulty and dispute. Inadequate descriptions in the Sasine deeds are a persistent problem. So too are discrepancies between legal boundaries (the land as owned) and occupational boundaries (the land as occupied). Sometimes the Ordnance Map itself is out of date or otherwise inaccurate.⁶⁰ In recommending registration of title for Scotland, the Reid Committee rejected the "general boundaries" rule, which operates in England, in favour of a fixed boundary plotted on the ground;⁶¹ but the plotting of such a boundary is often a difficult task and sometimes an impossible one. One law firm summed up the difficulty by complaining of "the attempt to impose mapping rigidities on the previously relatively fluid Sasine system where boundaries were not always specifically described and possession was extensively used to explain them".

2.28 It is unavoidable, therefore, that errors will sometimes occur, typically on first registration.⁶² Most are minor in nature, do not affect the acquirer's rights, and can easily be corrected especially if picked up at the time when the land certificate is first issued. But sometimes errors are more serious, and less easily adjusted. For example a title sheet might contain rights which are not properly supported by the underlying deeds;⁶³ encumbrances

⁵⁵ Robert Sutherland, "Reform of Land Law in Scotland" pp 23-4 (paper presented at the Institute of Advanced Legal Studies on 4 July 1978; available on www.sites.ecosse.net/robsuth).

⁵⁶ Thus there is difficulty in establishing even the basic question of whether registration under the Act is positive or negative in effect. See K G C Reid, "A *Non Domino* Conveyances and the Land Register" 1991 JR 79. For the difference, see paras 1.9 and 1.10. As a result of recent case law it is now possible to say that the system is positive. But the matter goes undiscussed in the Reid Report and the Henry Report.

⁵⁷ Certainly the Reid Committee was overly optimistic: see para 1.20.

⁵⁸ I Davis, "Positive Servitudes and the Land Register" (1999) 4 SLPQ 64.

⁵⁹ "Natural Water Boundaries and the Land Register" 47 (2002) JLSS May/11.

⁶⁰ A point emphasised to us by several law firms.

⁶¹ Reid Report paras 53–55, 103.

⁶² See eg the discussion at (2003) 48 JLSS Nov/61, listing some of the most common errors. Currently error affects around 2% of cases and strenuous efforts are being made to achieve a further reduction.

⁶³ eg *Doubar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513.

affecting the property might be omitted in error;⁶⁴ or again boundaries might be drawn incorrectly with the result that ownership is conferred of too much or, as the case may be, of too little.⁶⁵ It must be emphasised that errors of this kind are uncommon. Nonetheless, when they occur such errors are a serious matter. Registration of title presupposes an accurate, once-and-for-all examination of title at the time of first registration, followed by a guarantee of the results. If the title sheet is wrong in some material respect, it may be impossible to put it right.

2.29 **Dealings.** Error is a problem above all of first registration; and its relatively high incidence overall is attributable at least in part to the large numbers of such registrations in the early years of the new system. In time they will decline, and with them many of the problems mentioned above. And the key merit of registration of title is that "dealings" – subsequent transactions involving property which has already been registered – are much simpler, not only than first registrations, but than the same transaction under the Sasine system. Nonetheless, even a dealing may not be error-free.

2.30 Typically, of course, such errors as occur have nothing to do with the system of land registration. If a deed is forged, or blundered, that is the fault of the parties and not of the Keeper. If blame can be laid at the door of the 1979 Act it is merely that, under that Act, it is often difficult to put errors right, a point to which we return below. But errors may also occur at the Register. The deed may be correct but the entry giving effect to it wrong. In a well-known Canadian case, title to land which was transferred under reservation of petroleum was registered without the reservation. The land was later re-sold but the error was not detected. Petroleum was discovered under the land and, as a result, the original transferor was deprived of property worth, in 1950, some 5 million Canadian dollars.⁶⁶ As has been observed, an inherent difficulty with registration of title "is that the addition of one more step in the procedure for the creation of legal interests adds a further group of human beings in the Registrar's office who can make mistakes".⁶⁷

2.31 To human error may be added machine error, for the Land Register is held in electronic form and is vulnerable to computer malfunction. The recent litigation in *Safeway Stores plc v Tesco Stores plc*⁶⁸ arose out of technological change and the response made to it. The map base at the register was being subjected to digital conversion. As a result, a crucial boundary was altered on a title plan resulting in a gain of some two metres.⁶⁹ This was an internal process at the Register, unconnected with a dealing or application of any kind. The affected parties, therefore, were neither involved nor informed.

⁶⁴ *Keeper of the Registers of Scotland v MRS Hamilton Ltd* 1999 SC 116.

⁶⁵ eg *MRS Hamilton Ltd v Keeper of the Registers of Scotland (No 1)* 1999 SLT 829.

⁶⁶ *Canadian Pacific Railway Co Ltd and Imperial Oil Ltd v Turta* [1954] SCR 427.

⁶⁷ Mapp, *Torrens' Elusive Title* p 65.

⁶⁸ 2001 SLT (Lands Tr) 23 affd 2003 GWD 20-610.

⁶⁹ The precise cause was unclear. See 2001 SLT (Lands Tr) 23, 34B: "Although the evidence did not disclose precisely how the error arose, we are satisfied, on the evidence, that it can be described as an error by the Keeper's staff in matching the title boundary to the digital map."

The third difficulty: error and the balance of interests

2.32 Error on the Register can, and in an ideal world should, be reduced, but it cannot be avoided altogether. To some extent it is intrinsic to registration of title.⁷⁰ Further, there comes a point beyond which the elimination of error ceases to be a course worth pursuing. Professor Mapp expresses the position well, in the context of the Torrens system:⁷¹

"A Registrar could establish administrative procedures strict enough virtually to guarantee that only authentic transfers would be honored, but the resulting administrative bottleneck would strangle facility of transfer.⁷² Consequently, efficient operation of the system absolutely requires the Registrar to take the risk of error, and to do what in theory is not authorized. The point is that because errors do occur, the Torrens system substitutes an entirely new set of problems which did not exist at common law in order to achieve its objectives."

2.33 In this context the role of legislation is necessarily limited. Good legislation can make the task of the Keeper easier, and some of the ways in which this might be done will be explored in our second paper. But it cannot eliminate error. What legislation can do, however, is to provide a flexible regime for responding to problems which error creates. It must seek to balance the claims of the person who, through error, had received what may be a windfall gain with those of the person who is thereby deprived of property. One must be given the property and the other compensated for its loss – the usual solution both of the 1979 Act and of the Torrens system. The difficult question of which is the subject of the next part.

⁷⁰ Para 1.21.

⁷¹ Mapp, *Torrens' Elusive Title* p 65.

⁷² For the importance of facility of transfer, see para 3.12.

Part 3 Void Titles and Guaranteed Titles

Titles void, voidable, and absolutely good

3.1 It may be helpful to begin by putting void titles into a more general context. An apparent title to land is either good or it is not good. A person, in other words, either owns land or he does not own land. But whereas a "not good" title is simply void, a "good" title can be good in two different ways. Thus a "good" title might be absolutely good, that is, good beyond challenge; or it might be good for the moment but vulnerable to challenge. A title which is good but challengeable is commonly known as a voidable title.¹ Naturally, almost all titles are good, and of those a very high percentage are absolutely good rather than good but voidable. This part of the paper, however, is concerned with the small number of titles that are not good, or, in other words, are void. Voidable titles are considered separately, in part 6.

3.2 In principle, the 1979 Act, as interpreted, abolishes the category of void titles, for under a positive system of land registration all (or almost all) titles on the Register must necessarily be good (whether absolutely good or good but voidable).² Thus a title which, under the general law of property, would be void is transformed, on registration, into a voidable title, and ownership is conferred on the acquirer. The voidness, however, is not lost. As previously mentioned, a positive system operates bijurally, that is, with two concurrent systems of property law; and while the acquirer's title is good according to the rules of land registration it remains bad according to the general law of property. The conflict is resolved by saying that the acquirer is owner but the Register inaccurate; and the contingency of future rectification is the reason why the title is good but voidable rather than absolutely good.³

3.3 In this part of the discussion paper all references to a "void" title are intended as references to a title which is void under the general law of property – even if, by registration in the Land Register, the title has for the moment been upgraded to one which is good but voidable.

Positive prescription

3.4 **Withdrawal of prescription.** A preliminary topic is the role of positive prescription. In the form in which it was first introduced, the Land Registration Bill provided that prescription should run in much the same way as usual. By a Government amendment, however, prescription was restricted to the, unusual, case of where indemnity is excluded by the Keeper.⁴ This was because "if the State guarantees a title there is no need for prescription to operate on the registration thereof".⁵ It now seems accepted that this amendment was a

¹ Reid, *Property* para 601.

² Para 1.9.

³ Paras 2.11–2.13.

⁴ See 1979 Act s 10, amending the Prescription and Limitation (Scotland) Act 1973 s 1.

⁵ *Hansard* HL vol 398 col 1457 (Lord McCluskey, Solicitor-General).

mistake.⁶ In making a title "exempt from challenge";⁷ prescription cures titles which are voidable as well as those which are void; and while a title in the Land Register cannot be void, it may be voidable, in which case the need for positive prescription is no less strong than in the case of titles which rest on the Register of Sasines.

3.5 The 1979 Act admits two types of voidable title. There is, in the first place, a title which would be voidable under the general law – for example a title resting on a disposition which was procured by fraud. But in addition there is a title which, under the general law, would be void but which, as a result of registration in the Land Register, has been upgraded in status to voidable. An example is a title following a disposition which is granted *a non domino* or has been forged.

3.6 In relation to the first of those (titles voidable under the general law) the withdrawal of positive prescription puts Land Register titles in a position which may be less favourable than Sasine titles. Assuming possession, a voidable title in the Register of Sasines is cured – becomes absolutely good – after ten years. A Land Register title, however, must make do with the twenty years of the long negative prescription before the right to challenge is properly extinguished.⁸ It is true, however, that, depending on the ground of reduction, an acquirer in possession might sometimes be immune from rectification and hence from loss of the property. And it is also true that, assuming rectification, indemnity might sometimes be paid, although the very fact pattern which allows reduction and rectification will often mean that no indemnity is due.⁹

3.7 In relation to titles of the second type (titles voidable as an upgraded void title), there is in practice a distinction between cases where indemnity has been excluded and cases where it has not.¹⁰ The former are disadvantaged for the first ten years because no indemnity will be paid in the event of a challenge; but thereafter, assuming previous possession, their position is the more favourable because positive prescription has run and cut off any challenge. The latter are immediately secure against rectification, assuming possession; but if, during the twenty years of negative prescription, possession is lost, or if the acquirer had displayed "fraud" or "carelessness" in accepting the void title, there could be rectification without, in the second case, payment of indemnity.

3.8 There is a more fundamental point. A positive system of registration of title is no substitute for positive prescription. Prescription makes a void title good beyond challenge. Registration of title makes it good but challengeable. Legislation which introduces registration of title only at the expense of removing positive prescription makes titles, in that sense at least, less secure and not more. This is not an argument against registration of title, which provides many benefits to the acquirer including indemnity from the state; but it is an argument for the restoration of positive prescription. The argument, indeed, seems beyond challenge.

⁶ D Johnston, *Prescription and Limitation* (1999) para 15.63.

⁷ Prescription and Limitation (Scotland) Act 1973 s 1(1).

⁸ 1973 Act s 7.

⁹ ie because the acquirer will have been fraudulent or careless.

¹⁰ In theory indemnity could also be excluded in respect of the voidable titles discussed in the previous paragraph, but in practice the Keeper will not usually know of the ground of potential challenge.

3.9 A practical, and it seems unavoidable, difference between prescription in the two registers is that in the case of the Land Register the title, being plotted on the Ordnance map, is always bounding in character. There can be no question, therefore, of acquisition beyond the boundaries of the title plan, and hence of mere possession maturing into ownership.¹¹

3.10 **Changing registers.** Even as the law now stands, positive prescription will sometimes run on Land Register titles. What is unclear, however, is the effect of a change of register in, as it were, mid-prescription. Thus suppose that land is possessed for eight years on the basis of an *a non domino* disposition recorded in the Register of Sasines. The land is then sold and registered for the first time in the Land Register, but with exclusion of indemnity. Must the acquirer start again, so that a further ten years' possession is required before prescription has run? Or can the first two years' possession after first registration be added to the eight years already achieved on the basis of the Sasine title? The legislation is unclear. Section 1(1) of the Prescription and Limitation (Scotland) Act 1973 requires that the ten years' possession "was founded on, and followed" either the recording of a deed in the Register of Sasines or the registration of a title in the Land Register. Thus recording and registration seem marked out by the legislation as alternatives not capable of cumulation. Nonetheless there is an argument that a period of possession which began with a deed in the Register of Sasines can be treated as having continued on the same basis despite the fact that the successor who completed the possession derived his immediate title from the Land Register. Whatever the current position may be, however, it seems clear that, as a matter of policy, prescription should not be interrupted merely by the accident of a change of register. The matter should be put beyond doubt.

3.11 **Proposals.** We invite comments on the following proposals:

1. (a) **Positive prescription should apply to all titles registered in the Land Register.**
- (b) **Positive prescription which is founded on a deed recorded in the Register of Sasines should not be considered as interrupted by first registration in the Land Register.**

Guaranteed title

3.12 Registration of title is directed above all at facility of transfer. To discover who is owner, a potential acquirer need only consult the Register; and by taking a conveyance from that person in good faith he receives a title that is, in some sense, guaranteed. Strictly, of course, such protection is needed only in the small number of cases where, under the general law, the acquirer's title would be bad. A good title does not need the protection of registration of title – any more than, as is often said, it needs the protection of positive prescription.¹² But, as with prescription, the main utility of registration of title is evidential and not substantive. Most titles are good, no doubt, but under the general law a painstaking examination is needed to confirm the position. Registration of title removes the risk, slight as it is. In taking on the faith of the Register the acquirer has the benefit of the state guarantee.

¹¹ R Rennie, "Prescriptive Possession in the Sasine and Land Registers" (1997) 2 SLPQ 309, 314-5.

¹² But as was seen earlier (para 3.4), a title which is good but voidable does in fact require the protection of positive prescription.

3.13 Naturally, the guarantee is invoked only if the transferor's title turns out to have been bad – if, in other words, C acquires from B land which, according to the underlying law of property, belonged to A. The guarantee, it is important to note, can take two different forms. Normally C is allowed to keep the property and A is paid its value as compensation. In the terminology favoured by the Torrens system, C's title is then said to be "indefeasible". But sometimes the positions are reversed, so that the property is restored to A and C is paid compensation ("indemnity"). Under the 1979 Act the form of guarantee depends on the state of possession,¹³ a subject considered in detail in part 4 of this paper. For present purposes it is only necessary to bear in mind that when an acquirer's title is said to be "guaranteed", the guarantee might sometimes amount to the payment of money rather than to the award of the property.

3.14 The state guarantee presupposes good faith, or its broad equivalent, on the part of the acquirer. The terms used by the 1979 Act to indicate the opposite of good faith are "fraud" and "carelessness". An acquirer who is fraudulent or careless loses both the property and also the chance to claim indemnity.¹⁴ On the other hand, the Act does not require that consideration was paid. A person who, in good faith, receives a gift of land to which the donor had no title is, under the Act, entitled to the full benefit of the state guarantee. In effect the state makes good the gift which the donor lacked the means of giving. Part 7 of this paper explores the meaning of good faith, as well as considering whether donees should continue to have the benefit of state protection. In the discussion in the rest of this part, and in parts 4 and 5, it is taken for granted that the acquirer was in good faith and hence qualified for the state guarantee.

Register error and transactional error

3.15 Under the general law, a newly acquired title might be void for a number of reasons, of which the most important are absence of title in the person from whom the land was acquired,¹⁵ and error in the conveyance from transferor to transferee.¹⁶ For present purposes, however, it is convenient to distinguish between what may be called "Register error" and "transactional error". This distinction is central to the discussion in much of the rest of this paper.

3.16 A "Register error", in the sense meant here, is one which already affected the Land Register *at the time of the acquisition*. If, for example, the Register shows the owner as being A whereas the "true" owner – the person who, under the general law of property, ought to be owner – is B, then there is a Register error. Similarly, if the Register fails to disclose a standard security which, nonetheless, exists as a matter of the general law, then there is Register error.

3.17 A transactional error is any error which is not a Register error. It is connected with the transaction itself and not with the state of the Register. Typically, this means an error in the actual conveyance, such as inept wording or a forged signature. It is true, of course, that an error in a deed will eventually become, by registration, an error in the Register itself. And even if the deed was itself perfectly valid, the resulting entry on the Register might be

¹³ 1979 Act s 9(3)(a).

¹⁴ 1979 Act s 9(3)(a)(iii), 12(3)(n).

¹⁵ D 50.17.54 (Ulpian): *nemo plus juris ad alium transferre potest, quam ipse haberet*. The same proposition is often expressed as *nemo dat quod non habet*.

¹⁶ See eg *Boyd v Mayor of Wellington* [1924] NZLR 1174 at 1201 *per* Salmond J.

inaccurate as a result of administrative error, that is, error by the staff at the Register.¹⁷ But although the end result in both cases is a mistake on the Register, both are examples of transactional error and not of Register error. For the error arose out of the transaction and was not an independent error already present on the Register at the time the transaction was taking place.

3.18 An example illustrates the difference. Suppose that A is the registered owner of land. B impersonates A and forges his signature on a disposition to C. C is duly registered as owner of the land in place of A. Although the end result is an inaccuracy on the Register – the entering of C as owner in place of A – the inaccuracy is a direct result of the current transaction and so is a transactional error only. For at the time when C was buying, the Register correctly showed A as owner. If, however, C now comes to sell to D, the error, in a question with D, becomes a Register error – that is to say, a pre-existing error which does not arise out of the transaction now being entered into by D. As this example shows, an error which begins as a transactional error is converted, on the next transaction, into a Register error. In the discussion which follows it is important to keep in mind this capacity for transformation.

Errors and the 1979 Act

3.19 The 1979 Act makes no distinction as to type of error. In principle, a title which is void is covered by the state guarantee whatever the cause.¹⁸ Nonetheless the disapplication of the guarantee in cases involving "carelessness" means that transactional error is in practice less favourably treated than Register error. This acknowledges, if only indirectly, that not all errors are worthy of legislative intervention. To give a guarantee is indeed a serious matter. If, as usually, the land is awarded to the acquirer, the result is to deprive the "true" owner of his property without his consent. But in any event a guarantee is likely to involve payment, whether to the "true" owner or the acquirer, at a cost to the state and ultimately, through registration dues, to the users of the system. A guarantee, therefore, must be justified before it is conceded. In the rest of this part the justifications are considered in respect of the different types of error.

Register error

3.20 It seems self-evident that a person acquiring on the basis of the Register should receive a guaranteed title. This is Ruoff's curtain principle mentioned earlier.¹⁹ As Lord Watson expressed the position in the context of the Torrens system:²⁰

"The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of

¹⁷ See eg *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SC 271 (omission of leasehold casualty on first registration).

¹⁸ Thus the guarantee turns on the idea of rectification (or refusal of rectification) on the ground of inaccuracy, without further consideration of how the inaccuracy arose.

¹⁹ Para 1.14.

²⁰ *Gibbs v Messer* [1891] AC 248 at 254.

transfer or mortgage on the register, shall thereby acquire an indefeasible²¹ right, notwithstanding the infirmity of his author's title."

Thus a title which is taken from the registered owner is, and should continue to be, guaranteed, notwithstanding that the Register is inaccurate and the underlying title void. In essence the principle is one of faith of the register.²² The guarantee should not, however, extend to a matter in respect of which the Keeper has excluded indemnity.²³ Our formal proposal, on which we invite views, is that:

2. (a) **The title of a *bona fide* acquirer should continue to be guaranteed in respect of Register error.**
- (b) **"Register error" is an inaccuracy which already affected the Land Register at the time of the acquisition.**

Transactional error: defective conveyance

3.21 **Meaning.** The typical case of transactional error is an error in the conveyance rendering the deed void.²⁴ Not all mistakes have this effect, of course, but among those which do are forgery, defective execution, absence of legal capacity, and words so blundered that the deed cannot take effect. Whether absence of title in the transferor, another source of nullity, is properly classified as transactional error or as Register error depends mainly on whether the transaction is a dealing or a first registration. In a dealing the transferor is usually the person named as owner on the Land Register. If so, any defect as to title is a Register error and so covered by the guarantee already discussed. Conversely, on a first registration the title of the transferor rests on Sasine deeds which must be examined as part of the transaction. Any error, therefore, is a transactional error and not a Register error, for there is no title sheet on the Land Register on which reliance might be placed. But even in dealings a title defect might sometimes be a transactional error. This would occur where, for example, the person registered as owner had died, the property was being sold by an executor or legatee, and the confirmation²⁵ or other midcouple was defective.

3.22 **Good faith.** As with Register error, good faith is a prerequisite of any guarantee.²⁶ The question is whether it is enough. The general law would argue otherwise, for under that law good faith protects only against defects which would make a title voidable and not against those which would make the title void.²⁷ To protect a *bona fide* acquirer, therefore, is to go well beyond the ordinary rule.

3.23 **Position in other countries.** While united in their approach to Register error, systems of registration of title are divided in their treatment of error which arises out of the current transaction.

²¹ That is the doctrine of Torrens, where the acquirer is in principle able to keep the property. Under the English system, adopted also in Scotland, it is more accurate to talk of a title which is "guaranteed" rather than "indefeasible". See generally E. Cooke, *The New Law of Land Registration* (2003) ch 6.

²² *Gibbs v Messer* [1891] AC 248 at 255 *per* Lord Watson.

²³ Paras 3.42–3.45.

²⁴ But for a second category see paras 3.35–3.41.

²⁵ In the case of a confirmation, however, some defects are covered by the Succession (Scotland) Act 1964 s 17.

²⁶ Para 3.14. The meaning of good faith is discussed in part 7.

²⁷ For voidable titles, see part 6.

3.24 In German law no protection is given for transactional error,²⁸ although the use of notaries public in the transfer of land makes error of this type uncommon in practice. Forgery, in particular, is rare.

3.25 In Torrens systems the issue has tended to be analysed as involving a competition between the principles of "immediate indefeasibility" and "deferred indefeasibility".²⁹ If protection is given only in respect of Register error, the system is said to be one of deferred indefeasibility, for it is only on the next transaction that an error in the current transaction is cured – in effect by assuming the mantle of a Register error in the manner described earlier.³⁰ Conversely, if protection is extended to transactional error the system is one of immediate indefeasibility. The title, in other words, is unchallengeable at once. In fact the position in Torrens jurisdictions has changed over time. At first the tendency was to discount transactional error, on the model already established in Germany. The modern view, however, is that transactional error is protected, and hence that immediate indefeasibility is granted.

3.26 The change is encapsulated in two decisions of the Judicial Committee of the Privy Council. In *Gibbs v Messer*,³¹ decided in 1891 on appeal from the Australian state of Victoria, the Judicial Committee rejected the idea that a good title might flow from a forged deed. In the advice, given by a Scottish Lord of Appeal, Lord Watson, the view was expressed that:³²

"Those who deal, not with the registered proprietor, but with a forger who uses his name, do not transact on the faith of the register, and they cannot by registration of a forged deed acquire a valid title in their own person, although the fact of their being registered will enable them to pass a valid right to third parties who purchase from them in good faith and for onerous consideration."

Gibbs was, however, distinguished in 1967 in the New Zealand appeal of *Frazer v Walker*.³³ The result was to protect the acquirer against forgery and other transactional error. At first the decision in *Frazer* was the subject of heated debate.³⁴ The matter was referred by the New Zealand Government to its Law Revision Committee, which concluded, after consultation, that³⁵

"it was divided on the intrinsic merit of the two alternatives, but that, in accordance with the principle of law reform that there must be a compelling reason for changing an established rule of law, it had reached the ... conclusion that the present law as expounded in *Frazer v Walker* did not call for any alteration."

²⁸ An acquirer is only protected as to the contents of the Register (*Grundbuch*): see § 892 BGB.

²⁹ See eg Peter Butt, *Land Law* (4th edn, 2001) pp 628-31; Bruce Ziff, *Principles of Property Law* (3rd edn, 2000) pp 426-7.

³⁰ Para 3.20.

³¹ [1891] AC 248.

³² At p 255. The Committee included a second Scottish judge, Lord Shand.

³³ [1967] AC 569.

³⁴ R A Woodman, "The Torrens System in New South Wales – One Hundred Years of Indefeasibility" (1970) 44 ALJ 96; W Taylor, "Scotching *Frazer v Walker*" (1970) 44 ALJ 248; G W Hinde, "Indefeasibility of Title since *Frazer v Walker*", in G W Hinde (ed), *The New Zealand Torrens System Centennial Essays* (1971) 33, 40-51.

³⁵ Property Law & Equity Reform Committee, *Report on the decision in *Frazer v Walker** (1977) para 21.

3.27 More recently, the decision has come to be accepted,³⁶ and followed³⁷ – evidence, it has been suggested, of a tendency of jurisdictions with prolonged exposure to registration of title to become more "registration minded".³⁸

3.28 **Position in Scotland.** In Scotland the 1979 Act avoids both extremes entertained by Torrens systems. Transactional error is neither always covered nor is it always disregarded. Instead the position depends on the level of care shown by the acquirer.³⁹ An acquirer exercising a normal degree of skill and care is protected against such transactional defects as remain undetected. If he is in possession he is able to keep the property, notwithstanding the defect; otherwise he receives indemnity. But a defect which arises due to "carelessness" is beyond the scope of the guarantee.⁴⁰ A well-known example of transactional error is *Kaur v Singh*.⁴¹ The defender bought a flat from, as he thought, the pursuer and her husband. In fact the pursuer was not in the country and did not consent to the sale, and her signature on the disposition was forged. The defender was duly registered as owner of the flat but, one of the signatures being forged, the disposition was a nullity to that extent.⁴² Since the defender was neither fraudulent nor careless,⁴³ he was entitled to the guarantee conferred by the 1979 Act; and since he was in possession, that guarantee took the form of being able to keep the flat. Although, therefore, the Register was inaccurate, owing to the forged deed, it could not be rectified against a proprietor in possession such as the defender. The pursuer – deprived of ownership without her consent and unable to reacquire it by rectification – was entitled to indemnity from the Keeper.⁴⁴

3.29 Whether the compromise arrived at by the 1979 Act was the result of calculation or of accident is difficult to say. Certainly there is no evidence that the Henry Committee, which sat from 1965 to 1969, was aware of *Frazer v Walker* (1967) or of the controversy which it generated. On the contrary, the provision recommended by the Henry Committee was no more than a copy of the equivalent provision in the English legislation of 1925;⁴⁵ and when, after the Henry Committee had reported, that provision was found to be defective and was replaced,⁴⁶ it was the replacement provision which was used in the 1979 Act.⁴⁷ Whatever the reasons for its adoption, however, the solution of the 1979 Act offers a middle way between the unqualified rejection of protection for transactional error in the German system and its unqualified acceptance in Torrens. It is time to consider the merits of these three approaches.

³⁶ The most recent discussion can be found in two, as yet unpublished, papers given at a conference in the University of Auckland in March 2003 on "Taking Torrens into the 21st Century". The papers are Sir Anthony Mason, "Indefeasibility – Logic or Legend?", and Peter Blanchard, "Indefeasibility under the Torrens System in New Zealand".

³⁷ eg *Breskvar v Wall* (1971) 126 CLR 376.

³⁸ R J Smith, "Forgeries and Land Registration" (1985) 101 LQR 79, 88.

³⁹ In effect the carelessness test is confined to transactional error and does not extend to Register error; for it is not careless to rely on the Register: see *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513.

⁴⁰ 1979 Act ss 9(3)(a)(iii), 12(3)(n).

⁴¹ 1998 SC 233, 1999 SC 180.

⁴² For the interlocutor pronounced after the proof, see 2000 SLT 1323, 1324-5.

⁴³ The pursuer's averments of fraud on the part of the defender were held to be irrelevant and were excluded from probation: see 1998 SC 233.

⁴⁴ *Kaur v Singh (No 2)* 2000 SLT 1323.

⁴⁵ The Henry Committee provision (para 47(4)(a)) protected a proprietor in possession from rectification "unless such proprietor shall be a party or privy or shall have caused or substantially contributed by his act, neglect or default to the fraud, mistake or omission in consequence of which such rectification is sought". This was almost an exact copy of the Land Registration Act 1925 s 82(3)(a).

⁴⁶ By the Administration of Justice Act 1977 s 24, following Law Commission, *Working Paper on Transfer of Land: Land Registration (Third Paper)* (Law Com, WP No 45, 1972).

⁴⁷ 1979 Act s 9(3)(a)(iii).

3.30 **Evaluation.** Each competing approach has something to be said in its favour. In its comprehensive and influential review of land registration, the Joint Land Titles Committee, representing numerous provinces and territories in Canada, concluded that:⁴⁸

"Title registration is designed to facilitate transfer of interests in land. If the system requires every purchaser to conduct elaborate investigations to determine that the conveyances they receive are binding upon his or her vendor, it will tend to obstruct rather than facilitate the transfer of interests. If it requires everyone who registers an interest in land to contribute to the cost of the compensation system and then leaves an innocent registrant with neither the land nor compensation, it is unfair. Section 5.6 of the Model Act therefore makes it clear that a person who becomes registered under an invalid transaction in the belief that it was valid and without knowledge to the contrary should get either the interest or compensation."

3.31 Some may find this view unpalatable. It is one thing to say that facility of transfer should be the goal of registration of title.⁴⁹ It is quite another to allow it to intrude into areas which have nothing to do with registration. "Why", it has been asked, "have such elaborate laws for the form and signature and attestation of a transfer if an utterly bogus transfer is completely validated by the automatic step of registration?"⁵⁰ And if facility of transfer is to be preferred over all other principles, the result will be for property law to be overrun by land registration. Arguments of this kind lead to the view that transactional error is a matter for the acquirer alone, and its main justification remains that advanced by Lord Watson in *Gibbs v Messer*, namely that in respect of transactional error an acquirer is not proceeding on the faith of the register. Furthermore, as a practical matter an acquirer may often be better placed to detect error than either the Keeper or the true owner (in practice often, like the pursuer in *Kaur v Singh*, the innocent victim of forgery), and so is the proper person to bear the loss.⁵¹

3.32 The last of the solutions, that of the 1979 Act, can be presented as carrying most of the advantages of a guaranteed title while avoiding most of the disadvantages. Forgery or other undetectable error, it argues, has such calamitous consequences for the acquirer that protection is justified. But the objection that protection "tends to encourage (or at least not to discourage) careless and slipshod conveyancing"⁵² is met by insisting on ordinary care on the part of the acquirer. In this way the solution avoids what might be seen as the indiscriminating protection conferred by the Torrens system. The requirement of care, however, introduces a degree of uncertainty which some might find unacceptable.

3.33 Choosing between these approaches is not easy. Each has at least one compelling argument in its favour. Each has been tried in practice and found to be workable. And none is obviously flawed or unfair. The question of whether transactional error should be guaranteed at all cannot be separated from the issue, considered in part 4, of whether, if the guarantee applies, the acquirer should receive the property or its value. In the case of forgery in particular it may seem a harsh doctrine to prefer an acquirer over the "true" owner; and so protection against transactional error is more likely to be rejected in a

⁴⁸ Joint Land Titles Committee, *Renovating the Foundation* p 25. The same passage appears in Alberta Law Reform Institute, *Land Recording and Registration Act* p 47.

⁴⁹ Para 3.12.

⁵⁰ W Taylor, "Scotching *Frazer v Walker*" (1970) 44 ALJ 248, 253.

⁵¹ Mapp, *Torrens' Elusive Title* p 131. But of course circumstances will vary. For example, the problem may have been caused by the transferor's lack of care in allowing the land certificate to fall into the wrong hands. See R J Smith, "Forgeries and Land Registration" (1985) 101 LQR 79, 89-90.

⁵² W Taylor, "Scotching *Frazer v Walker*" (1970) 44 ALJ 248, 254.

jurisdiction like Germany where the guarantee always take the form of an award of the property than in a jurisdiction like Scotland where compensation is a possible alternative.⁵³ Indeed if, as is provisionally proposed in part 4, Scotland were to move further in the direction of compensation, the issue would come close to one of title insurance, and the argument in favour of protection strengthened accordingly.

3.34 If it is accepted that transactional error ought to be covered in one form or another, the choice is then between the absolute protection of Torrens and the qualified protection of the 1979 Act. The latter seems better directed, as well as having the advantage, for Scotland, of representing the *status quo*. Provisionally we support its retention. In part 7 we suggest that, for technical reasons, the carelessness test be replaced by a requirement of objective good faith.⁵⁴ Our proposal therefore is that:

3. (a) **The title of a *bona fide* acquirer should continue to be guaranteed in respect of transactional errors arising out of the invalidity of the conveyance in the acquirer's favour.**
- (b) **"Transactional error" is a defect or error other than a Register error (as defined in proposal 2(b)).**

Transactional error: administrative mistake

3.35 There is also a second category of transactional error.⁵⁵ Due to administrative mistake the entry made on the Register might not give proper effect to the transaction. The title plan, for example, might be wrong, conferring ownership of too much land or too little, or an encumbrance might be omitted or a reservation overlooked. Typically, but not invariably, these are errors of first registration.

3.36 It is important to distinguish mistakes of this kind from mistakes in the deed itself (the subject of the previous discussion). If the deed is wrong so is the Register, but the cause of the inaccuracy is then the deed and only incidentally the administrative process by which the deed was given effect. An administrative mistake, by contrast, is a mistake of implementation. Whatever the merits of the deed, the entry on the Register does not properly reflect its terms.⁵⁶ In a dealing, there is usually only one deed at issue so far as concerns title (the immediate conveyance in favour of the acquirer) and so only one potential source of failure. In a first registration, however, the new title sheet must give effect to the whole Sasine title, and error is correspondingly more common.

3.37 Characteristically, the 1979 Act makes no distinction between administrative error and error of any other kind.⁵⁷ This means that the acquirer's title is guaranteed except where he was careless (or fraudulent).⁵⁸ Carelessness in this context is likely to refer to the completion of the form 1 or other form making application for registration. Thus an inaccuracy resulting from a form which was completed incorrectly and without proper care

⁵³ In Torrens systems, one of the objections to *Frazer v Walker* [1967] AC 569 was precisely that it took property from the more deserving party. Proposals for reform have tended to suggest that the acquirer be given compensation rather than the property.

⁵⁴ Paras 7.13–7.20.

⁵⁵ Para 3.17.

⁵⁶ Or, if it reflects its terms at first, is later changed, as in *Safeway Stores plc v Tesco Stores plc* 2003 GWD 20-610.

⁵⁷ Para 3.19.

⁵⁸ 1979 Act ss 9(3)(a)(iii), 12(3)(n).

can be rectified without payment of indemnity. But where the mistake is the Keeper's own the statutory guarantee applies.

3.38 This uniformity of treatment seems open to question. An administrative mistake is different in kind from other types of error. In the case of Register error the acquirer proceeds in reliance on what is stated on the face of the Register. Where the error is in the conveyance, the acquirer proceeds – and pays – in reliance on the deed. In both cases a guaranteed title is necessary, or at least justifiable, if facility of transfer is to be achieved. But an administrative mistake occurs *after* the deed has been delivered and the price paid. There is no reliance. On the contrary, the acquirer expects to receive the property as described in the conveyance and, in the case of a dealing, as previously set out on the Register. If, by error, he is given more than expected, there is no strong reason why he should keep the windfall benefit, or be compensated for its loss.

3.39 The factual background is also of importance. On first registration, in particular, mistakes can and do occur. There is much to be said for the view that they should be capable of correction without financial or other penalty. For example, a title plan issued on first registration might, by mistake, include part of a neighbour's garden. If so, the error would probably come to light only when the neighbour's house was sold in turn, triggering its own first registration. As the law currently stands, the Register could then be rectified, assuming that there was no possession, but indemnity would be payable for the "loss" of land in respect of which, nonetheless, there was no prior entitlement and which was included only by administrative error. It is not clear that such a payment can be justified.⁵⁹

3.40 In our preliminary view, therefore, the statutory guarantee should not extend to administrative mistake by the Keeper. But this proposal must be set against two other factors. First, a withdrawal of guarantee would be balanced to some extent by the restoration of positive prescription already proposed.⁶⁰ Secondly, it is only the immediate acquirer who would be vulnerable. A successor, acquiring on the faith of the Register, would receive a guaranteed title. For once property is sold, a transactional error is transformed into a Register error, that is, into an error which already affects the Register at the time of acquisition in question.⁶¹

3.41 Our formal proposal, on which we invite comment, is that:

4. **The title of an acquirer should cease to be guaranteed in respect of rights conferred or omitted due to administrative mistake.**

⁵⁹ It is possible to argue, even under the 1979 Act, that no payment is due. For if land is included in a title sheet by administrative error, the true owner may have an action against the registered proprietor in unjustified enrichment. And if that is correct, rectification would only be a convenient way of achieving what could in any event be achieved by other means. It would not, therefore, cause loss to the registered proprietor. See para 7.21. In practice, issues of unjustified enrichment have tended to be ignored in discussions of registration of title; yet in some circumstances they are plainly of considerable importance.

⁶⁰ Paras 3.4–3.11.

⁶¹ "[I]ndefeasibility is deferred until this second dealing, when it is the register itself that contains the lie": see Bruce Ziff, *Principles of Property Law* (3rd edn, 2000) p 427.

Exclusion of indemnity

3.42 Sometimes a title defect is uncovered as the application for registration is processed. If so, the 1979 Act allows the Keeper to withhold the guarantee which would otherwise apply. This is done by a formal exclusion of indemnity, in respect of the defect, at the time of registration.⁶² Despite the reference to "indemnity", an exclusion has the effect of withdrawing both versions of the guarantee. In other words, the acquirer, in the event of a successful challenge, receives neither the property nor its value, for an exclusion of indemnity permits rectification even against a proprietor in possession.

3.43 The Keeper's policy is that⁶³

"Not every title defect will necessarily lead to an exclusion of indemnity. Where the defect in the title is minor and unlikely, in the Keeper's opinion, to induce a claim on the indemnity, effect may be given to the application without taking into account the defect."

Conversely, a conveyance which is blatantly *a non domino* will be met by an exclusion of indemnity, if indeed it is accepted for registration at all.

3.44 It seems clear that the power to exclude indemnity is needed and must remain. In its absence, the Keeper could protect his position only by a refusal to register at all – a refusal which would exclude the use of prescriptive acquisition by the traditional means of an *a non domino* conveyance. At a policy level, too, the power to exclude indemnity seems both useful and justifiable. There are three main cases where a title defect might be discovered by the Keeper. One is where the defect is obvious and was well-known to the acquirer, as in the case of an *a non domino* conveyance. The second is where the defect, if not known to the acquirer, could have been found by him by the exercise of greater care; for if a defect can be found by the Keeper, it can usually be found by the acquirer as well. The third is where the defect is due to an event discoverable only after the application for registration has been made and received – after, in other words, the date on which registration is deemed to occur.⁶⁴ For in practice there is an interval of time – and sometimes a substantial one – between the date of registration and the date on which the registration process is completed by the issue of a land certificate. If, during this period, an event comes to the Keeper's attention which imperils the title, he is likely to exclude indemnity. Perhaps the main example is the insolvency of the transferor which, if it occurred before the conveyance was delivered, has the effect of invalidating the deed due to lack of capacity.⁶⁵

3.45 Of these three cases it is only in the last that the acquirer deserves sympathy and, it may be, assistance. But the issue here is wider than exclusion of indemnity and cannot be considered without also considering matters such as the balance between retention of the property and payment of its value,⁶⁶ and the proper treatment of *a non domino* conveyances.

⁶² 1979 Act s 12(2).

⁶³ *Registration of Title Practice Book* para 7.17.

⁶⁴ 1979 Act s 4(3).

⁶⁵ Bankruptcy (Scotland) Act 1985 s 32(8). See Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) paras 4.4 and 4.5. Post-delivery sequestration would affect an acquirer only if the trustee's act and warrant were registered before the conveyance. But the risk here is not different in kind from the risk of prior registration of any other hostile deed, such as a standard security or competing conveyance.

⁶⁶ See generally part 4.

The particular topic of insolvency may merit further scrutiny in our second discussion paper. Subject to that, our proposal is that:

5. It should continue to be possible for the Keeper to exclude indemnity at the time of registration.

A feature of the current legislation is an absence of guidance as to when indemnity ought, or ought not, to be excluded. It is for consideration whether guidance might usefully be included in any replacement legislation.

3.46 Even where indemnity is not excluded by the Keeper in advance, section 12(3) of the 1979 Act sets out a long list of circumstances in which indemnity will nonetheless not be payable. A detailed consideration of the list may be postponed until our second discussion paper. For present purposes it is only necessary to note that section 12(3) has no effect on the alternative version of the statutory guarantee, namely retention of the property. The unexpected result is that in some cases⁶⁷ a proprietor in possession is able to keep the property even although, in the absence of possession, the Register could be rectified to his prejudice without payment of indemnity.

Subordinate real rights

3.47 For ease of exposition this part has concentrated on ownership to the exclusion of other (or "subordinate") real rights. But broadly the same principles would apply in respect of such registrable rights as long leases or standard securities. Thus, as under the present law, a person acquiring a right of this kind would receive a title guaranteed against both Register error and transactional error; and the guarantee would apply both in respect of the grant of a new right, and of the assignation of an existing one. Administrative error, however, would be excluded.⁶⁸ The proposal for the reinstatement of positive prescription⁶⁹ would apply equally to subordinate real rights but is likely to be of practical significance only in relation to long leases.

⁶⁷ Often, however, rectification will also be possible, either because the acquirer is fraudulent or careless, or because the defect concerns an overriding interest.

⁶⁸ Paras 3.35–3.41.

⁶⁹ Paras 3.4–3.11.

Part 4 The Nature of the Guarantee

THE PROPERTY OR ITS VALUE

Introduction

4.1 In part 3 we examined the scope of the statutory guarantee in respect of titles which would be void under the general law, and concluded provisionally that it operated well and should be retained in substantially unaltered form. In this part we consider the nature of the guarantee itself.

4.2 That guarantee, as previously noted,¹ can take one of two forms. Either the acquirer is allowed to retain the property, despite the radical defect of title; or alternatively the property is restored to the "true" owner with compensation being paid to the acquirer. The choice, as one commentator has expressed it, is between the "money" and the "mud".² Under the 1979 Act this choice is tied into the concept of rectification of the Register. In showing the acquirer as owner the Register is inaccurate, owing to the nullity of the underlying title. Whether the acquirer then keeps the property or receives compensation ("indemnity") depends on whether the Register can, or cannot, be rectified.³

4.3 Usually, of course, an acquirer would prefer to keep the property. It may have a special value to him, and at all events he chose it and, unless he has changed his mind, will wish to retain it. Further, the alternative of compensation has the potential for trouble and difficulty. A claim must be made to the Keeper. There may be a dispute as to quantum or even as to merits. At best there will be delay and at worst litigation. It will be many months before a replacement property can be acquired, even assuming one to be available. In short, compensation is likely to be seen as distinctly second-best: as with any form of indemnity, most people would prefer that the loss had not occurred in the first place. The relative unattractiveness of indemnity should not, however, be exaggerated. The property was not "truly" the acquirer's and yet he is fully compensated for its loss. The acquirer has only his good faith to commend him and yet that good faith is handsomely rewarded. Further, indemnity is better than no indemnity – the position under the Sasine system or in the purchase of any property other than land.

4.4 As systems of registration of title are aimed above all at facility of transfer,⁴ it comes as no surprise to find that, in most systems most of the time, the guarantee takes the form of an award of the property itself. In the Torrens system the governing principle is indefeasibility of title, that is, that a person who acquires without fraud receives a title which cannot be challenged; and even today, when that principle is under pressure and has been the subject of significant exceptions,⁵ the alternative of compensation is not usually available.

¹ Para 3.13.

² Mapp, *Torrens' Elusive Title* para 4.24.

³ 1979 Act ss 9 and 12.

⁴ Para 3.12.

⁵ Particularly from so-called rights *in personam*: see eg Peter Butt, *Land Law* (4th edn, 2001) pp 676-9.

The English system and, following that system, the system in force in Scotland, does not insist on indefeasibility as such.⁶ Nonetheless in most cases the acquirer receives the property rather than its value.

4.5 This approach, so favourable to the position of the acquirer, faces two difficulties. First, it tends to overlook the position of the "true" owner; and secondly it results in insecurity of title for everyone, including even the acquirer.

The first difficulty: the position of the "true" owner

4.6 To award the property to the acquirer is not a neutral act. If the acquirer becomes owner, then, necessarily, ownership is lost by someone else. It is a growing criticism of systems of registration of title that they tend to see matters only from the perspective of the acquirer and so overlook the position of the "true" owner, of the person at whose expense the acquirer is taking. Yet the balancing of the interests of those parties is, as Lord President Rodger has expressed it, a "profound" issue of legal policy.⁷ The dilemma, the Lord President explains:

"is no less fundamental for being simple to state. A owns land and, for example, B forges A's signature on a disposition to C who purchases in good faith and for value. C registers his title. Should the law support the claim of A, the "true" owner of the land, or the claim of C who has the registered title? If the law supports the claim of the "true" owner, then it will provide for the register to be rectified by deleting C's name and substituting A's name. C will be left with a claim for indemnity from the Keeper for any loss which he suffers as a result of the destruction of his registered title. If, on the other hand, the law supports the claim of the registered proprietor, it will refuse A's claim for rectification and he will simply have to claim indemnity from the Keeper for his loss of the ownership of the land."

4.7 There is a tendency to assume, without argument, that the position of the acquirer – of C in the Lord President's example – should always be preferred. Yet the "true" owner also has strong claims on the property. Not only was he first to register but he has not, usually, agreed to the transfer. Under the general law, a careful distinction is maintained between deeds which are void – the case currently under consideration – and those which are merely voidable.⁸ In a voidable deed the granter gives his consent, even if, in some cases, that consent is induced by unfair means. In void deeds there is usually no consent. As a result, ownership passes in the first case but not in the second, for it is a strong principle that a person is not to be deprived of property except by his consent. If, under registration of title, the acquirer under a void deed is not merely to be compensated but to be awarded the property itself, the distinction between void and voidable is eroded, and with it the policy basis – on one view, a principle of fundamental importance – on which it rests. Of course, if the "true" owner loses the property he is entitled to indemnity in turn, as Lord President Rodger noted. But the relative disadvantages of compensation which were described earlier apply as much to the "true" owner as to the acquirer. And the property

⁶ See eg S Cretney and G Dworkin, "Rectification and Indemnity: Illusion and Reality" (1968) 84 LQR 528: "The system of registration of title to land established by the Land Registration Acts 1925 to 1966 does not, in contrast with systems in force in other parts of the Commonwealth, seek to establish indefeasible titles. It is claimed, however, that the English land registration system does provide a 'state guarantee'".

⁷ *Kaur v Singh* 1999 SC 180 at 188.

⁸ Reid, *Property* paras 613–18.

may be of special value: certainly, if his connection with the property has been long and that of the acquirer short, it is likely to be of greater value to him than to the acquirer.

The second difficulty: insecurity of title

4.8 To prefer the acquirer over the "true" owner is to prefer a system where acquisition of title is easy over one where it is more difficult. But what has been easily acquired may just as easily be lost. In other words, the very set of circumstances which allowed the acquisition of the property would, if repeated, lead to its loss. If C acquires A's property through the forgery of B, so E might now acquire C's property through the forgery of D. "Easy come", as Professor Mapp observes, leads inexorably to "easy go":⁹

"A registered title cannot be indefeasible against errors occurring both before and after its creation: no legislature can work this miracle ... To whatever extent ... [a person] can acquire an interest from a predecessor through error, he is vulnerable to losing that interest to a successor through the same error repeated after his registration."

The conclusion that a Land Register title is less secure than a Sasine title is both uncomfortable and also unavoidable.¹⁰ As an English commentator has expressed the position:¹¹

"[D]eeds registration is a Rolls-Royce system, designed to offer absolute security of title. Title registration is a much more down-market system, where security comes from break-down insurance rather than good workmanship."

This is not an argument for abandoning the 1979 Act in favour of the Sasine system. But it is an argument for considering whether title under the 1979 Act is too easily acquired and hence too easily lost again.

Achieving a balance

4.9 Titles should be secure but at the same time easily acquired. There should, in other words, be both security of ownership and also facility of transfer. But, as just seen, these principles are irreconcilable and it is necessary either to choose between them or to arrive at a compromise under which security of ownership is sometimes preferred and sometimes facility of transfer.¹² Traditional property law, naturally, opts for security of ownership; and the Sasine system therefore does likewise. In what must have seemed to contemporaries as a revolutionary change, the Torrens system throws up property law in favour of facility of transfer, creating in the process "a mile-wide exception to the principle *nemo dat quod non habet*".¹³ The English system of registration of title, now copied by the Scottish,¹⁴ proceeds

⁹ Mapp, *Torrens' Elusive Title* paras 3.13 and 4.26.

¹⁰ Strictly one should say less secure than the Sasine system formerly was, for the introduction of registration of title has left Sasine titles vulnerable on first registrations. Under the 1979 Act a registered title also becomes insecure the moment that possession is lost: see paras 4.23–4.28.

¹¹ Jean Howell, "Deeds Registration in England: a Complete Failure?" (1999) 58 CLJ 366, 391.

¹² Mapp, *Torrens' Elusive Title* para 3.13.

¹³ Bruce Ziff, *Principles of Property Law* (3rd edn, 2000) p 423.

¹⁴ *Kaur v Singh* 1999 SC 180 at 188G per Lord President Rodger: "The [Reid] committee give us no glimpse of their thinking, but simply state that the dilemma should be resolved for Scotland by adopting the same rule as in England."

more cautiously and attempts a compromise of sorts based mainly on the location of possession.¹⁵

4.10 In our view a compromise is the proper approach. A system of registration of title must often award the property to the acquirer. That is the very nature of the system. But it should not always do so, for the interests of the "true" owner must also be taken into account. It is noteworthy that in the Torrens system too the need to move from indefeasibility of the acquirer's title is now under discussion.¹⁶ If, however, a compromise is desirable, it is less clear how it should be formulated. In considering this question, it is proper to begin with the compromise which already exists – that enacted by the 1979 Act.

THE 1979 ACT

Possession

4.11 Under the 1979 Act the allocation of property and indemnity depends mainly on the state of possession.¹⁷ If the acquirer possesses, he keeps the property, for the Register cannot usually be rectified to the prejudice of a proprietor in possession.¹⁸ Indemnity is then paid to the "true" owner.¹⁹ Conversely, if the acquirer does not possess, the Register can and in practice will be rectified on a claim being made by the "true" owner.²⁰ The acquirer must then make do with indemnity.²¹ It will be noted that there is no (positive) requirement that the "true" owner possesses but merely a (negative) requirement that the acquirer does not.

4.12 In this allocation of benefits the crucial statutory phrase is "proprietor in possession".²² An acquirer who is a proprietor in possession keeps the property; an acquirer who is not can be rectified against and is paid indemnity. Neither "proprietor" nor "possession" is defined in the 1979 Act and for a time the scope of the phrase was unclear. The current position is probably that "proprietor" is to be read narrowly, as confined to those who are entered in the proprietorship section of a title sheet – in other words, owners and tenants under a long lease; and "possession" is to be read widely as including civil possession, that is to say, indirect possession through tenants and others.²³ Broadly this means that, leases apart, the holders of subordinate real rights are not protected against rectification, for they are not "proprietors";²⁴ but that owners or tenants, as "proprietors", are in possession even if the property is occupied by a third party provided that that party's

¹⁵ The gradual move away, in England and Wales, from indefeasibility of title is traced by the Law Commission in its *Working Paper on Transfer of Land: Land Registration (Third Paper)* (Law Com WP No 45, 1972) paras 58 ff.

¹⁶ See most notably Mapp, *Torrens' Elusive Title* paras 6.109 ff; Joint Land Titles Committee, *Renovating the Foundation* pp 25-6 discussed below. From the perspective of the Torrens system, the compromise enacted in England and Wales has been described as achieving "a more finely-tuned balance of dynamic and static than the Australian system": see P O'Connor, "Registration of Title in England and Australia: A Theoretical and Comparative Analysis", in E Cooke (ed), *Modern Studies in Property Law* vol II (2003) 81, 99.

¹⁷ Paras 2.11–2.16.

¹⁸ 1979 Act s 9(3). For a discussion of the difficulties with the 1979 Act provisions, see paras 4.22–4.28.

¹⁹ 1979 Act s 12(1)(b).

²⁰ 1979 Act s 9(1). It may be noted, however, that there is a residual discretion as to whether rectification is granted.

²¹ 1979 Act s 12(1)(a).

²² 1979 Act s 9(3).

²³ *Kaur v Singh* 1999 SC 180. It was held that a heritable creditor could not be a proprietor in possession.

²⁴ That has been held to be true even of servitudes, a potentially difficult case, partly because there is proper possession, and partly because it is held by a person who is also a proprietor of land (as opposed to merely of the servitude). See *Griffiths v Keeper of the Registers of Scotland Lands Tribunal*, 20 December 2002, unreported. Compare however the *obiter* discussion in *Mutch v Mavisbank Properties Ltd* 2002 SLT (Sh Ct) 91.

entitlement derives from the owner or tenant. The position in England and Wales is much the same.²⁵

Other factors

4.13 **Introduction.** Even under the 1979 Act, possession is not always sufficient to protect an acquirer. In certain narrowly defined circumstances rectification can proceed even to the prejudice of a proprietor in possession.

4.14 **No guarantee.** There are, to begin with, three cases where the guarantee does not apply at all, that is to say, where the Register can be rectified but without payment of indemnity.

4.15 The first is where the guarantee, available in principle, is withdrawn by the Keeper in the particular circumstances that have arisen. This is achieved by a formal exclusion of indemnity at the time of registration.²⁶ The effect goes beyond a refusal of indemnity, allowing the Register to be rectified even against a proprietor in possession.²⁷ The "true" owner therefore always recovers. Earlier we proposed that the facility of excluding indemnity should continue to be available to the Keeper.²⁸

4.16 The second case is where the acquirer has been fraudulent or careless. The Register can then be rectified, and no indemnity is payable.²⁹ In part 7 we propose that this rule should be retained but that fraud and carelessness should be subsumed under the more familiar doctrine of bad faith.³⁰

4.17 The final case concerns overriding interests (ie rights which have been made real other than by registration).³¹ Again the guarantee does not apply. Thus the Register may be rectified in order to note an overriding interest or to correct an entry relating to such an interest; and no indemnity is payable in respect of an error or omission in the noting of such an interest.³² The policy here is unexceptionable, for overriding interests lie outside the framework of registration of title and should not be the subject of a statutory guarantee. For that very reason, however, the provisions in question are actually unnecessary. An overriding interest exists, and binds the owner, whether it is noted on the Register or not. A proprietor in possession, therefore, is unaffected by the making of an entry, accurate or otherwise, in respect of such an interest. There is neither prejudice nor a loss which needs to be indemnified. For this reason the new Land Registration Act in England and Wales omits overriding interests from the list of occasions on which rectification is allowed to the prejudice of a proprietor in possession.³³ It seems uncontroversial that any new legislation in Scotland should do likewise.

²⁵ Land Registration Act 2002 s 131.

²⁶ 1979 Act s 12(2).

²⁷ 1979 Act s 9(3)(a)(iv).

²⁸ Paras 3.42–3.45.

²⁹ 1979 Act ss 9(3)(a)(iii), 12(3)(n), 13(4).

³⁰ Paras 7.1–7.20.

³¹ See para 2.10.

³² 1979 Act s 12(3)(h).

³³ Land Registration Act 2002 sch 4 paras 3(2), 6(2). See Law Com No 271 para 10.16.

4.18 **Agreement.** A proprietor in possession can consent to rectification. Assuming that the "true" owner and the Keeper also agree, the Register will then be rectified.³⁴ Thus in effect the acquirer is able to elect for indemnity over the property itself.

4.19 **Discretion.** As originally introduced into Parliament, the bill that became the 1979 Act supplemented possession with a discretion which was to be exercisable by the Keeper or, as the case may be, by the courts. This allowed rectification to proceed to the prejudice of a proprietor in possession if³⁵

"the circumstances of the case are such that it is unjust that the interests of the proprietor in possession be preferred to those of another person."

This originated in the Henry Report³⁶ and was modelled on a provision in the English legislation which has now been carried forward into the 2002 Act.³⁷ The intention was to mitigate the rigours of a test which otherwise turned purely on possession. For even if possession was in the acquirer there might be circumstances in which it was just to restore the property to the "true" owner. In the event, the discretion did not commend itself to the Law Society of Scotland which feared that it "might open up the possibility of the exercise of an equitable jurisdiction which however appropriate in England would be an unwelcome addition to the law of Scotland".³⁸ Following discussions with the Law Society the provision was dropped from the bill, and does not appear in the 1979 Act.

4.20 **Transactional error.** A further ground for rectification recommended by the Henry Committee was transactional error (as opposed to Register error).³⁹ Thus rectification against a proprietor in possession was to be permitted where⁴⁰

"the immediate title by which he shall have acquired right is void or has been reduced or the title in favour of any person through whom he shall claim otherwise than for valuable consideration is void or has been reduced."

As before, the model was a provision in the legislation for England and Wales.⁴¹ That provision, however, was excised from the English Act in 1977,⁴² shortly before the introduction of the Scottish bill to Parliament. As a result it did not appear in that bill at all. In England and Wales the reason for the removal was primarily the existence of the overriding discretion (discussed in the previous paragraph) which, it was thought, made a special rule for transactional error unnecessary.⁴³ In Scotland the discretion appeared in the bill as introduced but not, as has been seen, in the bill as finally passed. It is not clear that it was fully understood that, in English eyes at least, the absence of a discretion would have necessitated a rule for transactional error.

³⁴ 1979 Act s 9(3)(a)(ii).

³⁵ Land Registration (Scotland) Bill cl 8(2)(a)(iv).

³⁶ Henry Report para 47(4)(c).

³⁷ Land Registration Act 2002 sch 4 paras 3(2)(b), 6(2)(b).

³⁸ As summarised by Lord McCluskey in the House of Lords. See Hansard HL vol 398 (1979) col 1455.

³⁹ For the distinction, see paras 3.15–3.18.

⁴⁰ Henry Report para 47(4)(b).

⁴¹ Land Registration Act 1925 s 82(3)(b).

⁴² Administration of Justice Act 1977 s 24.

⁴³ Law Commission, *Working Paper on Transfer of Land: Land Registration (Third Paper)* (Law Com WP No 45, 1972) para 86(d).

4.21 **The position in summary.** In certain cases no guarantee of title is given at all.⁴⁴ Otherwise a choice falls to be made between an award of the property or the payment of indemnity. Although at one time the intention seems to have been otherwise, possession is the sole⁴⁵ criterion used by the 1979 Act to determine the respective allocation of property and indemnity.

Possession: some difficulties

4.22 **The first difficulty: scope.** Three difficulties, at least, affect the rules on proprietor in possession in the 1979 Act. The first concerns a matter which is remote from the present discussion and may be disposed of quickly. The Act makes no distinction by type of error. Yet while possession has a valuable role to play in choosing between an acquirer and the "true" owner, it seems unhelpful in cases where the title to the property is not at issue. If, for example, the error is that a real burden was mistakenly omitted on first registration, the law must choose between (i) restoring the burden and compensating the acquirer or (ii) extinguishing the burden, by its continued omission from the Register, and compensating its holder. Such a choice is not assisted by considering the state of possession.

4.23 **The second difficulty: self help.** The 1979 Act allocates property and indemnity by reference only to the *current* state of possession. Sometimes this has been viewed as an invitation to self help. In *Kaur v Singh*⁴⁶ a flat was acquired under a forged disposition at a time when the "true" owner was out of the country. The acquirer was duly registered as owner, and took possession, in March 1996. Two months later, on her return to Scotland, the "true" owner recovered possession by the simple expedient of changing the locks. In December 1997 the acquirer broke into the flat, changed the locks in turn, and regained the coveted status of proprietor in possession. No doubt matters might have continued in this way indefinitely had the "true" owner not decided to accept the loss of her home and claim indemnity instead.⁴⁷ Another case of oscillating possession is *Safeway Stores plc v Tesco Stores plc*⁴⁸ where, in a dispute over a small section of riverbed, marker posts were put into position by one of the parties and then promptly removed by the other. In yet another example drawn to our attention but which was resolved without litigation, possession of a disputed part of a mutual boundary was asserted by the planting of flowers, denied by their removal at dead of night, and reasserted by the erection of a fence when the other party was on holiday.

4.24 It seems unsatisfactory that ownership should depend on the state of possession at the time when rectification happens to be sought. Nor is it clear what that time is. Potential dates include the date (i) of application for rectification (ii) that litigation on the issue is initiated (iii) of decree in that litigation or (iv) of rectification being effected by an appropriate change in the Register. If, for example, the acquirer possesses at the time of the initial application and again at the time rectification is to be effected, but not in between, is he a proprietor in possession such that rectification is barred? And must the Keeper send out staff to check the current state of possession every time it is proposed to change the

⁴⁴ Paras 4.14–4.17.

⁴⁵ Though the parties themselves may come to some other arrangement: see 1979 Act s 9(3)(a)(ii), discussed at para 4.18.

⁴⁶ 1999 SC 180.

⁴⁷ See *Kaur v Singh (No 2)* 2000 SLT 1323.

⁴⁸ 2003 GWD 20-610.

Register? In *Safeway Stores plc v Tesco Stores plc*⁴⁹ it was suggested that possession might be relevant "over an appropriate tract of time preceding" the date of application for registration, but this leaves much uncertain, including the length of the tract of time and the position where possession changes hands.

4.25 Just as serious is the apparent incentive to take the law into one's own hands. "It is ironic", one commentator has noted,⁵⁰ "that a supposedly sophisticated system seems to have revived the priority rules of the Stone Age". If parties are sufficiently determined, self help becomes the arbiter of title. It is true that the problem may be soluble even under the present law through an action of spuilzie, for a person who is dispossessed without consent is, in general, entitled to be restored to that possession.⁵¹ But to a person recently dispossessed litigation may be as unattractive as a further round of self help.

4.26 Neither party benefits from the rule as currently enacted. The difficulty for the "true" owner is shown all too clearly by the facts of *Kaur v Singh*. A forged disposition followed by forcible entry is sufficient to deprive the owner of his property. But the position is unsatisfactory even for the successful acquirer. The underlying defect in title remains, being cured neither by registration nor by possession. The virus is suppressed but it is not eliminated. The acquirer has an unchallengeable title only for as long as he retains possession. If possession is lost, even for a short period, the property might be lost with it. This is another reason for saying, as was said earlier,⁵² that the title conferred by the Land Register is less secure than that conferred under the Sasine system.

4.27 **The third difficulty: duration.** Ruoff and Roper,⁵³ in a passage which has been judicially approved in Scotland,⁵⁴ explain the principle behind the Land Registration Acts as being

"that an innocent registered proprietor who is in physical occupation of the registered property should not be ousted from his enjoyment of it. Monetary compensation is of little comfort to a man who is thrown out of his home or ejected from his land, whilst it should normally be sufficient to recompense the owner of a property who has never occupied it."

As a statement of policy, this has much to commend it. But the difficulty under the 1979 Act is that the "innocent registered proprietor who is in physical occupation" and has now been ousted may be the "true" owner and not the acquirer. Thus an owner might have possessed the property all his life and his forebears before him. Yet he is ousted by an acquirer under a void disposition who, by taking possession for even the briefest of periods, gains the status of proprietor in possession. For no term for possession is prescribed by the 1979 Act: it is enough that the acquirer possesses "now". In one case brought to our attention, an owner was alerted to the loss of his property only when workers employed by the acquirer proceeded to remove the trees preparatory to redevelopment.

⁴⁹ 2003 GWD 20-610 at para 80 per Lord Hamilton.

⁵⁰ George Gretton, commenting on *Kaur v Singh* at 1998 SCLR 863.

⁵¹ Reid, *Property* paras 161-6; Gordon, *Scottish Land Law* paras 14-23 and 14-24.

⁵² Para 4.8.

⁵³ Ruoff and Roper, *Registered Conveyancing* para 40-10.

⁵⁴ *Kaur v Singh* 1999 SC 180 per Lord President Rodger at p 189 G-I.

4.28 **Conclusion.** These criticisms suggest that possession in its current form is unsatisfactory. Whether, nonetheless, it might still have a useful role in allocating property and indemnity is a matter for later consideration. But first it is necessary to examine issues of legal policy.

THE ACQUIRER AND THE "TRUE" OWNER: ATTEMPTING A BALANCE

Introduction

4.29 In the allocation of property and indemnity there is a need to strike a balance between the interests of the acquirer and those of the "true" owner – between, in other words, the principles of facility of transfer and security of title. Up until now this issue has been presented only in rather general terms. It is now necessary to be more specific. What interests of the respective parties should a system of land registration seek to protect?

Protecting the "true owner": the notification principle

4.30 Under the 1979 Act there are two situations in particular in which the "true" owner is vulnerable to loss of property. One is where his property is conveyed by a forged deed. The other is where, on the sale and first registration of a neighbour's property, some of his own land is included by mistake in the title sheet of the neighbour. What is objectionable in such cases is not merely the loss of property. It is accepted that, in certain circumstances and for good reasons, property can be taken from a person against his will and given to someone else. Positive prescription is a familiar example. Further, it is also accepted that facility of transfer might sometimes be just such a good reason. For if simple and efficient conveyancing requires that, occasionally, the interests of a "true" owner be sacrificed to that of an acquirer, then the loss to one person can be justified by the gain to many. The fundamental objection, therefore, is not so much the loss of property, regrettable as that is, but the *manner* in which it is lost. Under the 1979 Act property is lost without notice and without any opportunity, following such notice, to reassert the title. For by definition the "true" owner is not party to a forged disposition. Nor is he party to a transaction by his neighbour. No mechanism exists to tell him that his title is in danger. On the contrary, it is expressly provided by the Land Registration Rules that the "true" owner is *not* to be notified if the acquirer's title is one which requires to be fortified by prescription.⁵⁵ It is true that possession by the acquirer would, in time, amount to notification. But in the very act of taking possession, the acquirer assumes the mantle of proprietor in possession and so deprives the "true" owner of the chance of getting the property back. Under the 1979 Act, possession and irrevocable loss of title are concurrent events.⁵⁶ Conversely, if possession is not taken, as may quite commonly occur in the second of the two situations mentioned above (property included in a neighbour's title), the "true" owner may continue to use the land for many years to come quite unaware that it is no longer his.

4.31 The shortcomings of the 1979 Act in this area have become increasingly apparent. In a written submission Registers of Scotland emphasised to us the difficulties of cases of this kind:

⁵⁵ Land Registration (Scotland) Rules 1980 r 21(2).

⁵⁶ Unless, of course, the "true" owner seeks to dispossess the acquirer by force: see paras 4.23–4.26.

"The effect of section 9 can be to disadvantage proprietors, thereby giving rise to perceived injustices. For example, the loss, to a proprietor whose interest is held on a title recorded in Sasines, of a right or area of land contained in their recorded deed, following an inaccuracy in the registration of a neighbouring interest in land in the Land Register. Proprietors disadvantaged in this way are understandably upset. Experience shows that they do not accept the explanation that the system of registration in Scotland forbids rectification of the Register except in the circumstances specified in section 9 ... On these occasions, the remedy of indemnity, or of an *ex gratia* payment, is not always seen as equitable. In the eyes of an injured proprietor, the enforced loss of land, or of amenity, or of an incorporeal right, does not necessarily lend itself to reparation in monetary terms. The inability of the Keeper to rectify the register to restore the title sheet to the position that ought to have obtained but for his error⁵⁷ is a major failing in the rectification provisions."

A "true" owner, deprived of land in a case on which representations have been made to us by a Member of Parliament, was more forthright still:

"I find it difficult to believe that a distinguished group could concoct such a piece of legislation. In fact this is a thief's charter duly protected by the State."

4.32 In our provisional view the solution to this difficulty lies in notification. It seems a sound principle that, if property is to be lost, it should not be lost by stealth. Instead the "true" owner should be given notice – whether by the acquirer's possession or in some other way – and, following such notice, should have a reasonable period in which to challenge the person now registered as proprietor. Only if and when that period has passed without a challenge should the acquirer have a title free from the possibility of rectification. Arguably, anything less is a breach of article 6 of the European Convention on Human Rights.⁵⁸ The principle that property should not be lost without notification we may refer to as the "notification principle".

Protecting the acquirer: the curtain principle

4.33 If, as just suggested, the balance of the existing law should be adjusted in the direction of security of title, this can be done only at the expense of facility of transfer. Property which is harder to lose is also property which is harder to acquire.⁵⁹ Yet the acquirer's burden could not be increased by more than a modest amount. Facility of transfer is of the essence of registration of title, and the so-called "curtain principle" – the principle that the Register is the sole source of information as to title – is, for many, a non-negotiable feature of the system.⁶⁰ No model is tenable, therefore, which necessitates going behind the Register and inspecting prior conveyances; and as a practical matter, once ARTL is fully in operation it is not clear that there will be conveyances to inspect.

4.34 The curtain principle limits the options for reform. Not only does it restrict the tasks that can be asked of an acquirer but it restricts also their timing. An acquirer must already know, by the time he parts with the purchase price and seeks registration, that the title as

⁵⁷ Earlier we proposed that administrative mistake should not be subject to the statutory guarantee: see paras 3.35 – 3.41. Thus rectification would be allowed, and no indemnity due. But errors on first registration are not only due to administrative error.

⁵⁸ See eg *Golder v United Kingdom* (1975) 1 EHRR 524. Article 6 provides that in the determination of civil rights everyone is entitled to a fair and public hearing. The absence of notice removes the chance of a challenge, and hence of a hearing.

⁵⁹ Mapp, *Torrens' Elusive Title* para 3.13. And see para 4.8.

⁶⁰ For the curtain principle, see para 1.14.

shown in the Register can be relied on. He must know, in other words, that rectification on account of Register error will not be possible. The reason is obvious. If, as a condition of immunity from rectification, some task had to be performed *after registration*, the acquirer would be faced with paying the price at a time when still vulnerable to Register error. The risk to his position could be minimised only by an independent check as to the Register's accuracy, or in other words by recourse to the prior deeds. In practice the temptation to peek behind the curtain would often be irresistible, even where it was not actually demanded by lenders concerned for the safety of their securities. The result would not, we think, be acceptable.⁶¹

4.35 The need to preserve the curtain principle excludes a model to which at one time we were attracted, by which a title would be free from challenge only after the running of a reduced period of positive prescription, such as five years. It also excludes any rule that requires possession on the part of the acquirer for a stipulated period, such as a year. Indeed, on a strict view the 1979 Act itself is not fully compliant with the curtain principle, for an acquirer remains vulnerable to rectification if he is unable to maintain possession.⁶²

Other considerations

4.36 In our preliminary view, any model for the allocation of property and indemnity must satisfy both of the principles outlined above, that is, the notification principle and the curtain principle. As will shortly be seen, that is no easy matter. On the other hand, we have not identified any other considerations which, in this context, seem of comparable importance. On both provisional conclusions we are anxious to have the guidance of consultees. Accordingly we invite views on the following proposal and question:

6. (a) **Any scheme for the allocation of property and indemnity must, as minimum, both –**
 - (i) **ensure that the "true" owner is not deprived of property without notice and the opportunity to object (the "notification principle"), and**
 - (ii) **relieve the acquirer of the need to consult prior conveyances (the "curtain principle").**
- (b) **Are there other issues of legal policy which need be taken into account?**

⁶¹ It is possible to attack the rationality of this view. A 5-year positive prescription, for example, would in most cases only require the inspection of one prior deed, which would be the work of a few minutes. The increase in workload would be negligible. But the principle that one should not go behind the Register is so fundamental to the idea of registration of title that it is probably not open to challenge. See eg para 1.21.

⁶² In *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 one of the arguments for the Keeper (at p 525E) was that: "A purchaser ... who could not take possession might find his rights restricted to claiming indemnity. It follows that the register could not be regarded as the sole means by which rights to registered land were to be appraised."

SOME POSSIBLE MODELS

Introduction

4.37 We now move from policy issues to options for reform. From the legislative history of the 1979 Act, already described, and from the study of other systems, it is possible to identify those criteria which might most readily determine the allocation of property and indemnity as between acquirer and "true" owner.

Possession

4.38 As has been seen, possession is the sole criterion used by the 1979 Act. If an acquirer is in possession, he keeps the property. Otherwise the property is returned to the "true" owner and the acquirer's entitlement is to indemnity. In England and Wales possession is the most important criterion but not the only one.

4.39 Possession has a certain intuitive attraction. The idea that, all things being equal, the current state of possession should not be innovated on runs deeply in our law, as can be seen in doctrines such as *spuilzie* and prescription. The principle, moreover, is supported by practicalities. A person in possession is likely to have a greater stake in the property than a person who is not. He may have formed a sentimental attachment to it, or carried out expensive improvements. In any event, to insist on a possessor's removal causes disruption and possibly hardship. Possession is also a useful indicator of innocent mistake. If an acquirer does not possess some of the property in his land certificate it may be because he did not intend to buy it and does not know that it is included in his title. Conversely a "true" owner who allows another to take possession may not regard himself as having a continuing claim on the property, or at any rate a claim upon which he wishes to insist. At a minimum the fact of possession constitutes notice.

4.40 Earlier the 1979 Act provisions on possession were subjected to detailed criticism,⁶³ but most of their shortcomings could be met if possession were required, not for a moment, but for a period of reasonable duration. If, however, the curtain principle is to be preserved, the possession could not be possession of the *acquirer*. The reason was explained earlier.⁶⁴ Unless, at the time of payment and registration, it is already certain that the Register can be treated as accurate, an acquirer would be bound to look behind it and investigate prior writs; and the necessary certainty would be absent if the accuracy depended on his own, *subsequent*, possession. Later, however, we suggest that possession by the *seller* might have a role in allocating property and indemnity.⁶⁵

Discretion

4.41 In England and Wales the Register is rectified ("altered"), and the property returned to the "true" owner, if "it would for any other reason be unjust for the alteration not to be made".⁶⁶ As was seen, an equivalent provision was eventually dropped from the bill which became the 1979 Act.⁶⁷ In Canada the Joint Land Titles Committee proposed a discretion

⁶³ Paras 4.22–4.28.

⁶⁴ Para 4.34.

⁶⁵ Paras 4.49 and 4.50.

⁶⁶ Land Registration Act 2002 sch 4 paras 3(2)(b), 6(2)(b).

⁶⁷ Para 4.19.

which would work the other way. The usual rule for transactional error would award the property to the "true" owner and not to the acquirer. But this could be reversed if that were just and equitable having regard to the following factors:⁶⁸

- "(a) the nature of the ownership and the use of the property by either of the parties,
- (b) the circumstances of the invalid transaction,
- (c) the special characteristics of one or both of the parties to receive compensation,
- (d) the ease with which the amount of compensation for a loss may be determined, and
- (e) any other circumstances which, in the opinion of the Court, may make it just and equitable for the Court to exercise or refuse to exercise its powers ..."

4.42 It seems unlikely that discretion is an adequate basis for the allocation of property, at least on its own. If it allows justice to be done in individual cases, this is at the cost of uncertainty and, often, of litigation. Matters admittedly are improved by the listing of relevant factors in the manner proposed by the Joint Land Titles Committee and quoted above. But we are inclined to agree with the comment on those proposals of Sir Anthony Mason, the former Chief Justice of Australia, that⁶⁹

"for a significant period of time at least, there would be uncertainty as to how the courts would exercise the discretion. I doubt that court decisions would bring sufficient certainty in the short term. And title to property is the area par excellence where a degree of certainty is expected."

The objections of the Law Society of Scotland to a discretion have already been mentioned,⁷⁰ to which it may be added that the discretion in the English legislation seems virtually unused.⁷¹

4.43 There is also another objection. If matters were to be regulated, even partly, by discretion, the outcome could not be known by the acquirer at the time of registration. A practice might then develop of looking behind the Register. Once again, therefore, there are difficulties with the curtain principle.

Type of error

4.44 The final criterion is type of error. In Germany an acquirer is protected against Register error but not against transactional error.⁷² The state of possession is irrelevant. In the event of Register error the acquirer keeps the property. In the event of transactional error the property must be returned to the "true" owner.⁷³ The Henry Committee

⁶⁸ Joint Land Titles Committee, *Renovating the Foundation Model Act* s 5.6(4), (5).

⁶⁹ Sir Anthony Mason, "Indefeasibility – Logic or Legend?" p 25 (unpublished paper given at a conference in the University of Auckland in March 2003 on "Taking Torrens into the 21st Century").

⁷⁰ Para 4.19.

⁷¹ Hansard HL vol 398 (1979) col 1455 (Lord McCluskey); Ruoff and Roper, *Registered Conveyancing* p 40/8 n 1.

⁷² § 892 BGB. For the distinction, see paras 3.15–3.18.

⁷³ Since the German system is negative in character, the "true" owner has remained actual owner throughout.

recommended a similar rule for Scotland which was not, in the event, adopted.⁷⁴ Broadly the same approach was adopted in Canada by the Joint Land Titles Committee in its review of the Torrens system,⁷⁵ and by the Law Reform Commission of Victoria.⁷⁶

4.45 Allocation by type of error has much to be said in its favour. If the acquirer is sometimes to be given the property and sometimes denied it, it seems a reasonable basis for distinction that he should be given the property in those cases where the Register was wrong and denied it (but paid indemnity) in those cases where the Register was right and the mistake is in the acquirer's own conveyancing. In its first part the rule is an emphatic assertion of the curtain principle. In its second it ensures that title is not lost to forgery.⁷⁷ The provisional view, expressed earlier, that protection should continue in respect of transactional error was partly on the basis that the guarantee would take the form of money and not the property.⁷⁸ A rule which allocates by type of error is also attractively simple. Register error is cured the moment the acquirer's title is registered.⁷⁹ Transactional error is cured on the next transfer, for in a question with a subsequent acquirer it assumes the form of Register error.⁸⁰ Alternatively, it is cured after ten years' possession following the running of positive prescription. Compared to the 1979 Act these are clear and principled outcomes. The task of the acquirer is correspondingly straightforward. He must inspect the Register; he must take care with his own conveyancing; and if he does both properly, his title is immune from challenge.

4.46 A serious difficulty remains, however. At least in the form outlined above the rule takes insufficient account of the position of the "true" owner. It produces a balance which is different from the 1979 Act, and one which on the whole is less favourable. It is accepted that, on this rule, the "true" owner would always be able to recover for transactional error notwithstanding that the acquirer was in possession and that this is an improvement on the present position; but once the property was transferred on, recovery would be barred even in a case where the "true" owner had retained possession. Cases such as *Doubar Properties Ltd v Keeper of the Registers of Scotland*⁸¹ and *Safeway Stores plc v Tesco Stores plc*⁸² – cases in which the Register was rectified against the acquirer – would be decided differently under this model. The "true" owner's position would thus rest on an unpredictable fact, namely the timing of the next transfer. The change might be acceptable if the "true" owner were notified and given an opportunity to reclaim the property. But in fact the notification principle is disregarded altogether and the loss of property is by stealth. On this model there is no intimation by the Keeper. There is no requirement of possession on the part of the acquirer. If the "true" owner finds out at all it will either be by chance or because he is

⁷⁴ Henry Report para 47(4)(b) discussed at para 4.20. Unlike the system operating in Germany, however, the Henry Committee would have indemnified the acquirer in respect of transactional error.

⁷⁵ Joint Land Titles Committee, *Renovating the Foundation* p 25 and Model Act s 5.6(3).

⁷⁶ Law Reform Commission of Victoria, *The Torrens Register Book* (Report No 12, 1987) para 16.

⁷⁷ Law Reform Commission of Victoria, *The Torrens Register Book* (Report No 12, 1987) para 16: to do otherwise and give the property to a person acquiring through forgery (the current position in Scotland) is to undermine "community expectations regarding security of ownership. It is at odds with the ancient principle under which forgeries are legally ineffectual." In Scotland forgery defeats even the running of positive prescription: see the Prescription and Limitation (Scotland) Act 1973 s 1(1A).

⁷⁸ Para 3.33.

⁷⁹ Among other advantages this means that the disposition in favour of the acquirer is not challengeable on account of the grantor's title, so that there could be no question of a reduction or an order for a reconveyance.

⁸⁰ This is because, by registration of the flawed disposition, the error comes to affect the Register itself. From the viewpoint of a subsequent acquirer, this is then a pre-existing error on the Register and not a transactional error. See para 3.20.

⁸¹ 1999 SC 513.

⁸² 2003 GWD 20-610.

now selling his property in turn. In the event that the acquirer had re-sold first, it would be too late to put matters right. To adopt the model as it stands, therefore, would be to abandon the notification principle, with results which many will regard as unacceptable. In the next section we consider whether the model, attractive in other respects, could be adapted so as to accommodate that principle.

The problem of notification

4.47 There are probably only two ways in which effective notification might occur. One would be for the Keeper to notify interested parties of all applications for registration as owner. The other would be to impose a requirement of possession.

4.48 In England and Wales notification by the registrar is mandatory in respect of applications by persons whose claim rests on adverse possession. Those who must be notified include the existing owner and the holder of any registered charge.⁸³ This, however, is a targeted provision, directed at a case where the application is quite likely to be subject to challenge. A universal notification requirement would be a different matter, slowing down the registration process, increasing costs, inviting unmeritorious claims, and yet in most cases of no value. The failure of the Land Registry Act 1862 in England and Wales is often attributed to a requirement of universal notification.⁸⁴ Further, the prospect of a post-notification challenge might weaken reliance on the Register and put the curtain principle at risk.

4.49 Possession is a more promising option. If, however, the curtain principle is to be upheld, then, as previously noted,⁸⁵ this must be possession by the seller and not by the acquirer. As compared to the present law, there would be a shift from buyer in possession to seller in possession. On this model an acquirer would take the property free of Register error if and only if, for a prescribed period immediately preceding registration,⁸⁶ the property had been possessed by the seller or by the seller's authors. Possession would include civil possession. The period would need to be long enough for the "true" owner to notice and, if desired, to apply for rectification of the Register; but it should not be so long as to impose evidential difficulties on the seller and acquirer. A period of one or two years might be about right, although in the normal case possession is likely to have been for much longer.

4.50 A solution along these lines is not perfect. Possession will not always alert the "true" owner, particularly in relation to marginal land forming a small part of a large estate; and even if alerted, the owner may be slow to take legal advice and to make the proper response. From the acquirer's point of view, too, the solution has shortcomings. Occasionally it may lead to unexpected results. Thus if the seller possessed for 13 months, the acquirer would take free of Register error (assuming a 12-month rule); but if he possessed only for 11, any pre-existing error on the Register would continue to affect the acquirer until such time as it

⁸³ Land Registration Act 2002 Sch 6 para 2(1).

⁸⁴ See eg Reid Report para 39. The notification showed the exact boundaries which it was proposed to register. In subsequent legislation the abandonment of notification was accompanied by the abandonment of exact boundaries and the introduction of a general boundaries rule. Scotland is in the difficult position of retaining a system of exact boundaries but without an accompanying requirement of notification.

⁸⁵ Para 4.35.

⁸⁶ Registration, as a publicly verifiable date, seems better than eg delivery of the disposition. Any rule would need to take account of the fact that, after delivery, possession is likely to be by the acquirer and not the seller.

was cured by positive prescription. More importantly, the conveyancing burden is increased, for as well as consulting the Register the acquirer must now take some account of the state of possession or accept the risk that the Register might be wrong. In fact the increase seems modest. Already under present law and practice, an applicant for registration must answer a question on the application form as to whether any person is in possession adversely to his interest. To extend that inquiry back for a year or two would not seem especially difficult. In practice we imagine that an acquirer would be satisfied either with the fact that the current seller possesses, or with affidavit evidence from the seller and, if need be, from a predecessor.⁸⁷ Reassuring in this regard is the relaxed practice adopted in Sasine transactions where, nonetheless, possession, and for a much longer period, is critical to the validity of title.

4.51 On the assumption that a requirement of possession is acceptable, we have concluded that a model based on type of error offers the best prospects of balancing the competing interests of acquirer and "true" owner. We have not managed to identify another model which satisfies both the curtain principle and the notification principle. And, more positively, the model offers rules which are clear, principled, and relatively simple. It has attracted the support of law reformers in Canada and Australia and has been in successful operation in Germany for more than a century (although without the speciality of possession).⁸⁸ In our preliminary view it would operate well in Scotland also.

4.52 Our proposal therefore, on which we invite comments, is that:

7. (a) **The title of a *bona fide* acquirer should be subject to rectification in respect of transactional error.**
- (b) **The title of a *bona fide* acquirer should be immune from rectification in respect of Register error provided that, for a prescribed period prior to registration of the acquirer's title, the property was possessed by the person from whom he acquired (or from a predecessor of that person).**
- (c) **In the event of rectification, indemnity should be paid to the acquirer.**
- (d) **In the event of a refusal of rectification, indemnity should be paid to the "true" owner.**

⁸⁷ Since a seller is already liable under missives to give a good and marketable title, an affidavit from the seller will not add to his obligations. But in practice missives often expire after two years, and the corresponding obligation in the disposition is not absolute but depends on judicial eviction.

⁸⁸ Para 4.44. In Germany notification is not needed because the incidence of error is low. Almost always, therefore, there is no "true" owner to protect. The reasons for this include (i) clear identification of plots of land both on the map base and on the ground (ii) notarial transfer and (iii) the fact that first registrations are no longer occurring.

- (e) In paragraph (b) should the period prescribed for possession be –
- (i) one year
 - (ii) two years, or
 - (iii) some other period (please specify)?

SUBORDINATE REAL RIGHTS

4.53 Thus far the discussion has concentrated on ownership. Where the right being acquired is not ownership but a subordinate real right, such as a standard security or real burden, the position is much more straightforward. The title is guaranteed, of course,⁸⁹ but, under the 1979 Act, the guarantee always takes the form of indemnity and the right itself, being void under the general law, is lost.⁹⁰ In *Kaur v Singh*,⁹¹ for example, it was decided that the Register could be rectified with respect to the standard security. So far as we know, this rule is not regarded as unsatisfactory. Certainly if ownership is to be protected, it must follow that lesser rights are sacrificed. And unlike the case of ownership, money will almost always be an adequate exchange. A heritable creditor, for example, is unconcerned at the loss of a security if, following the payment of indemnity, any shortfall in the loan is met. Indeed, if the loan exceeds the value of the property, it will always be easier to indemnify the creditor than the owner: the former would involve only the value of the property, being the extent of the security, but the latter the larger amount necessary to discharge the security by repayment of the loan in full.

4.54 There is one exception. Under the 1979 Act long leases are, for good reasons, treated in the same way as ownership; and, following that principle, the question of whether the lessee retains the land or must give it up against payment of indemnity should be governed by the model discussed above.

4.55 Our proposal is therefore that:

- 8. In the acquisition of a subordinate real right (other than a long lease), the guarantee should continue to take the form of indemnity rather than retention of the right.**

4.56 As well as being acquired, a subordinate real right may also be varied or extinguished. It is for future consideration whether the same rule should apply. The typical case would be the deletion of a subordinate real right following the registration of a discharge which had been forged or was otherwise invalid. If the property were then sold, it would be necessary to decide whether the acquirer should receive an unencumbered title (with indemnity paid to the holder of the real right) or whether, on the contrary, the Register

⁸⁹ Para 3.47.

⁹⁰ Para 4.12.

⁹¹ 1999 SC 180.

could be rectified to the effect of restoring the encumbrance (with indemnity paid to the acquirer). The former would be the result under the present law.⁹²

⁹² This is because, by s 3(1)(a) of the 1979 Act, an acquirer is affected only by those encumbrances (other than overriding interests) which are entered on the Register.

Part 5 Positive Systems and Negative Systems

INTRODUCTION

The position in Scotland

5.1 Systems of land registration are either "positive" or "negative" in nature.¹ A negative system operates, more or less, by the ordinary rules of property law, so that a person acquires ownership if and only if (i) the person from whom he is taking title owned (or was deemed to own) the land in question and (ii) the transfer itself was properly carried out. A bad title is not cured by registration, but rather registration is the final step in the process of transfer. Negative systems innovate on property law only to the extent of providing that, in a question with an acquirer, the Register is deemed to be correct. In this way Register error is cured but transactional error is not.²

5.2 In a positive system, by contrast, the ordinary rules of property law are set aside. Title flows from the Register and not from the transferor's conveyance. A person entered as owner on the Register *is* the owner. If the conveyance was good, the title so conferred is absolutely good. If the conveyance was bad, the title is good but voidable.³ As a general rule⁴ a positive system does not admit the possibility of void titles.

5.3 The German system of registration of title is negative in character and the Torrens system positive. Whether the scheme introduced by the 1979 Act is positive or negative was, at first, unclear.⁵ The first edition of the *Registration of Title Practice Book* held out the promise of continuity of property law and hence, by implication, of a negative system:⁶

"The Reid Committee in their Report (Cmnd. 2032), in recommending the introduction to Scotland of a system of Registration of Title, considered that any such system should be an extension and development of the existing system of Registration of Writs built up in Scotland over the centuries and should incorporate the minimum amount of change in the existing substantive law relating to land rights compatible with a system of Registration of Title. The Henry Committee, subsequently set up to prepare a detailed Scheme for the introduction of Registration of Title, in their Report (Cmnd 4137) closely followed the recommendation that there should be the minimum of change in the existing substantive law. The Act, in implementing the recommendations of the Henry Committee ... followed this principle."

¹ Paras 1.9 and 1.10.

² For the terminology here, see paras 3.15–3.18.

³ For the difference between titles which are absolutely good and those which are good but voidable, see paras 3.1–3.3.

⁴ But for exceptions see para 5.12.

⁵ K G C Reid, "A *Non Domino* Conveyances and the Land Register" 1991 JR 79, 82-7.

⁶ Para A.1.04. The corresponding passage in the second, and current, edition is para 1.5.

In similar vein, in commenting on section 3(1) of the 1979 Act, the *Practice Book* offered the view that:⁷

"The legal effect of registration in the Land Register is all important but differs in only one material respect from the effect of recording in the Register of Sasines. As with recording, registration is concerned with the vesting of real rights and their transmission, variation and discharge. The important difference between Sasine recording and Land Registration is that by reason of the indemnity provisions of the Act (see sections 12 and 13) the State under Registration of Title is 'guaranteeing' the title. In Sasine recording it is not."

Elsewhere, however, the *Practice Book* talked of title flowing from the Register and not from a progress of title deeds, a mode of expression suggestive of a positive system.⁸

5.4 The position was little clearer from an examination of the reports of the Reid and Henry Committees. Their discussion of principle was meagre and tended to focus on the state guarantee rather than on the title itself. Only the following passage, from the Reid Committee, might be taken as indicating a positive system:⁹

"[U]nder registration of title ... all registered interests become indefeasible except in the rare case in which rectification of the Register is allowed ...; even in that case the State guarantee will ensure full compensation to the owner ..."

5.5 The 1979 Act itself was opaque. The crucial provision was section 3(1), which described the effect of registration. The opening words might be taken as indicating that the new system was positive in nature:

"Registration shall have the effect of vesting in the person registered as entitled to the registered interest in land a real right in and to the interest ..."

But later this was qualified by the words:

"insofar as the right ... is capable, under any enactment or rule of law, of being vested as a real right ..."

Whether, say, a purported right under a conveyance *a non domino* was capable of being vested as a real right within the terms of this proviso was hard to say.

5.6 In fact the position remained in doubt until the development of significant case law on the Act in the 1990s, and even today the point has not been the subject of express decision. Nonetheless, on the basis of *obiter dicta* it seems possible to say that, whatever the original intentions might or might not have been, the system of registration of title in Scotland is positive in nature.¹⁰ Whether this view of the legislation should continue to be accepted is, however, a different matter.

⁷ *Registration of Title Practice Book* (1st edn, 1981) para C. 19.

⁸ *Registration of Title Practice Book* (1st edn, 1981) para A.1.05(iii).

⁹ Reid Report para 154(1).

¹⁰ See eg *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122 at p 130C per Lord Coulsfield and pp 138E and 141A per Lord President Hope; *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175 at p 1177D per Lord Kingarth; *M R S Hamilton v Keeper of the Registers of Scotland* 2000 SC 271 at p 277E per Lord President Rodger.

Technique not policy

5.7 The difference between a positive and a negative system is a difference of technique and not of policy. It has no bearing on the difficult issues, discussed in parts 3 and 4 of this paper, as to the scope and nature of the statutory guarantee. The model which, arising out of that discussion, has our provisional support could be operated as either a positive or a negative system. The same is true of the 1979 Act itself. The choice between a positive and a negative system is thus a choice of convenience, to be determined by criteria such as simplicity, efficiency, and coherence. As such it is of considerable importance in its own right. But it does not touch the purpose or effect of registration of title.

5.8 Furthermore, the choice affects directly only a narrow group of cases. Most titles most of the time are absolutely good, so that ownership is conferred immediately on registration. And many titles which are not absolutely good are good but voidable, with the same result. Whatever its importance in legal theory, therefore, the choice in practice affects only those few cases where the title under the general law would be void, either from the outset¹¹ or later, following reduction.¹² And the difference in result is simply that, whereas in a negative system the title remains void at least for an initial period, in a positive system it is upgraded at once to good but voidable.

5.9 The difference can be illustrated by reference to the model provisionally favoured in part 4.¹³ Under that model, and assuming possession, a *bona fide* acquirer is affected only by transactional error, that is, by mistakes in his own transaction. The typical case is a forged disposition. If the model were operated as a positive system, the acquirer would become owner immediately on registration, and despite the forgery. On a negative system ownership would remain with the "true" owner. In both cases the Register would show the acquirer as owner, and in both the Register would be inaccurate and vulnerable to rectification. In both cases the ultimate fate of the property would depend on whether the "true" owner sought rectification before either the acquirer sold on or positive prescription had run, at which point the defect would be washed out of the title.¹⁴ In both cases if the "true" owner sought rectification in time, the property would be restored. On this example the difference between a positive and negative system lies merely in the status of the property during a transitional period which begins with the registration of the forged disposition and ends with the curing of the defect or the restoration of the property. Does the property, during this period, belong to the acquirer (the result of a positive system) or to the "true" owner (the result of a negative)? Or to put the same question in a different way, is the title of the acquirer voidable or void? The maximum duration of the transitional period is ten years, being the length of time required for prescription to run. Often it will be shorter.

¹¹ Para 3.1.

¹² Paras 6.8–6.10.

¹³ Para 4.52.

¹⁴ The reintroduction of positive prescription is proposed in paras 3.4–3.11. The fact that a disposition is forged does not prevent the running of prescription in favour of a *bona fide* acquirer: see Prescription and Limitation (Scotland) Act 1973 s 1(1A)(b).

POSITIVE SYSTEMS: THE ADVANTAGES

5.10 The main advantage of a positive system lies in adherence to the mirror principle, or at least to that aspect of the principle which deems the information on the Register to be correct.¹⁵ For under a positive system a person shown as owner is indeed the owner – even if, on a wider view of things, the Register is inaccurate and vulnerable to rectification. The principle is intuitively attractive. If issues of ownership (and other rights) can be determined merely by a glance at the Register, that is a gain both for facility of transfer and for legal certainty; and the person holding a land certificate has the reassurance of a good title.

5.11 This advantage is not, however, unique to a positive system.¹⁶ Even under a negative system the Register will be incorrect only in the small number of cases where, owing to forgery or other transactional error, the wrong person is shown as owner. In practice the mirror principle is observed by a negative system almost as much as by a positive. It is for that reason that, in German law (which operates a negative system), the Register is presumed to be correct.¹⁷ In favour of a *bona fide* acquirer, of course, that presumption is irrebuttable.¹⁸

5.12 Furthermore, even under a positive system such as that operated by the 1979 Act, the Register is not always right. The person who is registered as owner might not exist. There might, for example, be no such person as "John Smith, 42 Cairns Crescent, Dundee", or a company named as owner might never have been incorporated. More importantly, an entry which begins as correct may cease to be correct with the passage of time. If John Smith is registered today as owner, then (assuming such a person exists) he is conclusively owner of the property in question. But it does not follow that he is owner tomorrow, or next week, or next year, even if his name remains on the Register. Although the 1979 Act confers ownership at the time the entry is made,¹⁹ it does not, and could not, guarantee its continuance. While therefore an entry on the Register is usually accurate at first, it may cease to be accurate in the event that circumstances change. In fact there are a number of ways in which ownership could be lost. Mr Smith might die. A company or other juristic person might be dissolved. Or the property might be acquired by someone else.²⁰ The last would happen if a different person were registered as owner of all or part of the same property – the situation in *Safeway Stores plc v Tesco Stores plc*²¹ – or if prescription ran in favour of someone else on the basis of a title recorded in the Register of Sasines. Subordinate real rights are lost more easily still. A lease is extinguished by irritancy, a standard security by repayment of the loan, and a real burden by acquiescence. All subordinate real rights other than leases are extinguished by negative prescription. None of this is detectable from the Register.

¹⁵ Paras 1.14 and 1.15.

¹⁶ Arguably the Sasine system conforms to the mirror principle: see para 1.21.

¹⁷ § 891 BGB.

¹⁸ § 892 BGB. In substance that is the rule proposed in part 4: see para 4.52.

¹⁹ 1979 Act s 3(1)(a).

²⁰ *Registration of Title Practice Book* para 6.5.

²¹ 2003 GWD 20-610. See paras 5.37 and 5.38.

5.13 Many of these events, of course, are unusual and some are exceptional. In a very high percentage of cases the Register gives an accurate account of the rights affecting land. But it is not infallible, and it is not greatly more accurate than a Register based on a negative system.

POSITIVE SYSTEMS: THE DISADVANTAGES

Introduction

5.14 Against the advantage of greater fidelity to the mirror principle must be set a number of disadvantages which affect a positive system of registration of title. Five in particular deserve mention.

Bijuralism

5.15 As previously mentioned, a positive system is of its nature bijural, that is to say that it makes simultaneous use of two different systems of property law.²² In the first instance transactions under the 1979 Act are governed by the special rules of land registration and in particular by the rule that registration, of its own force, confers title. But in order to determine the status of the resulting entry on the Register the sequence must be re-run by reference to the ordinary rules of property law. If the result is the same, the Register is accurate and the title of the acquirer unchallengeable. If the result is different, the Register is inaccurate and the title of the acquirer is voidable and vulnerable to rectification.²³ By contrast, a negative system works with ordinary property law alone.

5.16 Bijuralism faces certain difficulties. It is complex and awkward to use, and, sometimes, hard to understand and to explain. By operating with two different systems of law, moreover, it leaves uncertain the relationship between them. In the Torrens system this has led to a substantial, and growing, case law,²⁴ and there is every sign that the same will be true of the 1979 Act.²⁵

5.17 A simple example illustrates some of the problems. Suppose that A is the registered proprietor of land. B is then registered as proprietor in A's place on the basis of a disposition on which (unknown to B) the signature of A is forged. Sometime later B disposes the land to C, who is registered as owner in place of B.

5.18 At one level, of course, the position is perfectly straightforward. As the registered proprietor, C is the owner of the land. That is the result according to the rules of land registration. Nonetheless a number of difficulties arise.

5.19 The first is the status of C's title. In showing C as owner, is the Register accurate or inaccurate? If the ordinary rules of property law are applied strictly, the answer can only be that the Register is inaccurate and hence vulnerable to rectification. For no title could pass to B on the basis of a forged disposition, and if B did not own he could not pass ownership to C. But this may be too literal an application of the ordinary law. No doubt that law would

²² Para 1.11.

²³ Paras 2.11–2.13.

²⁴ Charted, in the case of Australia, in Peter Butt's regular column in the *Australian Law Journal*.

²⁵ Para 2.25.

not have invested B with ownership, but the fact remains that B *was* owner and that C took title from B. According to ordinary property law a person acquiring from the owner becomes owner in turn. It follows, on this view, that ordinary property law would confirm the result of the rules of land registration and that the Register is accurate. Which approach is correct? After more than 20 years of registration of title in Scotland the answer remains unclear. The first would apply property law to the entire chain of events from the time the defect (the forgery) first appeared. The second would confine its application to the most recent transaction on the basis that ordinary property law is itself affected by the rules of land registration. Both approaches are plausible and there seems no principled basis for choosing between them.

5.20 The controversy is avoided by simplifying the example, so that there was no transfer to C and the registered proprietor remained as B. But other problems remain. Take the position of A. A ceased to be owner on the registration of B's title. But the Register is inaccurate and can, in principle, be rectified at the instance of A. What then is the nature of A's right? If it is a personal right, who is the obligant (the Keeper? B?)? If it is a real right, what is its nature? Is it transferable and, if so, by what means? Is it a freestanding right or a pertinent of such other land as is still owned by A? Can it be attached by creditors? Is it affected by the bankruptcy of B? These questions are not only unanswered but, in the absence of a robust conceptual model, unanswerable short of litigation. The position of A may be the same, or different, if the potential inaccuracy at issue is not ownership but a subordinate real right. The issue of a successor's right to indemnity in respect of a lease has been litigated.²⁶

5.21 Often B will be in possession, thus preventing rectification. Instead A will have a claim for indemnity from the Keeper. It is unclear, however, whether payment of indemnity changes the underlying position. Does the Register not remain inaccurate, as before? Or if it does not, by what legal mechanism has B's title ceased to be voidable? Does the fact that A was paid indemnity prevent an application for rectification in the event that B comes to lose possession? And if rectification is granted, must the indemnity be repaid?

5.22 In time these questions could be answered, whether by the accumulation of case law or by legislation. But it is likely that they would be replaced by others like them, for bijuralism is an improvisation in search of principles, and the search may yet be a long one.

Ownership in the wrong place

5.23 The inconvenience and uncertainty of bijuralism might be justified if the result was to award ownership to the "right" person. Usually, however, the reverse is the case.

5.24 If a title is void under the general law it is usually because the disposition was forged or was granted *a non domino*. Under a positive system, ownership passes in both cases. The grantee is invested and the "true" owner divested. Nor is good faith a requirement, as it would be for the state guarantee.²⁷ A person who forges a disposition in his own favour is rewarded by the 1979 Act with ownership. The *male fide* grantee of a disposition *a non domino* is in the same position. The result seems unsatisfactory. Bad faith is rewarded. An innocent party is deprived of ownership without either consent or, usually, knowledge.

²⁶ *M R S Hamilton Ltd v Keeper of the Registers of Scotland (No 1)* 1999 SLT 829.

²⁷ Para 3.14.

And the careful distinction of the general law between voidable deeds and void deeds – between cases of consent and cases where no consent is given – is swept away.²⁸ It is true, of course, that the "true" owner could retrieve the property by applying for rectification, for our concern is only with the transitional period before the acquirer's title becomes secure.²⁹ But the question is whether he should have lost it in the first place.

5.25 The point seems stronger still when it is recalled that "ownership" in this context is not merely a label born of administrative convenience but is ownership *for all purposes*. Suppose, for example, that in 2004 B forges a disposition in his own favour, registers and takes possession; and further suppose that it is not until 2010 that A, the "true" owner, finds out about B's title and is able to have the Register rectified to the effect of restoring his name. Rectification is not, and indeed could not be, retrospective.³⁰ Thus for the six years between 2004 and 2010 the owner is B and not A. The rights and liabilities of ownership attach to B. B's occupation of the land is lawful, because he is the owner. Any attempt by A to dispossess him would fail.

5.26 In the common law world this result seems barely to have attracted attention, perhaps because of the prevalence of the idea of relative title and the generally weak sense of ownership. In a jurisdiction such as Scotland, with a largely civilian law of property, the result is startling. It is perhaps of significance that, so far as we can discover, no other civil law jurisdiction operates a positive system of land registration. In Germany, as already mentioned, the system is negative and not positive.

5.27 It is instructive to look at a comparable rule for moveable property. Where A sells and delivers goods to B on the basis of retention of title, and B then re-sells the goods to C, the effect of section 25 of the Sale of Goods Act 1979 is to confer ownership on C notwithstanding that B was not the owner. As under registration of title, security of ownership is sacrificed to facility of transfer: it is considered more important that a *bona fide* acquirer (C) should obtain a good title than that the "true" owner (A) should keep the property. But the mechanism by which this familiar objective is achieved is of considerable interest. A is not divested of ownership as soon as possession is obtained by B. On the contrary, A remains owner for as long as possible – or in other words, throughout what was described earlier as the transitional period. It is only when facility of transfer requires a different result – only, in other words, when B sells to C – that A is finally divested.³¹ This is, in effect, a negative system, and one which is properly respectful of the rights of the "true" owner.

5.28 If there are good reasons for leaving ownership with the "true" owner during the transitional period, there are no countervailing reasons for conferring ownership on the acquirer. On the contrary, for as long as the acquirer's position is at risk it seems reasonable that ownership should be withheld. Assuming good faith, he would remain entitled to the fruits of his period of possession.³² A third party taking from him would receive a good title, in the same manner as under section 25 of the Sale of Goods Act. And if the acquirer

²⁸ Para 4.7.

²⁹ Para 5.9. Once the Register ceases to be rectifiable, ownership should of course pass, even under a negative system.

³⁰ *Stevenson-Hamilton's Exrs v McStay* 1999 SLT 1175; *M R S Hamilton Ltd v Keeper of the Registers of Scotland* 2000 SLT 352.

³¹ And he is divested directly in favour of C. B does not become owner at all.

³² Reid, *Property* para 171.

possessed for ten years, ownership would be conferred by prescription. But to confer ownership at once, without possession, seems too great a reward for the mere act of registration.

5.29 Like this paper, the Reid Report had recourse to the idea of "true" ownership.³³ The phrase is revealing. The "true" owner is the person who ought to be owner, and who would be owner but for the positive system of land registration. A negative system would allow the inverted commas to be removed.

Title from the Register

5.30 "Under a Torrens system", it has been said, "B does not receive his legal interest by a transfer from A; it is conferred by the state through registration";³⁴ or, as the matter is sometimes expressed in respect of the 1979 Act, title comes from the Register and from the Register alone. This idea is perhaps a strange one. On the one hand the law lays down a series of formal requirements for the transfer of land; and on the other it proceeds immediately to discard them. Thus a transfer must be by written deed; the grantor must have title and both parties capacity; the deed must describe the parties and the property; it must contain words of transfer; it must evidence both an intention to transfer and, by acceptance of delivery, an intention to receive the property; and it must be executed in solemn form. Yet none of this is actually necessary because, regardless of the deed – regardless even of whether there *is* a deed – ownership is conferred by, and only by, the entering of a person's name on the Register as proprietor. Of course it is true that the deed and other solemnities remain a requirement of the underlying law – of the law by reference to which the accuracy of the entry on the Register is judged. But transfer under the 1979 Act is no longer a matter of the consent of the parties,³⁵ and the words "do hereby dispone" are empty and misleading.

5.31 Unexpectedly, the result resembles the method by which land was transferred under the feudal system prior to its simplification by the introduction of the conveyance *a me vel de me*. Feudal law did not allow for direct transfer from A to B. Instead A was obliged to resign the property to the superior who granted the property in turn to B. As with feudalism so, in a sense, with the 1979 Act. A resigns the property to the Keeper and the Keeper re-grants by entering B's name in the Register. But, unlike a feudal superior, the Keeper is able to re-grant even where there has been no resignation.

5.32 The doctrine of title from the Register is a necessary part of a positive system in respect of cases where the conveyance is void. But whether the small number of such cases justifies the abandonment of the principle of consensual transfer seems open to question.

European Convention on Human Rights

5.33 If title flows from the Register, every decision by the Keeper to register (or to rectify) is a decision to take ownership away from A and to give it to B. Arguably, this is a "determination of ... civil rights and obligations" and so must comply with article 6 of the European Convention on Human Rights. Article 6 provides that:

³³ Reid Report para 115.

³⁴ Mapp, *Torrens' Elusive Title* para 5.9.

³⁵ Stair III.2.3: "It must needs then be the present dispositive will of the owner, which conveyeth the right to any other ..."

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... Judgment shall be pronounced publicly ..."

It has been suggested that the 1979 Act may fail to reach this standard in respect that it "envisages the Keeper sometimes making deliberate expropriative decisions without any sort of hearing and sometimes without even informing the victim of what is happening".³⁶ The problem of absence of notice to the "true" owner was discussed earlier.³⁷ In the United States the registrar's discretion under the Torrens system was held unconstitutional under the Fourteenth Amendment (due process) and was replaced by a judicial process.³⁸ So far as we are aware, the only other jurisdiction subject to the ECHR which uses a positive system of land registration is England and Wales, and there an independent adjudicator has recently been introduced to hear disputes,³⁹ partly because of fears of non-compliance with article 6.⁴⁰ This is not to concede that the 1979 Act is in breach of article 6. Shortcomings in an initial process of decision-making can often be made good if the decision is reviewable by an independent court with full jurisdiction;⁴¹ and under the 1979 Act the Keeper's initial decision can be reviewed by the Lands Tribunal on any ground of fact or law.⁴² But in the event that a positive system were to be retained, it would be necessary to consider much more carefully whether the appropriation of property is subject to sufficient safeguards in respect of process.⁴³

Inflexibility

5.34 Even if a positive system were of value in some situations, it suffers from the difficulty that it applies in all situations. That everything that is registered turns into a real right is the registration equivalent of a Midas touch. Sometimes the result is plainly unwelcome.

5.35 An obvious example is *a non domino* conveyances. Often in such cases the invalidity of the deed is known both to the grantee and to the Keeper, but the Keeper chooses to register in order to allow the running of prescription.⁴⁴ Indemnity, naturally, is excluded. Nonetheless the grantee becomes owner, not at the end of ten years' possession, but at once; and there is a matching and immediate expropriation of the property of the "true" owner. The result is unsatisfactory but also unavoidable, for prescription requires registration and registration, under a positive system, involves the conferral of ownership.

5.36 A similar difficulty can be seen with parts and pertinents. On first registration it is good, and normal, practice for such pertinents as are mentioned in the Sasine writs to be listed in the A (property) section of the title sheet. Sometimes, however, these "rights" are of

³⁶ G L Gretton, "The Protection of Property Rights" in A Boyle, C Himsworth, A Loux and H MacQueen (eds), *Human Rights and Scots Law* (2002) 275, 289.

³⁷ Para 4.30.

³⁸ *The People v Chase* (1897) 165 Ill 527, 46 NE 454; *The People v Simon* (1898) 176 Ill 165, 52 NE 910.

³⁹ Land Registration Act 2002 s 73(7), part 11.

⁴⁰ Law Com No 271 para 16.1 n 2.

⁴¹ *Albert and Le Compte v Belgium* (1983) 5 EHRR 533; *County Properties v Scottish Ministers* 2002 SC 79; *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295.

⁴² 1979 Act s 25.

⁴³ Article 6 issues may also arise, if less acutely, in respect of other aspects of the Keeper's discretion. Even a negative system might raise article 6 issues. For if registration is refused, the applicant is denied the opportunity to become owner; and if it is accepted but the conveyance is void, the owner, while retaining title for the moment, is by the very act of registration put at risk of losing that title in the event that the acquirer sells on.

⁴⁴ For registration practice in relation to *a non domino* conveyances, see *Registration of Title Practice Book* para 6.4.

doubtful validity. The mention of a servitude, for example, might have been a result of wishful thinking and not of a grant by the servient proprietor or of possession for the twenty years of prescription. Or rights in common might contradict other rights in common held on other titles, or might otherwise have no proper basis for existence. Under the Sasine system such "rights" were null. On registration in the Land Register they are infused with life, with unpredictable results. A negative system takes rights as they are. A positive system must choose between not registering at all and the indiscriminate conferral of validity.

5.37 Overlapping titles are particularly troublesome. In *Safeway Stores plc v Tesco Stores plc*⁴⁵ Safeway were registered as owners of certain land. Shortly afterwards Tesco were registered as owners of adjacent land but including a strip which was also in the Safeway title. The Keeper, aware of the overlap, excluded indemnity on the Tesco title, narrating that the disputed strip "was registered under Title Number REN 56654 [the Safeway title] on 8 October 1997 and ranks prior to the Disposition to Tesco Stores Limited registered 14 May 1998 on which the entitlement of the said Tesco Stores Limited was founded". The intention seems to have been (i) to confirm for the time being the title of Safeway to the strip but (ii) by including the same area within Tesco's title, to allow for the possibility of prescriptive acquisition. And under a negative system that indeed would have been the result (assuming that the Safeway title was good in the first place). A positive system, however, operates in a different way. Safeway, of course, became owner on 8 October 1997, for registration must always lead to ownership. But for the same reason Tesco became owner on 14 May 1998. The result requires close attention. Property law is unititular, meaning that for any one thing at any one time there can only be one right of ownership.⁴⁶ That is a doctrine of the civil law, relative title on the English model not being accepted in Scotland.⁴⁷ There can be no question therefore of a ranking of ownership, in the same way as there is, for example, a ranking of heritable securities.⁴⁸ If Safeway and Tesco were both registered as owner, it was not the case that one was the first-ranking owner and the other the second. Instead one was owner and the other was not owner. When Tesco's title was registered on 14 May 1998, Tesco became owner, for that is the unavoidable effect of a positive system,⁴⁹ and if Tesco became owner, it follows that, simultaneously, Safeway was divested of ownership.

5.38 The result is to turn the ordinary law on its head. Under that law the rule is first in time first in right (*prior tempore potior jure*). Under a positive system the rule is last in time first in right,⁵⁰ a rule which is not only unfair but also unstable in its operation. For whereas there can only be one "first", there is a new "last" every time there is a new transaction. Thus if Safeway were now to sell to a third party, the third party would become owner on registration and Tesco would be divested. And if Tesco were in turn to dispose to a fourth party, the fourth party would acquire ownership and the third party would be divested. The sequence would continue indefinitely unless or until the Keeper decided to refuse registration in respect of one of the competing lines of title. Once again, the example places

⁴⁵ 2003 GWD 20-610. For a detailed discussion of the case at first instance, see K G C Reid and G L Gretton, *Conveyancing 2001* (2002) pp 108-15.

⁴⁶ *Sharp v Thomson* 1995 SC 455 at 469F *per* Lord President Hope; *Safeway Stores plc v Tesco Stores plc* 2003 GWD 20-610 para 13.

⁴⁷ For a discussion of the difference, see T Honore, *Making Law Bind* (1987) pp 186-7.

⁴⁸ Section 7, the ranking provision of the 1979 Act, is directed mainly at heritable securities and certainly not at ownership.

⁴⁹ 1979 Act s 3(1)(a).

⁵⁰ Reid, *Property* paras 684, 685.

in doubt the suitability of a positive system for jurisdictions where the law of property is based on civil law.⁵¹

5.39 One final effect of the Midas touch may be mentioned. Since registration, unavoidably, results in the conferral of a real right,⁵² it was necessary for the 1979 Act to introduce other methods of entering the Register which did not have that effect.⁵³ In particular the 1979 Act provides for the making up and maintenance of a title sheet,⁵⁴ and for the noting of overriding interests.⁵⁵ A move from a positive to a negative system would allow the position to be rationalised and simplified.

NEGATIVE SYSTEMS

Characteristics

5.40 A negative system operates by reference to ordinary property law alone although, if the model provisionally favoured in part 4 were to be adopted, that ordinary law would be altered by a rule that the Register is conclusively correct in a question with a *bona fide* acquirer provided that the seller was in possession. Importantly, this alteration would be a rule of the general law and not the superimposition of a second and parallel law.

5.41 How a negative version of the part 4 model might operate can be illustrated by reference to an example which was given earlier.⁵⁶ A is the registered proprietor of land. B is registered as proprietor in A's place on the basis of a disposition on which (unknown to B) the signature of A is forged. Sometime later B disposes the land to C, who is registered as owner in place of B. The result, on a negative model, is straightforward. Notwithstanding B's registration, A remains owner. This is because no title can pass on a forged disposition. In showing B as owner and not A, the Register mis-states the *actual legal position* and so on that basis is inaccurate and can be rectified.⁵⁷ Following rectification, B would be entitled to indemnity. Once B sells on to C, however, it is too late for rectification. This is because C, as a *bona fide* acquirer, is entitled to treat the Register as correct. The Register shows B as owner. Hence, as a matter of property law, B can confer a good title on C. The parallel with section 25 of the Sale of Goods Act, discussed earlier,⁵⁸ is apparent. On registration, C becomes owner and A is divested. Hence the Register is no longer inaccurate. A will be indemnified by the Keeper, and has an alternative remedy against the forger.

Advantages and disadvantages

5.42 The respective advantages and disadvantages of a negative system mirror those already described in respect of a positive system. The main disadvantage is a slight loss in the accuracy of the information on the Register, although there would be a presumption that the Register is correct. The loss, however, is in formal and not in substantive accuracy, and, as just seen, a *bona fide* acquirer would be fully protected. The main advantages are clarity,

⁵¹ See also para 5.26.

⁵² Unless the right is incapable of being made real: see 1979 Act s 3(1).

⁵³ Para 2.21.

⁵⁴ 1979 Act s 6(1).

⁵⁵ 1979 Act s 6(4). See para 2.10.

⁵⁶ Para 5.17.

⁵⁷ German law, on which this model is loosely based, is to the same effect: see § 894 BGB.

⁵⁸ Para 5.27.

simplicity and fairness. A negative system leaves matters to the ordinary law without intruding *ad hoc* solutions of its own. It is concerned with the narrow topic of registration and not with the much wider topic of property law, thus avoiding the tensions and confusions of bijuralism. It leaves ownership with the "true" owner for as long as is consistent with the protection of a *bona fide* acquirer. It is more readily compatible with the European Convention on Human Rights. Finally, a negative system avoids the inflexibility of coupling with registration the inevitable conferral of a real right.

Evaluation

5.43 In our provisional view, the balance of argument lies in favour of a negative system. However, it is worth re-emphasising that the choice is one of technique and not of policy.⁵⁹ Whether the system ultimately adopted is positive or negative, the respective protections afforded to acquirers and "true" owners will be the same, and the appearance and content of the Register unchanged. And unlike the far-reaching proposals made earlier, in part 4, a switch from a positive to a negative system would affect neither conveyancing practice nor practice at the Register. Indeed, to the outside world the switch would be invisible, for the change is "under the bonnet", a matter merely of engineering. Yet if the cost is slight the benefits, in our view, are considerable. It would result in legislation which was clearer, simpler, more principled, and a great deal less prone to accident. In a Scottish context a negative system is, quite simply, better engineered than the alternative in current operation.

5.44 Our proposal, on which we invite views, is that:

9. **Registration should not always result in the conferral of a real right. Whether a real right is conferred should depend on the ordinary rules of the law of property (as amended by proposal 7(b)).**

SUBORDINATE REAL RIGHTS

5.45 The same broad issue arises with the creation, or variation or discharge, of subordinate real rights. The current positive system ensures effective creation or, as the case may be, extinction, regardless of the validity of the deed. A standard security, for example, is extinguished on the registration of a forged discharge, although with consequences on the debtor's bankruptcy which are far from clear.⁶⁰ A negative system would allow the ordinary rules of property law to take their course, and makes a better fit with our earlier proposal that, as under the current law, rectification should always be possible in respect of a subordinate real right.⁶¹

⁵⁹ Paras 5.7 – 5.9.

⁶⁰ Paras 2.9 and 2.12. In particular, it is unclear whether the heritable creditor could have the security restored by rectification in a question with the trustee in sequestration.

⁶¹ Paras 4.53 – 4.55.

Part 6 Voidable Titles

Introduction

6.1 The concern thus far has been with void titles, that is to say, with titles which, under the general law and disregarding the "positive" effect of the 1979 Act,¹ would have been a nullity.² In part 6 the focus moves from titles which are void to those which are voidable. As before the concern is solely with the position under the ordinary law of property, and the discussion does not extend to titles which, void under the general law, become voidable owing to the positive effect of registration.³

6.2 Since, under the general law, title to land flows from a registered deed and not from the Register itself, it follows that a title can only be voidable if the deed itself is voidable. A voidable title is, nonetheless, perfectly good unless or until the deed on which it is based is set aside by reduction; and if, as often, the deed survives unscathed, there is no practical difference between a title which is good but voidable and one which is absolutely good.⁴ Thus on registration of a voidable deed, an acquirer becomes owner without the aid of the positive effect; as owner he can use the property or dispose of it; and the Register is, and remains, accurate unless or until the deed is reduced.

Voidable titles: three cases

6.3 Three main examples of voidable titles may be identified.

6.4 **Actual fault.** If a deed and, therefore the title from which it derives, is voidable, this is often because of fault on the part of the acquirer. Fraud and undue influence are standard examples. A deed vitiated by fault is an instance of what was described earlier as "transactional error", that is to say, error affecting the conveyance which is being registered.⁵

6.5 **Transferred fault: bad faith.** Alternatively there may be fault on the part of the grantor (or of an author of the grantor). For the deed then to be voidable the acquirer (grantee) must either know of the fault (the case under current consideration) or be a donee (the case considered next). Not all fault qualifies. A standard example is a grant in breach of an undertaking, express or implied, that it would not be made. So if A concludes missives of sale with B and thereafter conveys the same property to C, the conveyance to C is in breach of an implied term of the missives with B. The result is then that, assuming bad faith, C's title is voidable at the instance of B, an application of a principle sometimes known as the

¹ For the difference between a "positive" and a "negative" system, see paras 1.9 and 1.10.

² See generally parts 3 – 6.

³ As to which see para 3.2.

⁴ Para 3.1.

⁵ Para 3.17.

rule against "offside goals".⁶ The other leading example is where the grantor's title was itself already voidable.⁷

6.6 Bad faith implies knowledge of the prior undertaking or, as the case may be, of the voidable title. Normally actual knowledge is needed,⁸ but an acquirer is taken to know the contents of the property register.⁹ By proceeding with the transaction in the face of knowledge, the acquirer is viewed as "an accomplice in the fraud".¹⁰ The result is a form of transferred fault: the fault of the grantor is visited upon the grantee.

6.7 **Transferred fault: absence of consideration.** It seems likely that absence of consideration has the same effect as absence of good faith.¹¹ This means that if the title of a donor was voidable, or the gift was in breach of an undertaking, the title of the donee is voidable in turn. This too can be seen as an example of transferred fault, on the basis that the holder of a prior right is to be preferred to a donee. At least in some cases, however, the position can be analysed by reference to the principles of unjustified enrichment. There are also special statutory rules. Thus for the purposes of insolvency law a gratuitous alienation can be set aside.¹² The same is true of a donation which defeats a claim for aliment or financial provision on divorce.¹³ There are other examples.¹⁴

The effect of the 1979 Act

6.8 A negative system of registration of title would, as usual, leave the ordinary law of property undisturbed.¹⁵ Ownership, acquired by the initial act of registration, would be lost in the event that the conveyance was reduced. The Register would then be inaccurate and could be rectified; but whether rectified or not, the ownership of the acquirer would have fallen.

6.9 The position under the positive system operated by the 1979 Act is more complex. Since title flows from the Register and not from the deed, reduction of the deed has no immediate effect on the title. The Register, it is true, is now inaccurate in showing the acquirer as owner, for accuracy is measured by the ordinary rules of property law and not by the superimposed rules of land registration. But, assuming possession by the acquirer, the Register can be rectified only on one of the narrow grounds listed in section 9(3)(a) of the Act, and in practice the only available ground is likely to be the fraud or carelessness of the acquirer.¹⁶ The 1979 Act therefore puts an additional hurdle in the way of the pursuer. Not only must he establish the fault of the defender, actual or transferred, for the purposes of the reduction, but he then has the further task of showing that the original entry on the Register was caused by the defender's fraud or carelessness. Failure in respect of the second task undermines success in respect of the first, for the decree of reduction cannot be given effect. At most it entitles the pursuer to indemnity from the Keeper; and in certain cases of

⁶ Reid, *Property* paras 695–700.

⁷ Reid, *Property* para 692. This corresponds approximately to Register error (for which see para 3.16).

⁸ Stair I.14.5.

⁹ *Trade Development Bank v Warriner & Mason (Scotland) Ltd* 1980 SC 74.

¹⁰ *Morrison v Somerville* (1860) 22 D 1082, 1089 per Lord Kinloch.

¹¹ Though the position is not perhaps clear beyond doubt. See Reid, *Property* paras 692 and 699.

¹² Bankruptcy (Scotland) Act 1985 s 34.

¹³ Family Law (Scotland) Act 1985 s 18.

¹⁴ Those just mentioned, and others, are listed in s 12(3)(b) of the 1979 Act.

¹⁵ Paras 5.40 and 5.41.

¹⁶ If rectification proceeds on this ground, no indemnity is paid to the displaced owner. See 1979 Act s 12(3)(n).

reduction under statutory powers, the effect of the 1979 Act may be to withdraw even this entitlement,¹⁷ a result described by Lord Jauncey in the leading case as "startling" and coming "very near to confiscation".¹⁸

6.10 Whether it is possible to establish fraud or carelessness will depend on the ground of reduction. In cases of actual fault by the defender – the first of the categories identified above¹⁹ – it may be assumed that there is fraud or at least carelessness, although there may sometimes be a question as to whether this "caused" the inaccuracy, as is required by the Act. Bad faith (the second category) will often not amount to fraud but may be carelessness, although the scope of that unfamiliar term is uncertain.²⁰ Finally, absence of consideration (the third category) is not, of itself, either fraud or carelessness and will result in a request for rectification being refused. An attempt to avoid this result was the subject of the prolonged litigation in *Short's Tr*. In that case a conveyance of land was reduced as a gratuitous alienation at the instance of the donor's trustee in sequestration.²¹ The trustee then sought to avoid the restrictions on rectification by applying for the decree to be registered. For if one door to the Register (rectification) was barred, then it might turn out that a second door (registration) was open and unprotected. As a general rule,²² a document which is eligible for registration must be accepted by the Keeper. It was held, ultimately in the House of Lords, that, although the wording of the relevant provision was sufficiently wide to allow registration, the policy of the Act required that a decree of reduction should enter the Register only by rectification.²³ Hence, with the possibility of registration removed, and rectification in practice unavailable, the trustee's decree was of no avail. The sequel to this case is noted below.²⁴

Displacement of the ordinary law

6.11 At best the 1979 Act presents an additional barrier to the pursuer in an action of reduction. At worst it prevents enforcement of the decree and recovery of the property. It seems doubtful whether this result can be justified.

6.12 The rules of the ordinary law in respect of voidable titles are straightforward and unexceptionable. Insofar as the fraud or carelessness test of the 1979 Act duplicates these rules it is unnecessary. Insofar as it leads to a different result it is unsatisfactory. Suppose, for example, that B by fraud induces A to grant a disposition of land. Later B disposes the land to C by way of gift. The ordinary law would allow A to reduce the dispositions granted to B and C, and hence to recover the property. The 1979 Act, however, would prefer the donee to the defrauded owner – a further example of the tendency of positive systems to award ownership to the wrong person.²⁵

¹⁷ 1979 Act s 12(3)(b).

¹⁸ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14, 26F. For that reason the view was expressed, *obiter*, that s 12(3)(b) should be read as allowing indemnity.

¹⁹ Para 6.4.

²⁰ Paras 7.3 – 7.7. See also A J M Steven, "Problems in the Land Register: Recent Cases Surveyed" 1999 SLT (News) 163, 165-6.

²¹ *Short's Tr v Chung* 1991 SLT 472.

²² But subject to the 1979 Act s 4.

²³ *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14.

²⁴ Para 6.16.

²⁵ Paras 5.23–5.29.

6.13 A result such as that just described might be acceptable if it was needed to satisfy some fundamental principle of registration of title. But that is not the case. To give effect to a decree of reduction does not disturb the mirror principle or the curtain principle. It neither affects the accuracy of the Register nor requires a purchaser to look behind it. And indeed the policy of the ordinary law, of protecting only a *bona fide* acquirer, is entirely consistent with the general thrust of registration of title. If there is a difference, it is in the treatment of donees, a subject already mentioned and to which we return in part 7.

6.14 The needs of other jurisdictions may be otherwise. Quite often registration of title was mooted precisely because the ordinary law was thought to be unsatisfactory. The first Torrens statute, of 1858, began with the explanation that "the inhabitants of the Province of South Australia are subjected to losses, heavy costs, and much perplexity, by reason that the laws relating to the transfer and encumbrance of freehold and other interests in land are complex, cumbrous, and unsuited to the requirements of the said inhabitants".²⁶ Among the perceived difficulties were equitable interests, numerous and liable to affect innocent acquirers by reason of an overly expansive doctrine of constructive notice.²⁷ Torrens statutes sought to remove the problem by protecting acquirers except in the case of actual "fraud" – the remote original, it may be, of the term in the 1979 Act. Something of the same pattern can be detected in the development of the legislation in England and Wales,²⁸ where it has been said that:²⁹

"Above all, the system [of land registration] is designed to free the purchaser from the hazards of notice – real or constructive – which, in the case of unregistered land, involve him in inquiries, often quite elaborate, failing which he might be bound by equities ... The only kind of notice recognised is by entry on the register."

In Scotland, however, the position was, and remains, different. There are no equitable interests. The doctrine of constructive notice is narrow and does not seem to have caused difficulties in practice.³⁰ There is, in short, no reason in this area for a registration statute to innovate on the ordinary law.

6.15 In Scotland, the fraud and carelessness test is more plausibly explained as a device for regulating the fate of *void* titles, where indeed it performs an important role.³¹ That it should apply also to voidable titles seems no more than a conceptual accident, and a further example of the tendency of the Act to operate at too high a level of generality.³² Indeed the disaggregation of void and voidable titles would meet a key argument which found favour in *Short's Tr*, namely that to allow the registration of a reduction of the latter would defeat the operation of the Act in respect of the former.³³

²⁶ Torrens himself was more forthright still, castigating the law of real property as something which "could not be patched or mended: the very foundation was rotten therefore the entire fabric must be razed to the ground and a new super-structure substituted. Like a blundered calculation on a slate, it was in too much confusion for correction, so he would take a sponge and rub the whole out." See *Torrens' Printed Speeches* p 8, quoted in Peter Butt, *Land Law* (4th edn, 2001) p 621.

²⁷ See eg Alberta Law Reform Institute, *Land Recording and Registration Act* p 62.

²⁸ Ruoff & Roper, *Registered Conveyancing* para 1-01 ("evils ... in the law of real property").

²⁹ *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 503F per Lord Wilberforce.

³⁰ Para 6.6.

³¹ Para 3.14.

³² Para 2.25.

³³ *Short's Tr v Keeper of the Registers of Scotland* 1994 SC 122, 141C per Lord President Hope.

The alternative of reconveyance

6.16 The argument that the reduction of a voidable title should be given direct effect in the Register is strengthened by a consideration of alternative remedies. The failure of the trustee in *Short's Tr* to achieve registration of the decree of reduction has already been noted.³⁴ In the end, however, the property was recovered by the simple expedient of returning to the court and asking that the donee be ordained to convey the property to the trustee.³⁵ Although the remedy in that case turned on the wording of section 34 of the Bankruptcy (Scotland) Act 1985, the point is more general. In principle Scots law has regard to rights and not to remedies.³⁶ If, in substance, a person is entitled to the return of property, there is no reason to suppose that he is confined to the remedy of reduction when there are other remedies which would achieve the same result. In view of the difficulties created by the 1979 Act, a proper response to a voidable title might be to seek a reconveyance rather than a reduction.³⁷ But if this is correct, it puts into question the policy of the 1979 Act as well as suggesting that it is easily circumvented in practice. Under the Torrens system, too, the attempted suppression of equitable interests by confining rectification to cases of fraud³⁸ has increasingly been met by the enforcement of such interests by other means.³⁹

Judicial rectification

6.17 Finally, it seems worth examining the treatment of the parallel case of error in expression. Under the general law, such error was, and remains, a possible ground for reduction or partial reduction.⁴⁰ In practice, however, parties usually have recourse to the power to rectify defectively expressed documents invested in the courts by section 8 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985. Since a section 8 order would be worthless in respect of a deed registered in the Land Register unless it could be given effect to on that Register, the Act empowers the court to order rectification even against a proprietor in possession.⁴¹ No indemnity is paid in respect of any resultant loss.⁴² In our view, the policy should be the same in respect of ordinary reductions.

6.18 Our proposal, on which we invite views, is that

10. **Reductions of voidable deeds should be given effect as of right by an appropriate entry on the Land Register.**

Effect prior to registration

6.19 If proposal 10 is accepted, it is a matter for future decision whether reductions should enter the Register by rectification, as at present, or by registration, as sought in *Short's Tr*. Either way, entry on the Register would mark the point at which future acquirers

³⁴ Para 6.10.

³⁵ *Short's Tr v Chung* (No 2) 1999 SC 471.

³⁶ Niall R Whitty, "From Rules to Discretion: Changes in the Fabric of Scots Private Law" (2003) 7 EdinLR 281.

³⁷ Reid, *Property* para 700. That, after all, is the remedy in the case of corporeal moveables, where there is no deed to reduce.

³⁸ See para 6.14.

³⁹ These are the so-called *in personam* claims. The most recent study is Lyn Stevens and Kerry O'Donnell, "Indefeasibility in decline: the *in personam* remedies", a paper, as yet unpublished, delivered at a conference on *Taking Torrens into the 21st Century* held at the University of Auckland in March 2003.

⁴⁰ *Anderson v Lambie* 1954 SC (HL) 43; *Aberdeen Rubber Ltd v Knowles & Sons (Fruiterers) Ltd* 1995 SC (HL) 8.

⁴¹ 1979 Act s 9(3)(b).

⁴² 1979 Act s 12(3)(p).

of the property came to be affected. The reasoning, however, would be different as between positive and negative systems. Under a positive system the reduction would be of no effect until it entered the Register. Under a negative system it would take effect at once, divesting the registered proprietor of ownership, but a *bona fide* acquirer could continue to transact on the faith of the Register, on principles discussed earlier.⁴³

Subordinate real rights and indemnity

6.20 For subordinate real rights, the issues discussed above arise in a different way. With the single exception of long leases, the holder of a subordinate real right is not a proprietor in possession.⁴⁴ This means that reduction will always lead to rectification of the Register, and hence to the extinction of the right. The question then becomes one of indemnity. Fraud or carelessness excludes a claim for indemnity just as surely as, in cases involving ownership, it allows a claim for rectification. But the same difficulties arise as to the relationship with the grounds of reduction.

6.21 Where, for example, a standard security is reduced on the basis of the rule set out in *Smith v Bank of Scotland*,⁴⁵ it seems undesirable that the creditor should have a claim on the indemnity fund. Nonetheless the actual position is unclear. The basis of the reduction is the breach of a duty of good faith owed by the creditor to the debtor. Plainly that is not fraud, and whether it is carelessness is at least open to question.

6.22 Where the cause of reduction is donation rather than bad faith, the right-holder will have a claim in indemnity except in the few cases where, under the 1979 Act, it is expressly excluded.⁴⁶ That issue is considered again in part 7.⁴⁷ In cases involving bad faith, however, it is difficult to see any justification for the payment of indemnity. That payment should be

⁴³ See proposal 7 in para 4.52. Much the same result is currently achieved, for Sasine transactions, by s 46 of the Conveyancing (Scotland) Act 1924. As an incentive to register, the true owner would be denied indemnity if he had delayed.

⁴⁴ Para 4.12.

⁴⁵ 1997 SC (HL) 111.

⁴⁶ For the exclusion, see 1979 Act s 12(3)(b). This provision is not needed in respect of ownership (unless there is no possession) because the very ground which allows rectification (fraud and carelessness) also excludes a claim for indemnity. But with subordinate real rights the right-holder may be neither fraudulent nor careless and yet rectification proceeds. This is the answer to the House of Lords' difficulty with s 12(3)(b) in *Short's Tr v Keeper of the Registers of Scotland* 1996 SC (HL) 14 at 20F and 27B.

⁴⁷ Para 7.26.

even a possibility under the current law⁴⁸ is another example of the unfortunate conflation of voidable titles with void.⁴⁹

6.23 We propose, therefore, that –

11. **As a general rule indemnity should not be paid in respect of rights lost by reduction of a voidable deed.**

⁴⁸ ie because the right holder, while in bad faith in the sense of the general law (thus allowing reduction) is not fraudulent or careless in the sense of the 1979 Act (thus allowing indemnity).

⁴⁹ Para 6.15.

Part 7 Good Faith and Value

GOOD FAITH

Fraud and carelessness

7.1 Whether, in any particular case, the statutory guarantee of title is to be awarded or withheld is determined largely by reference to the concepts of fraud and carelessness. More precisely, an inaccuracy on the Register can be rectified even against a proprietor in possession in circumstances where it was caused wholly or substantially by his fraud or carelessness; and, following rectification, no indemnity is due where the claimant by his fraudulent or careless act or omission caused the loss.¹ In effect fraud and carelessness perform the role which, under the ordinary law, is assigned to bad faith; for it is a familiar rule of that law that an acquirer in good faith is protected against certain types of infirmity of title.² The concepts are not, however, identical. Fraud and carelessness are directed at conduct. There must be an act or omission,³ and the act or omission must in some sense be wrongful. Good and bad faith, at least in the present context, are directed at knowledge. A person who knows (or, sometimes, who ought to know) of a title defect is in bad faith in respect of that defect. Whether he caused the defect or resulting loss, or whether his conduct was wrongful, is of no importance. Of course, an acquirer who caused a defect – who forged a disposition, for example – will know of it and so be in bad faith. But an acquirer is in bad faith even if he knows of the forgery of others.

7.2 The origins of the 1979 Act provisions are of some interest. So far as concerns the state guarantee, the Reid Committee concluded that "the principles underlying the English practice are unexceptionable and we recommend that they be applied to Scotland".⁴ Accordingly, the clause drafted by the Henry Committee was a close copy of the English legislation which, at that time, made no mention of carelessness⁵ while giving a limited role to knowledge.⁶ Between the publication of the Henry Report and the enactment of the 1979 Act the original English provision, which had been subject to criticism,⁷ was replaced by a new provision prepared by the Law Commission.⁸ This protected a proprietor in possession against rectification "unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care".⁹ In substance this was the test then

¹ 1979 Act ss 9(3)(a)(iii), 12(3)(n).

² See eg D L Carey Miller, "Good Faith in Scots Property Law" in A D M Forte (ed), *Good Faith in Contract and Property Law* (1999). The important example of voidable titles was discussed in part 6.

³ *Doughbar Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 at 532G per Lord Macfadyen.

⁴ Reid Report para 114. And see also Henry Report para 47 note 1.

⁵ "Lack of proper care" dates only from the Land Registration and Land Charges Act 1971 s 3, and in the context of indemnity.

⁶ The rectification provision was para 47(4)(a). There was to be no rectification against a proprietor in possession "unless such proprietor shall be a party or privy or shall have caused or substantially contributed by his act, neglect or default to the fraud, mistake or omission in consequence of which such rectification is sought". The model was s 82(3)(a) of the Land Registration Act 1925.

⁷ S Cretney and G Dworkin, "Rectification and Indemnity: Illusion and Reality" (1968) 84 LQR 528.

⁸ Law Commission, *Working Paper on Transfer of Land: Land Registration (Third Paper)* (Law Com WP No 45, 1972) para 81.

⁹ Land Registration Act 1925 s 82(3)(a), inserted by the Administration of Justice Act 1977 s 24.

adopted in Scotland by the 1979 Act. Whether, in 1979, the significance of the change was understood and assessed may be open to question.

Some difficulties

7.3 Experience has exposed the shortcomings of the fraud and carelessness test. There is uncertainty as to the meaning of "carelessness" which, as the Law Commission in England has pointed out, is not "a technical expression familiar to conveyancers".¹⁰ More importantly, the test is an unexplained and unexpected departure from the common law, under which the protection of acquirers turns on questions of good faith. An important example of the resulting awkwardness was discussed in part 6.¹¹ In 1987 the Law Commission in England went so far as to recommend that the general law be reinstated:¹²

"We consider that it would make for greater consistency with the general principles of property law and conveyancing if the apparent protection against rectification conferred by section 82(3) were to be redrafted so as to benefit registered proprietors who were prudent purchasers for value in good faith ..."

But in England and Wales, as in jurisdictions which operate the Torrens system, a good faith test would reawaken the doctrine of notice and so risk subjecting acquirers to those equitable interests which it was one of the objects of registration of title to defeat.¹³ In its most recent review, therefore, the Law Commission recommended the retention of the criterion of fraud and carelessness,¹⁴ and the Land Registration Act 2002 so provides.¹⁵ In Scotland the position is different. On the one hand, good faith is the traditional and well-understood test; and on the other hand, equitable interests are unknown. Here, as in some other places in the 1979 Act, the departure from the ordinary law seems more a result of accident than of any special requirement of registration of title.

7.4 The choice would not, of course, matter if each test were in substance the same. And certainly there is much common ground between the act or omission required for fraud or carelessness and the knowledge which is the basis of bad faith. Thus a title defect caused by a fraudulent or careless *act* of the acquirer must presumably be known to – that is, be within the actual knowledge of – the acquirer who perpetrated the act. Similarly, a title defect caused by careless *omission* – typically an omission to see to the normal conveyancing inquiries and formalities – is likely to be within at least the acquirer's constructive knowledge. The position, however, is different in respect of defects caused by the act or omission of a third party. Here the acquirer might, or might not, know of the defect, but in any event it did not arise as a result of his fraud or carelessness.

7.5 The leading illustration is *Doubar Properties Ltd v Keeper of the Registers of Scotland*.¹⁶ By mistake the Keeper included on the title sheet a right which did not attach to the property in question. Subsequently the pursuers bought the property in the full knowledge of the mistake. When the Keeper rectified the Register by removing the right (which he was able

¹⁰ Law Commission, *Property Law: Third Report on Land Registration* (Law Com No 158, 1987) para 3.14.

¹¹ Paras 6.9 and 6.10.

¹² Law Commission, *Property Law: Third Report on Land Registration* (Law Com No 158, 1987) para 3.15.

¹³ Para 6.14.

¹⁴ Law Com No 271 para 10.15. See, for a discussion, *Land Registration for the Twenty-first Century: a Consultative Document* (Law Com No 254, 1998) paras 3.39 – 3.50 and 8.35.

¹⁵ Land Registration Act 2003 sched 4 paras 3(2)(a) and 6(2)(a), sched 8 para 5.

¹⁶ 1999 SC 513.

to do as there was no proprietor in possession), the pursuers sought payment of £1.39 million in respect of its value. Indemnity was held to be payable, subject to proof of loss. Mere knowledge, it was said, was not carelessness; and the knowledge in this case was not accompanied by an act or omission which could itself be characterised as careless. In the absence of carelessness (or fraud), therefore, the Keeper must indemnify the pursuers for their loss. As a matter of policy, the result is hardly satisfactory. The pursuers were not misled by the Register. They read the entry and knew it was wrong. Nonetheless they were compensated for the loss of a right to which, as they knew, there was no "true" entitlement. A simple good faith test would have avoided the difficulty. It is instructive to compare *Doughbar* with a case decided a few years earlier in Germany.¹⁷ In the course of preparing new register pages, a use restriction which had previously been registered was omitted by the registrar. A subsequent acquirer knew of the restriction, and that it had been omitted by mistake. Under German law the register is deemed conclusively correct in favour of an acquirer in good faith. It was held that an acquirer who knows that the register is wrong is not in good faith in respect of the error or omission in question, and hence the statutory guarantee of title did not apply.

7.6 Finally, a technical point may be mentioned. Good faith is usually straightforward, for either the acquirer knew of the defect or he did not know. But with fraud and carelessness matters are less easy. First, the legislation must select the event to which the fraud or carelessness is supposed to lead, and second, there is a requirement of a causative link. Both cause difficulties. The events selected by the 1979 Act are the inaccuracy on the Register, in the case of rectification, and the loss itself, in the case of indemnity. Almost certainly the fit is not perfect, because a loss may be attributable to factors other than those which cause the inaccuracy on the Register. More serious is the problem of causation. The difficulties where the act or omission was by a third party and not by the acquirer have already been mentioned.¹⁸ But even where the fraud or careless act or omission was by the acquirer, it may be open to question whether it *caused* the inaccuracy or, as the case may be, the loss. Take, for example, the case of a defective conveyance leading to an inaccurate entry on the Register. Even if the acquirer, through carelessness, caused the defect in the conveyance, it is less clear that he caused the inaccurate entry on the Register. The Keeper, after all, has his own opportunity to examine deeds, and the decision to register is his and not the acquirer's. Whether the Keeper missed the defect (in which case he may be as "careless" as the acquirer), or found it but decided that it should be overlooked, it is arguable that the resulting inaccuracy is caused by the Keeper and not the acquirer.

7.7 In our provisional view, there is only disadvantage in the retention of the fraudulent and careless test. Our proposal therefore is that:

- 12. In determining the applicability of the title guarantee mentioned in proposals 2 and 3, the fraud and carelessness test of the current law should be replaced by a test based on good faith.**

¹⁷ A decision by the *Oberlandesgericht* at Hamm, reported at (1993) RhNK 159, and discussed in Raff, *German Real Property Law* pp 382-4.

¹⁸ For this reason bad faith is a better test than carelessness even in relation to transactional error. For an acquirer would not be careless in respect of an act or omission of a third party – for example, the failure of a witness to sign properly.

Good faith

7.8 **Meaning.** It remains to consider the details. In the context of knowledge, the idea of good faith carries two different senses, although there may be a tendency for one to shade into the other.¹⁹ The first sense – and the usual one in the case of property law²⁰ – is subjective, based on actual knowledge. The question here is, what, at the material time, did the acquirer really know. This approach can be seen in what seems to be the only application of principles of good faith to registration of title, section 1(1A)(b) of the Prescription and Limitation (Scotland) Act 1973. This provides that positive prescription is not to run where

"the possession was founded on registration in respect of an interest in land in the Land Register of Scotland proceeding on a forged deed and the person appearing from the Register to be entitled to the interest was aware of the forgery at the time of registration in his favour."

Objective good faith, by contrast, is based on the standard of the reasonable man. The question is not merely what the acquirer knew but what, in the circumstances, he ought to have known. Examples in statute are common. For example, the protection against rectification of defectively expressed documents, which is otherwise afforded to third parties, does not apply where the person in question²¹

"knew, or ought in the circumstances known to him at that time to have been aware, that the document or (as the case may be) the title sheet failed accurately to express the common intention of the parties to the agreement ..."

In discussing good faith it is always necessary to be clear whether knowledge is to be measured subjectively or objectively.

7.9 Knowledge by an agent, acting as such, is treated as knowledge by the principal. That is of particular importance in land registration where a solicitor or other agent will usually be engaged to carry out the transaction.²²

7.10 **Scope.** Under the model provisionally favoured in parts 3 and 4, a *bona fide* acquirer is protected against both Register error and transactional error.²³ In respect of the first, the acquirer is, generally, entitled to keep the property: in other words rectification of the Register is refused.²⁴ In respect of the second, his entitlement is to indemnity only. Each requires separate consideration.

7.11 **Register error.** It seems self-evident that only subjective good faith can be relevant for Register error. To lose the statutory protection the acquirer must know, as a positive fact, that the Register is wrong – as in the *Douglas* case discussed above. If mere suspicion were enough, an acquirer, alerted to a possible error, would have no choice but to go behind the Register and inspect the prior deeds, in disregard of the curtain principle and consequently

¹⁹ Reid, *Property* para 132.

²⁰ M Hesselink, "Good Faith" in A Hartkamp, M Hesselink, E Hondius, C Joustra and E du Perron (eds), *Towards a European Civil Code* (2nd edn, 1998) 285, 287.

²¹ Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 s 9(3)(a).

²² *Wilson v Keeper of the Registers of Scotland* 2000 SLT 267 at 276F per Lord McCluskey.

²³ For the distinction between Register error and transactional error, see paras 3.15–3.18.

²⁴ But not in respect of the acquisition of subordinate real rights (other than long leases): see paras 4.53–4.55.

of one of the main purposes of registration of title.²⁵ It comes as no surprise that the equivalent rule in German law insists on actual knowledge.²⁶

7.12 There is one qualification. Where the title sheet contains an exclusion of indemnity, an acquirer is put on notice that the title is or may be defective. He should not then have the status of a *bona fide* acquirer in respect of the matter affected by the exclusion but must take title as it is. Otherwise a person who, by definition, would not be entitled to indemnity would nonetheless be able to retain the property even if the title turned out to be defective.²⁷ The result is the same under the present law, for exclusion of indemnity is one of the grounds for rectification of the Register in a question with a proprietor in possession.²⁸

7.13 **Transactional error.** The position is different for transactional error. Here there is no reliance on the Register as such. Instead, the acquirer (or at least the acquirer's solicitor or other agent) makes standard inquiries in respect of the grantor and his title and capacity to grant extending, in a case of first registration, to a full examination of the Sasine title. A subjective approach to good faith would undermine this practice, for if an acquirer were in bad faith in respect only of what he knew, there would be a strong incentive to know as little as possible. It seems unavoidable, therefore, that for transactional error good faith should import an objective standard. An acquirer should be expected to make the usual conveyancing inquiries. If he fails to do so, he is still fixed with the knowledge which such inquiries would have revealed. In the event that protection is extended to donees, as discussed below, it is assumed that the rule ought to be the same, notwithstanding that in such cases the title may in reality be subject to a less rigorous examination.

7.14 By and large, this proposal would reproduce the current law where an objective standard is imported by means of the concept of carelessness. The meaning of "carelessness" in the context of transactional error was considered by the Inner House in *Wilson v Keeper of the Registers of Scotland*:²⁹

"In a matter of the present kind, where any carelessness would apparently have to be on the part of the solicitors rather than the actual proprietor in possession, there would evidently have to be material indicating that the solicitors departed from a usual and normal professional practice or that the alleged failure to discover alleged flaws in the title ... was a failure which no professional conveyancer of ordinary skill would have committed if acting with ordinary care."

In England and Wales also the equivalent test³⁰ has been said to refer to "failure to carry out the usual conveyancing inquiries and inspections".³¹ An advantage of this formulation is to

²⁵ In the Irish case of *Persian Properties Ltd v The Registrar of Titles and the Minister for Finance* [2003] IESC 12 (available on www.bailii.org/ie/cases/IESC/2003/12.html) an acquirer who completed a transaction in reliance on the Register was awarded indemnity despite being aware of a possible hostile claim (which in the event materialised) in respect of part of the property. We are grateful to Professor R R M Paisley for drawing this case to our attention.

²⁶ § 892(1) BGB ("... die Unrichtigkeit dem Erwerber bekannt ist"). For a discussion, see Raff, *German Real Property Law* pp 382 ff.

²⁷ If, however, the title was good all along, and hence the restriction of indemnity over-cautious, the acquirer can retain the property without the help of legislative protection.

²⁸ 1979 Act s 9(3)(a)(iv).

²⁹ 2000 SLT 267 at 276 F-G *per* Lord McCluskey. See also *Douglas Properties Ltd v Keeper of the Registers of Scotland* 1999 SC 513 at 532-3 where, in a different context, Lord Macfadyen stressed the importance of knowledge and of the opportunity to take some step which would have avoided the harm.

³⁰ Now Land Registration Act 2002 sch 4 paras 3(2)(a), 6(2)(a), sch 8 para 5. The wording is "lack of proper care".

³¹ DJ Hayton, *Registered Land* (3rd edn, 1981) p 175.

ensure that an innocent acquirer is always able to recover, either from the solicitor (if the solicitor has been negligent) or from the Keeper (if the solicitor has not). An objective approach to good faith would carry the same advantage.

7.15 On an objective approach, an acquirer would be entitled to indemnity except where he knew, or ought reasonably to have known, of the transactional error in question. Patent defects can be assumed to be within his knowledge, for if an acquirer's agent drafts the disposition, the acquirer must be treated as familiar with its contents; and he can be taken to know of such other documentation as, in normal conveyancing practice, an acquirer would be expected to consult. Latent defects, however, will often be unknown. Forgery, in particular, may be undetectable. If, later, it is uncovered, the acquirer will usually have proceeded in good faith and so have a claim against the Keeper for indemnity. The present law is the same.³²

7.16 **Fixed list of defects.** At one stage we were attracted by a different approach. No protection would be given for transactional errors which were reasonably discoverable. Other, less easily uncovered, errors would be listed and the acquirer protected, except in a case where there was actual knowledge. Constructive knowledge, or rather its absence, would thus be re-expressed in the form of fixed list of defects. This approach had the obvious virtues of certainty and simplicity, but an attempt to produce a workable list quickly revealed the difficulties. Should it be confined to the most serious defects such as forgery and lack of capacity? Or should it attempt to cover all defects which might conceivably arise? If so, there would need to be included, for example the case where a deed was delivered or registered without the authority of the transferor, and the case where the transferor died after execution and before delivery (an issue litigated only once, in 1696).³³ Then there is the problem of nullities which are "new", either in the sense that the law has changed or that they have been recognised as nullities for the first time. Following the decision of the House of Lords in *Sharp v Thomson*,³⁴ for example, property which, at the time of attachment of a floating charge, was already the subject of a delivered disposition, does not fall under the receivership. Therefore it cannot be transferred by the receiver.³⁵ As a result, it would be necessary to protect an acquirer against absence of title in a receiver owing to the existence of a latent delivered disposition.³⁶ To this must be added the analogous situation of absence of title in a trustee in sequestration or liquidator owing to the existence of a latent trust.³⁷ There might also be doubt as to what should and should not be included in any list: in other words whether or not the investigation of a particular topic falls properly within the work of a solicitor acting for a buyer. Moreover, even if a clear view could be reached as to the current position, it would be likely to change with changes in the law and practice of conveyancing. In the end, therefore, and despite superficial attractions, we concluded that a fixed list could not be managed.

³² *Kaur v Singh* 1999 SC 180, 2000 SLT 1323.

³³ *Stamfield's Creditors v Scot's Children* (1696) 4 Brown's Supp 344.

³⁴ 1997 SC (HL) 66.

³⁵ See Scottish Law Commission, Discussion Paper on *Sharp v Thomson* (Scot Law Com DP No 114, 2001) para 2.15.

³⁶ This is currently covered by the guarantee, at least in the ordinary case: see *Registration of Title Practice Book* para 5.37.

³⁷ The effect of a trust is to exclude the trust property from the insolvency and deny the trustee or liquidator title to deal with it. See *Heritable Reversionary Co Ltd v Millar* (1892) 19 R (HL) 43; Bankruptcy (Scotland) Act 1985 s 33(1)(b).

7.17 **Timing.** Finally it is necessary to fix a point in time at which good faith is to be tested and after which knowledge of defects ceases to matter. There are three main possibilities:³⁸ (i) the date of delivery of the conveyance (ii) the date of registration and (iii) the date on which the amended land certificate is issued by the Keeper. Under the 1979 Act, the date of registration is usually the date on which the application is received.³⁹ Typically the conveyance will have been delivered some two or three weeks earlier. The land certificate arrives some weeks or, especially in the case of a first registration, some months after the date of registration.

7.18 This last date (date of land certificate) can probably be discarded, partly because it is so variable, and partly because an acquirer should not be fixed with knowledge which was not reasonably discoverable at the time of settlement or registration. It is true, of course, that a title defect which comes to the attention of the acquirer after registration may come to the attention of the Keeper as well, giving rise to the possibility of an exclusion of indemnity or even a refusal to complete registration.⁴⁰ It may be necessary to return to this subject in our second discussion paper.⁴¹ But at any rate the acquirer should not be bound to share such supervening knowledge with the Keeper.

7.19 The first date (date of delivery) has certain attractions. It marks the point at which the acquirer becomes committed by payment of the price. Bad news arriving later will be unwelcome and potentially harmful. Nonetheless it is awkward to suppose that an acquirer can settle a transaction in good faith and then, without penalty, register in bad faith. If a defect emerges between settlement and registration, it seems unsatisfactory that it should be suppressed in the application for registration. In other words, if an acquirer is to be protected by the Register, then he ought to register with clean hands. Others have reached the same conclusion. The provision from the Prescription Act quoted above requires good faith at the time of registration.⁴² The common law rule for voidable titles is apparently to the same effect.⁴³ Under the system of land registration in Germany – where, unlike the English and Torrens systems, good faith is the determinant of the acquirer's protection – faith is likewise tested at the point of registration.⁴⁴ As well as being sound in principle, such a rule seems acceptable in practice. If a defect already existed at the time of settlement then, in most cases at least, it ought to have been uncovered by the acquirer and so will be within his knowledge, actual or constructive. And if it emerges after settlement, it will almost always involve the insolvency of the transferor – a topic which may require special

³⁸ A fourth possible date is the date on which the form applying for registration is signed.

³⁹ 1979 Act s 4(3).

⁴⁰ Paras 3.44 and 3.45.

⁴¹ Thus there is an argument that the protection of the acquirer is incomplete unless he is protected in this situation also, for it may be unprincipled that protection should be lost merely on account of chance knowledge on the part of the Keeper. Under the present law, however, indemnity is paid only when the Register is rectified, and a fuller protection of the acquirer would involve an extension of indemnity beyond rectification. Indemnity is among the subjects to be considered in our second paper. The issue does not usually arise in respect of Register error because a good statutory title is conferred and there is no question of claiming indemnity.

⁴² Para 7.8.

⁴³ *Alex Brewster & Sons v Caughey* 2002 GWD 15-506 at para 73 *per* Lord Eassie. For a different view, see Scott Wortley, "Double Sales and the Offside Trap: Some Thoughts on the Rule penalising Private Knowledge of a Prior Right" 2002 JR 291.

⁴⁴ § 892(2) BGB: "Ist zu dem Erwerbe des Rechtes die Eintragung erforderlich, so ist für die Kenntnis des Erwerbers die Zeit der Stellung des Antrags auf Eintragung .."

treatment for other reasons and which is considered further in our Discussion Paper on *Sharp v Thomson*.⁴⁵

7.20 **Proposal.** The previous discussion may be summarised in the form of a proposal, on which we invite views:

13. (a) For the purposes of proposal 12 good faith should be measured by reference to –
 - (i) in the case of Register error, that which the acquirer actually knew, and
 - (ii) in the case of transactional error, that which the acquirer actually knew or ought reasonably to have known.
- (b) The relevant date for assessing knowledge should be the date of registration (ie the date on which the application for registration is received).

VALUE

Current law

7.21 There remains the question of whether good faith should be sufficient to attract the statutory guarantee of title or whether value must also be given. Take, for instance, the case of a forged disposition. The current law is unclear. The 1979 Act, it is true, makes no distinction between purchasers and donees. Registration, for both, transforms a void title into one which is merely voidable, and the resulting inaccuracy in the Register cannot usually be rectified to the prejudice of a proprietor in possession except in cases of fraud or carelessness.⁴⁶ Thus a *bona fide* donee, like a *bona fide* acquirer for value, receives a title which is good beyond challenge, and the "true" owner must claim indemnity from the Keeper. So much is clear. What is less clear is whether, in the case of donees, the statutory gain can be reversed by recourse to the doctrine of unjustified enrichment.⁴⁷ While the donee in one sense acquires *cum causa* (ie by donation), in another sense he acquires *sine causa* since his author (the forger) had no title to grant. Can, therefore, the "true" owner require the donee to disgorge his enrichment? And since the "true" owner will in practice seek indemnity from the Keeper, can the Keeper, subrogated to the "true" owner's rights, make good his loss from the donee? If the answer to these questions is "yes", as it may be, the protection afforded to a donee by the 1979 Act is not all that it seems. The donee can keep the property, as a *bona fide* acquirer, but he must account for its value.

7.22 Thus far it has been assumed that the donee is in possession. If he is not, the position is different but no more certain. Under the 1979 Act the property is restored to the "true" owner and indemnity paid to the donee. The result is enrichment of the donee but without any mirror loss on the part of the "true" owner. Whether this enrichment can be reversed

⁴⁵ Scot Law Com DP No 114, 2001.

⁴⁶ 1979 Act ss 3(1)(a), 9(3)(a).

⁴⁷ K G C Reid, "Unjustified Enrichment and Property Law" 1994 JR 167, 187-8. We are grateful to one of our former Commissioners, Professor Niall R Whitty, for putting his expertise on this topic at our disposal.

seems doubtful. The Keeper has suffered loss, in paying the indemnity, but it is difficult to see any basis on which that loss could be made good. Yet if the gain is kept, a donee who does not possess may be in a stronger position than one who does.

7.23 Elsewhere, systems of registration of title are often unsympathetic to donees. In Germany the good title conferred on registration by the law of property is undermined by the obligation of the donee, under the law of unjustified enrichment, to pay the "true" owner the value of the land thus acquired.⁴⁸ The rule in the Torrens system is not free from doubt and in any case varies from country to country, but in general donees are not protected in respect of void titles.⁴⁹

Options for reform

7.24 Two broad options are available for reform. One is to clarify what may be the current law and to deny special protection to a donee. Under this option a person taking a gift must simply take his chance. If the title is bad, the gift is inept. On the model provisionally adopted in part 5, the donee's title would be void despite registration, allowing the "true" owner to retain title throughout. Even so, the effect of other proposals would be to improve a donee's position in two respects. In the first place, positive prescription would run in his favour, allowing ownership to be acquired after possession for ten years.⁵⁰ And secondly, donees would benefit, if only indirectly, from the proposed rule which would confer ownership on a *bona fide* acquirer for value.⁵¹ Thus suppose that B is mistakenly registered as owner of land which really belongs to A. B sells to C who later donates the land to D. Assuming that C bought in good faith, the defect in title is washed out by C's registration, C becomes owner and can confer a good title on D. A receives indemnity from the Keeper.⁵²

7.25 The second option, to protect the donee, raises the familiar question as to whether the acquirer should be given the property or merely its value. In relation to purchasers, our provisional view was that the type of protection should depend on the type of error. A person buying in reliance on a false entry in the Register would usually be allowed to keep the property, but an error in the current transaction would only give entitlement to indemnity.⁵³ It would be possible to apply the same rule to donees, on the basis that the preconditions for protection, including the standard of good faith, are the same in both cases. Alternatively, the donee's claim could be restricted to indemnity even in the case of Register error. This acknowledges that a donee may not in practice examine the donor's title or consult or rely on the Register. At the same time it upholds security of title by preferring the claim of the "true" owner over that of a mere donee: the former keeps the property and the latter is compensated with indemnity. Both approaches have merit but our provisional view is that, if a donee is to be protected, the protection should take the form of indemnity and not the property. It is accepted that one result of this view is that, in a case where

⁴⁸ §§ 816(1), 892(1) BGB. For a discussion, see Raff, *German Real Property Law* pp 354 ff.

⁴⁹ Mapp, *Torrens' Elusive Title* pp 121-5; G W Hinde and D W McMorland, *Butterworths Land Law in New Zealand* (1997) pp 209-18; Bruce Ziff, *Principles of Property Law* (3rd edn, 2000) pp 435-6; Peter Butt, *Land Law* (4th edn, 2001) pp 684-8.

⁵⁰ Paras 3.4-3.11.

⁵¹ Paras 4.45-4.52.

⁵² It may be necessary for any legislation to make clear that no claim will lie in unjustified enrichment.

⁵³ Paras 4.45 and 4.52.

retention of the property is important, a donee would be obliged to go behind the Register – to breach the curtain principle, in other words – if he is to be assured as to the donor's title.⁵⁴

Voidable titles

7.26 If donees were to be indemnified in respect of void titles – the result of the second option just described – it would presumably be necessary to extend the indemnity to voidable titles as well. That would innovate on the ordinary law which, in relation to voidable titles, equates donation with actual bad faith.⁵⁵ On the other hand, there seems no strong reason of legal policy for refusing the extension.

Arguments against protection

7.27 The choice, in summary, is between state indemnity for the *bona fide* donee or no protection at all. In either case the "true" owner would, in our provisional view, be reinstated in the property.

7.28 A number of reasons can be advanced for denying protection to a donee. As already mentioned, a donee does not usually transact in reliance on the Register.⁵⁶ Nor does he pay for the property. To give a donee indemnity is, arguably, to give him something for nothing. It is not clear why the state should make good an inept gift – or, if it is to do so, why the principle should be confined to gifts of land.

7.29 Fraud is also a danger. Most gifts take place within a family or, in commercial life, within a group of companies. The availability of indemnity presents an opportunity to enrich the family or group at the expense of the state. Often, admittedly, that would be difficult to achieve without exposing the donor to liability in delict or under the criminal law. Thus a husband who forges Great Aunt Beth's signature on a disposition in favour of his credulous wife is likely to find that the payment of indemnity to his wife is cancelled out by a claim by the Keeper in respect of his fraud. But a scam will not always be easy to unravel. If Great Aunt Beth's memory is poor, she may have no recollection as to whether she signed or not. At any rate, proof may be lacking that the signature was forged by her great nephew. Insofar as the Keeper has a claim it will usually be on the basis of subrogation to a claim held by the donee;⁵⁷ but, especially if only simple warrandice is given in the disposition, the facts may exclude the claim. Retribution, moreover, might be avoided by insolvency. If for example a wife, secretly on the verge of bankruptcy, conveys the family home to her husband, the disposition can be set aside as a gratuitous alienation but, on the option under consideration, indemnity would be paid to the husband. Since any claim by the Keeper against the wife is likely to be valueless, the overall result is to save the family home at the expense of the state.

⁵⁴ If, however, the donor was himself a *bona fide* acquirer for value, the effect of the model provisionally favoured in this paper would be to restrict examination of title to the immediate deed in the donor's favour. For any previous error would already have been washed out of the title.

⁵⁵ Para 6.7.

⁵⁶ Although, for the purposes of assessing good faith, in the event that donees are to be protected, he would be fixed with a knowledge of its contents.

⁵⁷ 1979 Act s 13(2).

7.30 These arguments can be criticised as overlooking the role of insurance. Although not usually viewed in this way, the single fee paid by an applicant for registration can be seen as having two distinct components. One is to cover the cost of registration. The other, much smaller in amount, serves as a premium for compulsory state insurance.⁵⁸ This suggests that an acquirer is protected, not merely because he relies on the Register, but also because he takes out insurance. Indeed that, at root, is the justification for protecting a purchaser in respect of transactional (as opposed to Register) error.⁵⁹ And the existence of an insurance element in the registration fee negates the argument that, in paying indemnity, the state is giving something for nothing. If the very event that has been insured against has come to pass, it is to be expected that the insurer will make the necessary payment. The existence of an indemnity scheme, moreover, makes it possible to satisfy all deserving interests. The "true" owner receives the property and the donee its value; and the payment to the donee, on this view, is a matter of insurance and not an enrichment at the expense of the "true" owner.⁶⁰

7.31 A focus on insurance also puts the danger of fraud in perspective. All insurance schemes are vulnerable to fraudulent claims. But that is not an argument for abandoning insurance but for greater care in making payments.⁶¹ In this connection it seems worth noting that the 1979 Act already excludes claims for indemnity in respect of gratuitous alienations by bankrupts,⁶² and in the event that indemnity is extended to donees generally it may be necessary to consider further categories where no payment would be made.

Arguments in favour of protection

7.32 Insurance is also, of itself, a key argument in favour of protecting donees. Donees pay the same registration dues as acquirers for value; and having thus paid for insurance, it may seem unprincipled that they should be denied its benefit. Admittedly, registration in the (uninsured) Register of Sasines is no cheaper than in the Land Register, and it is also true that there is no discount in the fee where indemnity is excluded by the Keeper in the Land Register. Nonetheless the general principle remains that a person who is made to pay for insurance ought, in the ordinary case, to be entitled to its benefits.

7.33 This, and other, arguments were persuasively made by the Joint Land Titles Committee of Canada in recommending that, contrary to the current law, protection should be extended to donees ("volunteers"):⁶³

"The general law looks more favourably on purchasers who give value for interests in land than upon volunteers who do not ... However, the Joint Committee have concluded that the protection of title registration should be given to registered owners whether or not they have given value for their interests. Volunteers who register interests will contribute to the cost of the compensation system. Volunteers who become registered as owners of interests of the kind that can be registered are likely to spend money on land and involve it in their economic affairs and thus require assurance of ownership as much as do purchasers. The elaborate

⁵⁸ This is because the registration system is self-financing, ie the fee for registration must cover all costs including the cost of indemnity payments. See Land Registers (Scotland) Act 1868 s 25.

⁵⁹ Para 3.33.

⁶⁰ Mapp, *Torrens' Elusive Title* pp 126-7.

⁶¹ Mapp, *Torrens' Elusive Title* pp 127-8.

⁶² 1979 Act s 12(3)(b).

⁶³ Joint Land Titles Committee, *Renovating the Foundation* p 36.

investigations required by the common law are as burdensome for volunteers as for purchasers, and the exposure to risk of ownership being upset by someone further up the chain of title is just as harsh, once investment has been made in land."

In assessing these arguments it should be borne in mind that, in Scotland, a *bona fide* donee has a claim against the repossessing "true owner" for any increase in value attributable to improvements, and can keep possession until payment has been made.⁶⁴

7.34 One other matter may be mentioned. Suppose that a husband wishes to dispoise the family home as a gift to his wife, and further suppose that, although the husband is currently registered as owner, the title is bad due to transactional error. On the basis of the proposals made earlier in this paper, the husband would not own but, assuming good faith, would have a claim for indemnity against the Keeper. Unless, however, a donee were similarly protected, the effect of the donation would be for the husband to lose the right to indemnity without a corresponding right being acquired by his wife. In other words, as a result of the husband's generous impulse the value of the house would be lost to the family unit.⁶⁵ The consequence would be the same if the donation arose by will, on the husband's death.

Two questions

7.35 At this stage we do not make even a preliminary choice between the options outlined above but merely ask consultees

14. (a) **Should the title guarantee mentioned in proposals 2 and 3 be extended to donees?**
- (b) **If so, should the guarantee take the form of –**
 - (i) **the retention of the property in respect of Register error and the payment of indemnity in respect of transactional error (as proposed for acquirers for value), or**
 - (ii) **the payment of indemnity in all cases?**

⁶⁴ Reid, *Property* para 173.

⁶⁵ If, however, the title defect was a Register error, the husband would have become owner, and ownership would thus be passed to his wife. See para 7.24.

Part 8 Summary of Provisional Proposals

THE PROPOSALS

1. (a) Positive prescription should apply to all titles registered in the Land Register.

(b) Positive prescription which is founded on a deed recorded in the Register of Sasines should not be considered as interrupted by first registration in the Land Register.

(Paragraph 3.11)
2. (a) The title of a *bona fide* acquirer should continue to be guaranteed in respect of Register error.

(b) "Register error" is an inaccuracy which already affected the Land Register at the time of the acquisition.

(Paragraph 3.20)
3. (a) The title of a *bona fide* acquirer should continue to be guaranteed in respect of transactional errors arising out of the invalidity of the conveyance in the acquirer's favour.

(b) "Transactional error" is a defect or error other than a Register error (as defined in proposal 2(b)).

(Paragraph 3.34)
4. The title of an acquirer should cease to be guaranteed in respect of rights conferred or omitted due to administrative mistake.

(Paragraph 3.41)
5. It should continue to be possible for the Keeper to exclude indemnity at the time of registration.

(Paragraph 3.45)
6. (a) Any scheme for the allocation of property and indemnity must, as minimum, both –
 - (i) ensure that the "true" owner is not deprived of property without notice and the opportunity to object (the "notification principle"), and
 - (ii) relieve the acquirer of the need to consult prior conveyances (the "curtain principle").

(b) Are there other issues of legal policy which need be taken into account?

(Paragraph 4.36)

7. (a) The title of a *bona fide* acquirer should be subject to rectification in respect of transactional error.

(b) The title of a *bona fide* acquirer should be immune from rectification in respect of Register error provided that, for a prescribed period prior to registration of the acquirer's title, the property was possessed by the person from whom he acquired (or from a predecessor of that person).

(c) In the event of rectification, indemnity should be paid to the acquirer.

(d) In the event of a refusal of rectification, indemnity should be paid to the "true" owner.

(e) In paragraph (b) should the period prescribed for possession be –

(i) one year

(ii) two years, or

(iii) some other period (please specify)?

(Paragraph 4.52)

8. In the acquisition of a subordinate real right (other than a long lease), the guarantee should continue to take the form of indemnity rather than retention of the right.

(Paragraph 4.55)

9. Registration should not always result in the conferral of a real right. Whether a real right is conferred should depend on the ordinary rules of the law of property (as amended by proposal 7(b)).

(Paragraph 5.44)

10. Reductions of voidable deeds should be given effect as of right by an appropriate entry on the Land Register.

(Paragraph 6.18)

11. As a general rule indemnity should not be paid in respect of rights lost by reduction of a voidable deed.

(Paragraph 6.23)

12. In determining the applicability of the title guarantee mentioned in proposals 2 and 3, the fraud and carelessness test of the current law should be replaced by a test based on good faith.

(Paragraph 7.7)

13. (a) For the purposes of proposal 12 good faith should be measured by reference to –
- (i) in the case of Register error, that which the acquirer actually knew, and
 - (ii) in the case of transactional error, that which the acquirer actually knew or ought reasonably to have known.
- (b) The relevant date for assessing knowledge should be the date of registration (ie the date on which the application for registration is received).

(Paragraph 7.20)

14. (a) Should the title guarantee mentioned in proposals 2 and 3 be extended to donees?
- (b) If so, should the guarantee take the form of –
- (i) the retention of the property in respect of Register error and the payment of indemnity in respect of transactional error (as proposed for acquirers for value), or
 - (ii) the payment of indemnity in all cases?

(Paragraph 7.35)

EFFECT OF THE PROPOSALS IN SUMMARY

8.1 If the provisional proposals just listed were fully adopted, the result would be a system along the following lines.

8.2 The legislation on land registration would no longer contain a second system of property law. Instead questions of title would be determined by the ordinary law of property (including a restored positive prescription) but with the additional rule that, in favour of a person acquiring in good faith and for value from a registered proprietor in possession, the registered proprietor would be taken to be owner.

8.3 The result can best be understood by considering the position of a *bona fide* acquirer for value. Two things can go wrong with a conveyancing transaction. One is that the seller does not own the property. The other is that the disposition is so defective as to be invalid. The first is called in the paper "Register error" and the second "transactional error". Neither is common. In respect of the *first* of these, the acquirer is fully protected, provided that the seller is in possession and is the registered proprietor of the land. On registration, therefore,

the acquirer becomes owner, notwithstanding the absence of title in the seller. In respect of the *second*, ownership is not transferred but the acquirer is entitled to indemnity from the Keeper.

8.4 Occasionally ownership, initially acquired by registration, can be set aside on the ground that the title is voidable. Here the legislation would leave the ordinary law substantially undisturbed. But since, under that law, a *bona fide* acquirer for value is fully protected, the broad result would be for void and voidable titles to be treated alike.

8.5 An example shows how legislation based on these proposals would work:

A is the registered owner of land. B impersonates A and grants a disposition to C in which A's signature is forged. C registers the disposition and is entered on the Register as proprietor. C is in good faith and gives value for the disposition.

On these facts A remains as owner, for, as a matter of ordinary law, no title can pass on a forged deed. The forgery is a transactional error. The Register is therefore inaccurate and can be rectified at the instance of A. On rectification C is entitled to indemnity from the Keeper. If, however, A failed to rectify, he would in time lose ownership of the property. This could happen in one of two ways. One is where C disposes the land to D. If (i) C had possessed the land for at least a year and (ii) D was in turn a *bona fide* acquirer for value, the result would be for ownership to pass to D on registration. In a question with D the forgery is a Register error and not a transactional error. A's ownership, accordingly, would fall, but he would have a claim for indemnity from the Keeper. The other is where C retains the land and possesses for ten years.¹ At the end of that period the infirmity of title would be removed by prescription, and ownership would pass from A to C. Since A's loss was attributable to the general law and not to a special rule of the registration statute, there would be no claim for indemnity.

¹ Since the conveyance to C was forged, prescription would run only if C continued to be in good faith. See Prescription and Limitation (Scotland) Act 1973 s 1(1A)(b).

Appendix 1

List of law reform publications on land registration

Alberta Law Reform Institute

Report for Discussion on *Towards a New Alberta Land Titles Act* (No 8, 1990)

Report on *Section 195 of the Land Titles Act* (No 63, 1993)

Report on *Proposals for a Land Recording and Registration Act for Alberta*, 2 volumes (No 69, 1993)

Joint Land Titles Committee: Canada

Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada (1990)

Renovating the Foundation: Proposals for a Model Land Recording and Registration Act for the Provinces and Territories of Canada: Final Revisions (1993)

Law Commission

Working Paper on *Transfer of Land: Land Registration* (1st Paper) (No 32, 1970)

Working Paper on *Transfer of Land: Land Registration* (2nd Paper) (No 37, 1971)

Working Paper on *Transfer of Land: Land Registration* (3rd Paper) (No 45, 1972)

Property Law: Report on *The Implications of Williams & Glyn's Bank Ltd v Boland* (Law Com No 115, 1982)

Property Law: First Report on *Land Registration: Boundaries, Conversion of Title, Leases, Minor Interests* (Law Com No 125, 1983)

Property Law: Second Report on *Land Registration: Inspection of the Register* (Law Com No 148, 1985)

Property Law: Third Report on *Land Registration A. Overriding Interests; B. Rectification and Indemnity; C. Minor Interests* (Law Com No 158, 1987)

Property Law: Fourth Report on *Land Registration* (Law Com No 173, 1988)

Transfer of Land: Land Registration Law. First Report of a Joint Working Group on the *Implementation of the Law Commission's Third and Fourth Reports on Land Registration* (Law Com No 235, 1995)

Consultative Document on *Land Registration for the Twenty-First Century* (Law Com No 254, 1998)

Report on *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, 2001)

Law Reform Commission of Victoria

Discussion Paper on *The Torrens Register Book* (No 3, 1986)

Report on *The Torrens Register Book* (No 12, 1987)

Discussion Paper on *Priorities* (No 6, 1988); Report on *Priorities* (No 22, 1989)

Discussion Paper on *Easements and Covenants* (No 15, 1989)

Manitoba Law Reform Commission

Report on *Improved Methods of Enforcing Support Orders Against Real Property* (No 36, 1979)

Report on *The General Register* (No 44, 1980)

Report on *Certificates of Lis Pendens* (No 54, 1983)

Discussion Paper on *Towards a New Manitoba Real Property Act* (1991)

New South Wales Law Reform Commission

Issues Paper on *Torrens Title: Compensation for Loss* (No 6, 1989)

Discussion Paper on *Torrens Title: Compensation for Loss* (New South Wales Law Reform Commission DP No 19 and Law Reform Commission of Victoria DP No 16, 1989)

Report on *Torrens Title: Compensation for Loss* (No 76, June 1996)

New Zealand Property Law and Equity Reform Committee

Report on *The Decision in Frazer v Walker* (1977)

Ontario Law Reform Commission

Report on *Land Registration* (No 32, 1971)

Queensland Law Reform Commission

Discussion Paper on *Real Property Acts* (No 1)

Report on *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* (No 16, 1973)

Working Paper on *A Bill to Amend the Real Property Acts with Respect to Writs of Execution, Bills of Encumbrance and Bills of Mortgage, and Caveats* (No 25, 1982)

Working Paper on *A Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland* (No 32, 1989)

Appendix 2

List of those who responded to the October 2001 consultation

1. Archibald Campbell & Harley, WS
2. Bell & Scott, WS
3. J C Bowie, Solicitor
4. Brechin Tindal Oatts, Solicitors
5. Campbell Connon, Solicitors
6. Craxton & Grant, SSC
7. Esslemont & Cameron, Solicitors
8. A R Hart, Solicitor
9. G A Hay, Solicitor
10. Henderson Boyd Jackson, WS
11. D A Johnstone, Solicitor
12. Ledingham Chalmers, Solicitors
13. Maclay Murray & Spens, Solicitors
14. I W McDonald, Solicitor
15. M D McMillan, Solicitor
16. J & H Mitchell, WS
17. G L K Murray, Solicitor
18. J I Ness, Solicitor
19. Paull & Williamson, Solicitors
20. J & R A Robertson, WS

21. Stuart, Wilson, Dickson & Co, Solicitors
22. A S M Thornton, Solicitor.