Removing Title Blemishes as a Function of Registration

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I. Introduction

The English model of registration of title was first developed as a response to the problems of inconvenience in transferring ownership, and the landowner's lack of confidence in the validity of his title and the third party rights affecting it. It therefore shares a fair number of the common characteristics of other European land registration systems to the extent that they were designed to respond to problems of a similar genus. However, there are specific elements of the current English system which reflect England's peculiar heritage. In particular, the system involves a distinctive registry process for sifting the titles submitted for first registration and a broad discretionary power to rectify the register, which this paper will link to a possible function of registration.

All registration systems involve some initial sifting process for assessing the alleged rights in a plot of land and for making a decision about which rights are sufficiently proved to justify their entry on the register. The English sifting process developed various noteworthy features: for example, the examination of title was informed primarily by the self-interested submission of the applicant for registration rather than by an independent, inquisitorial tribunal, and it allowed the registry a substantial degree of latitude to accept applications for registration with perfect title despite a known risk of imperfection. A response to the dangers of this approach to sifting emerged in the doctrine of rectification which enabled the court afterwards to insert any omitted rights onto the register.

These two elements - the registry's sifting process and the doctrine of rectification - were originally intended to ensure that the registry's examination of title and first compilation of the register for a plot of land could be carried out quickly and efficiently. But it has subsequently been suggested, controversially, that these elements are indicative of a further, independent function: the function of removing blemishes in title. This observation was said to be justified by the registry's approach to sifting titles, which achieved the effect of eliminating 'blemishes', that is, suspected rights whose existence was hinted at by the historical title documents but whose legal existence or enforceability was unascertained. The effect of removing these blemishes was seen as a socially desirable policy to improve the quality of land titles and facilitate land transfer.

This paper will explain the development of the registry's sifting process and the doctrine of rectification, and the original intention behind those elements. It will explain how they have subsequently been perceived to establish a function of removing blemishes in title. It will consider how this alleged function interacts with other principles in the land registration system and it will finally discuss why this alleged function might require reconsideration in the light of contemporary pressures.

II. The Background to Registration: Title in Unregistered Land

To understand the evolution of the registry's process for sifting titles and how it is tied to practices that occurred prior to the introduction of the registration system, it is necessary to turn to the law and practice as it stood in the early nineteenth century. The development of land registration occurred against the background of a law of real property which was vastly complex, a landowning class which took pleasure in fragmenting the constituent rights of

ownership amongst limited right holders, and a conveyancing protocol which involved a strange blend of technical fastidiousness when examining titles and trusting to good fortune when evaluating them. The following sections will give an impression of some features of law and landholding which demonstrate the fragmentation of land rights, followed by a sketch of the process by which sellers informed buyers about the state of title and the legal standard that the sellers had to fulfil.

1. Real Property: Law and Tenure

In order to prepare the scene for the introduction of registration, a convenient starting point is to consider the deficiencies perceived in the prior law. English real property law at the beginning of the nineteenth century acknowledged an abundance of proprietary interests, including the fee simple estate, entail, life estate, remainders and reversions, leases, mortgages, family charges, easements, rights of common, and others, each of which might exist in land of freehold, leasehold, customary or copyhold tenure. Creation and transfer of these interests occurred primarily through written deed, as required by the Statute of Frauds 1677, rather than through a ceremony of investiture or other unwritten method. The deeds were subject to technical rules concerning validity and legal effect, and their drafting was often exceedingly complex, particularly in family settlements. The interests so created were governed by priority rules which included rules binding a purchaser in the absence of actual notice, chiefly the rule *nemo dat quod non habet* for legal interests and the doctrine of constructive notice for equitable interests. In this environment, it is no surprise that prospective purchasers employed professional conveyancers to assess the state of title and that this was mainly achieved through an inspection of the title deeds held by the seller. The process of eliciting title as a matter of inference from the evidence presented in a bundle of title deeds could, of course, never be secure against all risks; there might have been misunderstanding over the legal effect of documents, ignorance of factual events affecting succession, invalid execution or attestation of deeds, undiscovered incumbrances arising informally, and deeds fraudulently concealed or accidentally destroyed, to name a few. The problem of concealed or lost deeds was mitigated by systems for the recording of deeds in a public repository, supported by a law which protected a purchaser against the effect of any absent deed, but this limited solution was only ever implemented in isolated counties. The issue still remained of curing the uncertainty in titles and improving the land transfer process. The land reform movements targetted their endeavours at these twin deficiencies.

The problems were exacerbated by the tradition of strict settlements. This was the structure used by the great landowning families kept ancestral lands in the family. Typically, the owner might divide the ownership so as to give his wife an annual income secured by rentcharge on the land, himself a life estate, and on his death a larger annual income again secured by rentcharge to his widow, and an income to his eldest son's wife secured by rentcharge; long leases might be given as security to trustees to raise capital sums for the owner's daughters and younger sons; and subject to all those rights, the eldest son was given an entail in the land; once the entail came to an end for lack of issue, further entails would be given to the owner's other sons in order of seniority, and then to the daughters, and then other relations, with an ultimate reversion of the full ownership back to the owner when all the preceding rights had come to an end. The interests of individual family members were often protected by the interposition of trustees which added further layers of complexity. The whole land might already be subject to paramount mortgages. By these arrangements, two-thirds of the land in England[1] was subject to regimes which fragmented entitlements and

[1] J. DeVilliers, *The History of the Legislation Concerning Real and Personal Property* (Clay, 1901), p. 46.

dispersed them widely among dozens of family members, leading to severe difficulties in assembling land rights for sale in a way which could give a purchaser confidence in his acquisition of title, and effectively keeping land out of market circulation. Even when collective agreement to sell could be achieved, there would often be an extensive number of lesser rights affecting the estate of which the buyer might have little information - rights of way, rights of pasture, mining rights, rights to light, agricultural leases, rights to fixtures, manorial rights, and so on. Pressures accumulated in the nineteenth century which pushed against the effects of practical inalienability and the delay and vast legal expense of land purchases: the infrastructure demands of an industrial revolution, the political aspirations of the building society movement, the financial needs of impecunious landowners, the desire to exploit the development potential of prime building sites.

During the 1830s, an official, comprehensive scrutiny of land laws took place with a view to appraisal and reform. Amongst the principal findings was the conclusion that in the contemporary law, the 'most important evil is the insecurity of title.'[2] The phrase referred to the hazard of undiscovered interests burdening land titles. While it was a problem in itself[3], it also prompted laborious investigations into title as a precaution before transferring land.[4] The practical consequences included slow and costly conveyancing, reluctance of prospective purchasers to enter the land market, a corresponding suppression of property values, and a heightening of the rate of interest on land mortgages.[5] Despite various technical improvements to real property law, these problems continued to cause difficulties for conveyancing for many decades to come.

2. Unregistered Conveyancing: The Duty to Prove Title

When contracting to buy land, it was obviously desirable for the purchaser to have proof of the vendor's title before paying the price. In a country that was committed to upholding sophisticated long-term arrangements for private land holding, title to land had to depend in a large measure on written documents and the buyer looked for proof of the vendor's right beyond the fact of possession. The English law of contracts for the sale of land therefore required, unless agreed otherwise, the vendor to explain summarily how title had passed to him and to prove each of the stages in that process. This was known as showing and making title. It required the vendor to supply such evidence as would be sufficient to raise the presumption that the vendor owned or was entitled to transfer the interest which he had contracted to sell. This duty to *prove* title existed independently of the vendor's duty to *transfer* title in accordance with the contract.[6] If the vendor failed to prove title, the purchaser could withdraw from the contract; the purchaser would not be compelled to wait for the vendor to make the inadequate transfer and sue for damages.

The vendor could prove his title by a legally-perfect original grant (such as a grant from the Crown or under an Act of Parliament), plus any deeds or facts which proved its subsequent transmission to the vendor. But it was rare that vendors were able to offer a perfect original grant. Much more commonly, the vendor would fulfil his duty by giving evidence to the purchaser that the vendor or his predecessors had exercised acts of ownership for a certain number of years back so as to raise a presumption of ownership. In the early nineteenth century, this had to be shown for the period spanning the sixty years before the

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2 *Second Report of the Commissioners appointed to Inquire into the Law of England respecting Real Property* (1830, HCP xi.1), p. 4.
3 *Second Report* (1830) p.17.
4 *Second Report* (1830) p.7.
5 *Second Report* (1830) pp.7, 17, 18.
6 *Barclays Bank plc v Weeks Leggs & Dean* [1999] QB 309, 325 (Millett LJ).

contract to sell. To perform this task, the vendor might, for example, provide evidence that his ancestors had taken possession of the land at a date more than sixty years earlier and that from them the land had descended to him as true heir under the rules of inheritance.

The law, however, required the vendor to produce the best evidence from which ownership could be inferred[7], and often this evidence would not come from longstanding possession alone, but instead from the existence of deeds purporting to deal with the property. If the vendor wished to prove his title by this method, he had to produce a deed disposing of the land which constituted a 'good root of title', plus any deeds or proof of facts (such as deaths or marriages) which showed its subsequent transmission to the vendor. A 'good root of title' was understood as a deed which (i) dealt with the whole estate in the property, (ii) included a description by which the property could be identified, (iii) contained nothing to cause any doubt that the person purporting to deal with the interest by the deed was entitled to do so, and (iv) was at least sixty years old.[8] The origin of the sixty-year rule is sometimes attributed to the fact that the true owner would be barred from claiming back land which had been in the possession of the seller or his predecessors for sixty years[9] but not even sixty years' possession would necessarily have given a title to land free from challenge because in some circumstances the commencement of that period would be postponed.

The practical means to achieve this proof of title were the abstract, requisitions and verification. The vendor was required to provide to the purchaser a written summary of the evidence of his title in chronological order. This summary, known as an 'abstract', had to contain a statement of the material parts of every document by which any disposition of the property was made during the time for which title had to be shown; it also had to contain a statement of every birth, death, marriage, bankruptcy, or other event relevant to deciding how the entitlement had been transmitted. The purchaser was entitled under an implied rule of contract law to review the abstract and make demands, known as 'requisitions', that any missing links or inadequacies were repaired. Finally, the vendor was required to verify the abstract by allowing the purchaser to see the original documents. Once these steps had properly taken place, the purchaser would not be able to withdraw from the contract on the ground that the vendor had not proved title and the vendor would be eligible to seek an order for specific performance against the purchaser.

3. The Criterion of Good Marketable Title

Proving title in the manner described above would satisfy the law's default contractual rule. It was known as 'good marketable title'. When the proof attained this standard, the vendor was able to sell without the necessity of making special contractual clauses to restrict the purchaser's rights to proof of title, and the court would force a contracting to buyer to complete the purchase even if he no longer desired to buy the property.[10] When the proof fell short of this standard, the vendor ought to have made a special contractual clause for the purpose of denying the purchaser's right to insist on it; in its absence, if the purchaser sought to withdraw from the contract on discovering that the vendor was unable to give proof of good marketable title, the court would not force the buyer to complete. The legal standard of 'good marketable title' was therefore the pivotal test which preoccupied the legal fraternity.

The requirement of good marketable title imposed a high standard on the vendor, but there were significant limitations on it. The first limitation concerned the quality of evidence.

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7 T.C. Williams, *A Treatise on the Law of Vendor and Purchaser* 4th edition (Sweet & Maxwell, 1936) p. 123.

8 J.H. Dart *Treatise on the Law and Practice Relating to Vendors and Purchasers* 8th edition (Stevens, 1929) p. 294.

9 Real Property Limitation Act 1833, s.34.

10 *Lord Braybroke v. Inskip* (1803) 8 Ves Jun 417; 32 ER 416.

It did not force the vendor to give proof of title to the same level as would be required by a court in contested litigation. A leading textbook began: 'The evidence required by conveyancers in passing a title is of a character materially different from that required by courts of justice.'[11] For example, unlike the court, a purchaser could not demand that a vendor provide an original will as evidence of the vendor's entitlement. Equally, a purchaser could not demand that the vendor bring witnesses to give oral testimony that a particular deed had been signed properly. The vendor's duty to prove title comprised 'merely such as affords reasonable belief that the requisite evidence exists and can be procured when wanted.'[12] Secondly, the vendor's task was aided by the availability of presumptions. A lack of evidence about facts could in many circumstances be overcome by a very wide range of presumptions embodied in rules established by court, or customs established by conveyancers, which the purchaser was required to accept.[13] One particularly important example was the presumption, which applied in land purchases, but not in other contexts at the time, that a deed was properly executed, thus avoiding the need to obtain supporting evidence from a witness present at its execution.[14] Also important was the presumption in favour of the sanity of the parties to a deed.[15] The courts were particularly willing to make presumptions on the basis of a pattern of behaviour over a long period of time: for example, where the vendor sold land with the benefit of a right of way that could not be proved by the deeds, the long enjoyment of a right of way 'may most reasonably be accounted for by supposing a grant of such rights'; or where the vendor sold free from the burden of a right of way that appeared from the title deeds, 'a long forbearance to exercise it... may most reasonably be accounted for by supposing a release of the right'.[16] In this way a defect in the title could be cleared away by presuming a lost deed of grant or of release, and this type of presumption was widely used 'for the purpose and for the principle of quieting the possession'[17], even to the extent of presuming the enactment of a lost Act of Parliament.[18]

A third principle which alleviated the vendor's burden was found in the rule that a merely technical imperfection in the title would not put the vendor in breach of duty. Mere suggestions that outstanding rights might exist[19], or that unmentioned facts might have affected the devolution of title[20], were never allowed as valid objections to the vendor's title. The point was summed up by an eminent conveyancer in the early nineteenth century: the purchaser 'will not be permitted to object to a title on account of a bare possibility.'[21] The court held that it 'must govern itself by a moral certainty, for it is impossible in the nature of things, there should be a mathematical certainty of a good title.'[22] For example, where the deeds revealed that the Crown had retained mining rights 111 years earlier, but there was a great probability that there were no minerals, that the Crown had no right of entry, and that there had 'never been an exertion of this right in a single instance since the grant, and no

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11 T. Coventry, *On Conveyancers' Evidence* (Clarke, 1832) p. 1.

12 T. Coventry, *On Conveyancers' Evidence* (Clarke, 1832) p. 3.

13 See e.g. J.Y. Lee, *A Treatise on the Evidence of Abstracts of Title to Real Property* (Blenkarn, 1843) p. 436-476; J.H. Dart, *Treatise on the Law and Practice Relating to Vendors and Purchasers* 8th edition (Stevens, 1929) pp. 306-414.

14 T.C. Williams, *A Treatise on the Law of Vendor and Purchaser* 4th edition (Sweet & Maxwell, 1936) p.158.

15 J.Y. Lee, *A Treatise on the Evidence of Abstracts of Title to Real Property* (Blenkarn, 1843) p. 439.

16 *Doe d Putland v Hilder* (1819) 2 Barn & Ald 782, 791; 106 ER 551, 554 (Lord Tenterden).

17 *Eldridge v Knott* (1774) 1 Cowp 214, 215; 98 ER 1050 (Lord Mansfield).

18 S. Atkinson, *An Essay on Marketable Titles* (Sweet, 1833) p. 450.

19 *Lyddall v Weston* (1739) 2 Atk 19; 26 ER 409; *Lord Braybroke v Inskip* (1803) 8 Ves Jun 417; 32 ER 416.

20 *Dyke v Sylvester* (1806) 12 Ves Jun 126; 33 ER 48 (purchaser's unsubstantiated assertion that there may have been other children entitled).

21 E.B. Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates* 4th edition (Butterworth, 1813) p. 274.

22 *Lyddall v Weston* (1739) 2 Atk 19, 20; 26 ER 409, 409 (Lord Hardwicke).

probability there ever will'[23], it was decided that the vendor had shown good title.[24] Where the vendor is able to put forward a compelling case that the purchaser would not be at risk of the incumbrance being successfully asserted, therefore, the defect will be regarded as merely technical and the vendor will have shown a good title, even if the title could not be described as free from all possible imperfections. That is the case where a third party claim creating a flaw in title has since ceased to be enforceable due to its abandonment, acquiescence, waiver, estoppel, laches, expiry of the limitation period, or otherwise.[25] The purchaser would be contractually bound to accept such a title and specific performance would be ordered. The doctrine has continued in force so that a good marketable title will still be found if the alleged risk is 'purely theoretical'[26], 'so remote or so shadowy as to be one to which no serious attention need be paid'[27], or if the court concludes 'beyond reasonable doubt that the purchaser will not be at risk of a successful assertion against him of the incumbrance.'[28]

4. Failure to Prove Good Marketable Title

Despite the above limitations on the vendor's duty, it remained a common enough occurrence that the vendor failed due to some defect in the title. There might have been a failure in the legal effectiveness of a transaction in the chain of title on which the vendor's title depended (e.g. failure to comply with formalities imposed by Acts of Parliament relating to notices and advertisements before disposing). Or there might have been a failure in a necessary fact on which the vendor's title depended (e.g. where a father's will left the property to his eldest son and the vendor was mistaken in his belief that he matched this description). But in order to resist a decree for the specific performance of the contract, it was not necessary for the purchaser to convince the court that the title actually suffered such a defect: it was enough to show that there was a sufficient doubt over the title, in which case the court would not decide whether the title was or was not proved in accordance with the contract. Titles could therefore be divided not only into the classes of 'good' and 'bad', but also 'doubtful' where the judge declined to make a final decision on the matter.

The surprising category of doubtful title arose from the unique division of English jurisdiction over contracts into common law and equity, and the nature of the remedies available from each. The remedy of specific performance to compel a purchaser to pay the price was available only from the court of equity; but equity had no independent power to appoint a jury to rule on disputed facts, and equity judges were reluctant to speculate on how a court of common law might rule on disputed principles of common law and so decide whether the vendor was in breach of his contract. The result was that equity judges were willing to leave doubtful titles undecided, relying on the common law courts to provide a remedy in damages if it were decided that the title was defective.[29]

In the courts of equity, therefore, the vendor's proof of title would be rejected as doubtful if there was uncertainty over a relevant principle of law which was not clear upon the authorities, or uncertainty over the application of a relevant principle of law to the instant

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23 *Lyddall v Weston* (1739) 2 Atk 19, 20; 26 ER 409 (Lord Hardwicke).

24 *Lyddall v Weston* (1739) 2 Atk 19; 26 ER 409. Contrast *Seaman v Vawdrey* (1810) 16 Ves Jun 390; 33 ER 1032 (no abandonment after 100 years of non-use of a private reserved saltmine).

25 *MEPC Ltd v Christian-Edwards* [1981] AC 205 (abandonment), *Kitney v. MEPC Ltd* [1977] 1 WLR 981 (non-registration), *Re Stone and Saville's Contract* [1963] 1 All ER 353 (occurrence of terminating condition).

26 *Re Heaysman and Tweedy's Contract* (1893) 69 LT 89, 91 (Lindley LJ).

27 *Manning v Turner* [1956] 3 All ER 641, 643.

28 *MEPC Ltd v Christian-Edwards* [1981] AC 205, 220 (Lord Russell).

29 *Marlow v Smith* (1723) 2 P Wms 198; 24 ER 698.

facts (as often occurred over the interpretation of words in a document[30]), or uncertainty over the existence of a relevant fact. The degree of doubt which rendered a title inadequate was never, however, a matter of simple mechanical determination. Courts expressed the extent of the required doubt in different ways. A future Lord Chancellor wrote: 'Where there is such a defect, the degree of risk associated with the defect must be assessed. If the defect renders the title genuinely defective on the ground that the possible enforceability of the defect could only be resolved in court proceedings, then the vendor is unable to show a good marketable title.'[31] It seemed plain that the court of equity would not make an order which forced the purchaser to proceed with a purchase that would foreseeably require him to defend an attack on his title in the common law court. The requisite degree of doubt was not an easy matter to express in a form that offered helpful guidance and commentators distilled various formulations from the emerging case law. A title was defective if there was 'a reasonable doubt either as to a matter of law or a matter of fact involved in it'[32], or 'such a degree of uncertainty apparent upon the transaction (taking into consideration all the possible as well as the probable circumstances) as should naturally raise a doubt or suspicion in an unprejudiced mind.'[33]

Evaluating the degree of risk associated with the possible enforceability of the right was a taxing matter for the professional judgment by the purchaser's legal adviser. In assessing the likely outcome of a suit for specific performance, the lawyers had to bear in mind that 'each case must depend upon the nature of the objection, and the weight which the Court may be disposed to attach to it; and that, in determining whether specific performance is to be enforced or not, it must not be lost sight of that the exercise by the Court of its jurisdiction in cases of specific performance is discretionary.'[34] A predictable result of this doctrine of doubtful title was the minute accuracy which became necessary to investigate title. It was felt that zealous lawyers responded to the doctrine 'by pointing out every objection, however trivial; by directing their inquiries on every matter as to which there is the barest probability that some defect might be discovered; by requiring the fullest satisfaction on all matters of legal construction on which it is possible that two lawyers might think differently; and by calling for satisfactory evidence on every material fact involved in the title for a period of sixty years.'[35] On the other hand, the adviser had to take care not to hold out too tenaciously with improbable objections because he might then be made to suffer an adverse order for costs if the matter reached court. The need for lawyers to make such a refined judgment could hardly have been expected to facilitate the process of land transfer. In practice, the seller's solicitor would review title and would occasionally take a barrister's advice, the buyer's solicitor would review it and send the matter to a barrister specialising in conveyancing advice; and the title would not infrequently be finally tested in court through a suit for specific performance.

In any litigation between the vendor and purchaser, such as a suit for specific performance or court summons on title, it must be remembered that the decision resolved only the contractual issue between vendor and purchaser. If the defect in title comprised a third party's right in the land, then that right would still be enforced in any litigation between the rightholder and the purchaser, leaving the purchaser to seek damages against the vendor

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30 E.g. *Sharp v Adcock* (1828) 4 Russ 374; 38 ER 846 (ambiguous terms where a predecessor had owned a freehold estate but gifted 'all my right ... in my leasehold estate').

31 E.B. Sugden, *A Practical Treatise of the Law of Vendors and Purchasers of Estates*' 4th edition (Butterworth, 1813) p. 274.

32 S. Atkinson, *An Essay on Marketable Titles* (Sweet, 1833) p. 3.

33 J.Y. Lee, *A Treatise on the Evidence of Abstracts of Title to Real Property* (Blenkarn, 1843) p. 438.

34 *Pyrke v Waddingham* (1852) 10 Hare 1, 10; 68 ER 813, 817 (Sir George Turner V-C).

35 S. Atkinson, *An Essay on Marketable Titles* (Sweet, 1833) p. 29.

on any covenants by which he might have guaranteed the title. Whatever decision about title was reached in vendor and purchaser litigation, it did not affect the validity of the possible right. This was recognised in *Toulmin v. Steere*[36] where the court had sanctioned the title in earlier proceedings by the purchaser, but the court later confirmed that that 'was a circumstance that cannot affect or prejudice the rights and interests of third persons. The Court of Chancery employs its officer to investigate the titles of estates, but does not warrant them.'[37] In summary, the conveyancer would take extreme pains to investigate and appraise title, yet even with the most exhaustive review, there was never any assurance that the purchaser would be protected from defects. The transfer of unregistered land was therefore one which involved great cost and delay, involved a difficult professional evaluation of risk, and yet ultimately gave the buyer no certainty that the seller truly owned the land free from the rights of others.

III. The Transition to Registration

1. Introducing Registration

The complexities and uncertainties of conveyancing within the tenurial and legal context explained above, contributed to the problems of delay, cost and lack of confidence in the land market which were the stimulus for the early proposals for registration of title. In the state's review of property law in 1829-33, one of the most important deliberations was over the introduction of a central system to give publicity to deeds. It was found that the 'most important evil is the insecurity of title'[38] - meaning the lack of confidence that purchasers and owners would have in their ownership despite the extensive investigations into deeds and other sources that were normally carried out. The state commissioners declared: 'We believe it may be confidently asserted, that of the real property of England, a very considerable portion is in one of these two predicaments: either the want of security against the existence of latent deeds renders actually unsafe a title which is yet marketable, or the want of means of procuring the formal requisites of title renders unmarketable a title which is substantially safe.'[39] This was the cause of the unsatisfactory aspects of land transfer at that time - its delay, cost and inconclusive outcome. The commissioners' key proposal was that the purchaser should be protected at least against the danger of rights created by any deeds that had been suppressed and were consequently not apparent from the vendor's proof of title.[40] A central system for recording deeds was their answer to this. Following that first review, the idea of recording deeds was officially discussed again in 1850[41] and 1853[42], but in the latter report it became clear that support in favour of full registration of title was gathering momentum and in 1857 another committee was appointed to consider registration.[43]

The report of 1857 marks the beginning of the English movement towards registration of title. It recognised the same generic problems as were pointed out by the commissioners earlier in the century,[44] which could equally have been solved by registration of title as well

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36 *Toulmin v Steere* (1817) 3 Mer 210; 36 ER 81.
37 *Toulmin v Steere* (1817) 3 Mer 210, 223; 36 ER 81, 84 (Sir William Grant MR).
38 *Second Report of the Commissioners appointed to Inquire into the Law of England respecting Real Property* (1830, HCP xi.1), p.4.
39 *Second Report* (1830), p.17.
40 *Second Report* (1830), p.14.
41 *First Report of the Registration and Conveyancing Commissioners* (1850, c.1261).
42 *Report of the Select Committee on the Registration of Assurances Bill* (1853, HCP xxxii. 1).
43 *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).
44 *Report* (1857), para. 13.

as by deeds recording. Once it had been decided to pursue voluntary registration of land with the register conferring a warranted title, it became important to make a decision on the processes which the registry would use to sift applications to determine which were acceptable for registration. It later transpired that this was a momentous issue on which the success of the entire registration programme depended. With the benefit of hindsight, the evolution of the criterion for sifting titles marked an important step in land registration and has continued importance for an understanding of the functions that may be attributed to the English system. To advance these points it is useful to explain how the sifting criterion developed.

2. The Sifting Criterion for Registration: from Good Marketable Title to Safe Holding Title

The first report on registration in 1857 envisaged that the land registrar would direct that the title be fully investigated and examined with ordinary care by a barrister and solicitors, and if he were satisfied with their advice that the title was good, then he would register the applicant with warranted ownership.[45] There was nothing to suggest a change in the standard of proof required, but rather an assumption that it would follow the established legal criterion of good marketable title applied in unregistered land sales. The report explicitly rejected the proposal that a judicial inquiry should be launched into every plot of land to hear and finally determine all the claims to interests in it.[46] Without such an inquiry, it was recognised that relying on the applicant's proof of good marketable title might not reveal certain adverse interests in the land. These undetected latent rights would be omitted from the first compilation of the register and would become unenforceable upon registering the applicant with warranted ownership. The commissioners were naturally concerned at how to 'reconcile the registered ownership with the preservation and protection of unregistered interests'.[47] Their answer was to offer state compensation to the holders of these interests, and it was made clear that this indemnity scheme was an integral part of their recommendations.[48]

The report was largely implemented by the Land Registry Act 1862. Section 5 stipulated that the registrar could accept an application for registration with warranted title only if it 'shall appear to be such as a court of equity would hold to be a valid marketable title.' But the experiment in registration under this Act was an unmitigated failure. The number of people wishing to register their titles was negligible and a Parliamentary inquest into the causes was appointed. It concluded[49] that the explanations were these: that landowners feared the process of first registration would stir up controversies with neighbours and other potential claimants by the process of notifications; that by insisting on good marketable title, any flaws in the title had to be removed by the applicant or perpetuated by an entry in the register and thereby signalled as a warning to all future purchasers even though it might be highly improbable that they reflected a claim which would ever be enforced; and that the registrar was unable to follow the common practice of accepting something less than good marketable title. That final point was an important realisation. Despite the legal requirement of good marketable title in a suit for specific performance, the inquiry heard evidence that purchasers were willing in practice to accept special contractual conditions which limited the vendor's proof of title; in particular, they would commonly accept a title shown for a shorter period than 60 years, and were often content to waive their

[45] *Report* (1857), paras. 30, 57, 81.
[46] *Report* (1857), paras. 27, 48.
[47] *Report* (1857), para. 39.
[48] *Report* (1857), paras. 26, 30, 39, 40, 48, 57, 62, 86.
[49] *Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act* (1870, c.20), para.31.

right to requisitions on defects in title when they felt that the title would be safe.[50] In the light of this evidence, the crucial recommendation was that the registrar should be 'empowered to accept titles not technically marketable.'[51]

The recommendation was implemented by the Land Transfer Act 1875 which allowed the registrar to accept a title if he was 'of opinion that the title is open to objection, but is nevertheless a title the holding under which will not be disturbed.'[52] This standard, colloquially known as 'safe holding title', was recognised in general terms as the proof of title which a willing purchaser might reasonably be advised to accept[53], but it had not been defined with any greater precision. Although used frequently in practice in the opinions of conveyancing barristers at the time, there were very few occasions requiring the courts to consider the nature of safe holding title.[54] Almost no direct judicial guidance existed, except for an isolated, generic dictum: 'You must show something that is satisfactory to the mind of the Court—that there has been such a long uninterrupted possession, enjoyment and dealing with the property as to afford a reasonable presumption that there is an absolute title in fee simple.'[55] Despite the lack of detail in the concept of safe holding title, and perhaps because it thereby conferred a wide discretion on the registrar, this new statutory clause has endured as the legal basis for sifting all unregistered titles into those which are acceptable for registration with warranted title and those which are not.

3. The Indemnity Scheme as the Catalyst for Effective Administration under Safe Holding Title

The changes to the registry's process of title examination, which were implemented by the Land Transfer Act 1875, were unable to encourage landowners to register. It was a voluntary system and in its first four years only 48 titles were registered. A House of Commons committee reported[56] that landowners simply did not regard the benefits derived from registered titles as offsetting the cost and annoyance of registering, even under the criterion of safe holding title. It was eventually settled that registration would become compulsory[57] and that the underlying real property law would be subjected to a programme of simplification to aid registration.[58]

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50 *Report* (1870), paras. 40, 41, 44. Fifty years earlier, Atkinson, for example, had referred to the practice of accepting a 'secure holding title': S. Atkinson, *An Essay on Marketable Titles* (Sweet, 1833) p. 3.

51 *Report* (1870), para. 77.

52 Land Transfer Act 1875, s. 17(3).

53 *Barclays Bank plc v Weeks Leggs & Dean* [1999] QB 309, 325 (Millett LJ).

54 (i) Privy Council cases considering the Torrens statutes referring to the composite phrase 'good safe holding and marketable title', e.g. *Esquimault and Nanaimo Railway Co v Granby Consolidated Mining, Smelting and Power Co Ltd* [1920] AC 172; (ii) cases in which a willing buyer was a fiduciary and wished to know whether the title would fulfil his duty to his principal e.g. *Re Huish's Charity* (1870) LR 10 Eq 5; (iii) cases in which the buyer contracted on express or implied terms which restricted him to a safe holding title, e.g. *Re Banister* (1879) 12 Ch D 1, *Smith v Robinson* (1879) 13 Ch D 148; (iv) cases in which land rights were given merely as a fund for the payment of an indemnity, e.g. *Cottrell v Watkins* (1839) 1 Beav 361; 48 ER 980.

55 *Cottrell v Watkins* (1839) 1 Beav 361, 365-6; 48 ER 980, 981 (Lord Langdale MR).

56 *Report from the Select Committee of the House of Commons on Land Titles and Transfer 1878-9* (1879, HCP xi. 1) p. 7.

57 *Report from the Select Committee on the Land Transfer Bill* (1895, HCP xi. 1), para. 17. But it was only for compulsory for the owner to apply for registration, and then it was the owner's choice whether to seek a warranted absolute title, or an unwarranted possessory title. Compulsion applied only to nominated districts and only when a triggering disposition occurred.

58 *Report from the Select Committee of the House of Commons on Land Titles and Transfer 1878-9* (1879, HCP xi. 1), p. 7.

At this moment, Brickdale, a barrister employed as assistant registrar, came to the conclusion that the change to safe holding title would never provide its intended benefits until it was supported by an appropriate scheme for compensation. Returning to the 1857 report, it had been appreciated that even under the old criterion of good marketable title there might be latent rights that would be made unenforceable by registering an applicant with warranted ownership, and the solution had been to operate a state compensation scheme for anybody affected in that way.[59] But the notable discrepancy between the 1857 report and the 1862 Act was the absence of any indemnity scheme due to the Treasury's veto.[60] When the 1870 commissioners subsequently proposed the innovative criterion of safe holding title, with its expected increase in the destruction of latent rights, they urged the reactivation of the indemnity scheme: 'Nor, except by a system of state guarantees or insurance, do we see how it is possible to commence a registry of indefeasible titles without rigid examination such as that which exists under the Act of 1862.'[61] In their opinion the indemnity had to be included as 'the price of avoiding the stricter investigation'.[62] Yet indemnity was still omitted from the Land Transfer Act 1875.

Brickdale's insight was that the criterion of safe holding title under the 1875 system was not being administered by the registry as intended, and he attributed this to the omission of the indemnity scheme. His experience of the registry was that its business had been 'conducted under such a perpetual terror of making the slightest mistake or leaving the least loophole for imposition, and, as a consequence, under such stringent safety regulations, that the process of first registration costs a great deal more trouble and time than all the law expenses of a sale of the property under the usual conditions.'[63] The way forward, Brickdale argued, was inspired by the Australian model which operated an indemnity scheme and thus authorised the registrar to run the risk of an occasional error and admit titles to the register on easier terms that ordinary purchasers would allow.[64] This policy was approved in the legislative bills subsequently put forward to Parliament and, in accordance with the evidence before a Parliamentary committee of 1895[65], an indemnity scheme was enacted in the Land Transfer Act 1897.[66]

Under the 1897 Act, registration finally became a success. No doubt a contributing factor was the progress in the simplification of property laws and conveyancing laws that had been achieved in the preceding decade.[67] But the success was widely attributed to the introduction of indemnity and its effect in facilitating the registrar's acceptance of titles for registration without burdensome inquiries into title defects that represented possible latent rights. Indemnity encouraged the registrar to make use of the full latitude offered by the safe holding criterion, it facilitated the acceptance of titles, and allowed the registrar to take a business-like approach.[68] The effect of indemnity also enabled the further loosening of other processes involved in examination of title through the Land Transfer Rules 1898, 1903 and 1908 - most notably the clauses which allowed the registrar to 'modify' his examination of

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59 See footnote 48.

60 J.S. Anderson, *Lawyers and the Making of English Land Law 1832-1940* (OUP, 1992) p. 110.

61 *Report of the Royal Commissioners Appointed to Inquire into the Operation of the Land Transfer Act* (1870, c.20), para. 61.

62 *Report* (1870), para. 77.

63 C.F. Brickdale, *Registration of Title to Land* (Stanford, 1886) pp. 28-9.

64 C.F. Brickdale, *Registration of Title to Land* (Stanford, 1886) pp. 35-6.

65 *Report from the Select Committee on the Land Transfer Bill* (1895, HCP xi. 1), para.28.

66 Land Transfer Act 1897, s. 7.

67 E.g. Conveyancing Act 1881, Solicitors Remuneration Act 1881, Conveyancing Act 1882, Settled Land Act 1882, Vendor and Purchaser Act 1874, Land Transfer Act 1897 (Part One); and note the completion of the cadastral Ordnance Map in 1890.

68 C.F. Brickdale & W.R. Sheldon, *The Land Transfer Acts 1875 and 1897* (Stevens, 1899) p. 9.

title which was invoked to accept shorter periods of title, to rely on the approval of the applicant's conveyancer, and otherwise to relax the proof.[69] These developments were recognised, approved and encouraged by the next commissioners' report[70] and it became accepted wisdom that indemnity was pivotal in enabling registration to work efficiently for the first time: 'by an extensive reliance on the insurance principle, the general practice can be rendered extremely convenient and elastic, and the once formidable difficulty of first registration with absolute title can be almost entirely eliminated.'[71] Brickdale's successor as registrar concluded that indemnity permitted 'a swiftness, smoothness and freedom from irritating official requisitions on small matters which in 1897 would have been regarded as incredible.'[72]

The original vision for registration became a reality only through the symbiotic growth of the safe holding criterion and the state indemnity scheme. These two principles were carried through into the Land Registration Act 1925[73], they formed the basis for the successful expansion of title registration in England throughout the twentieth century[74], and have now been absorbed into the Land Registration Act 2002.[75]

4. The Emergence of Discretionary Rectification as an Alternative to Indemnity

The sections above have established the motivation underlying the safe holding criterion could only reach fruition when linked to the indemnity scheme. This section will now establish the further link between the indemnity scheme and the doctrine of rectification. The discretionary power to rectify the register is an identifying characteristic of the English system of registration and it is argued that it evolved from the same ideas that inspired the safe holding criterion and indemnity.

It was noted above that the early reports on registration of title proposed an indemnity system to award compensation to persons whose latent rights in land had been destroyed by the registration of another as first registered proprietor. Their rights were protected only through the medium of money.[76] But during the debates between the Land Transfer Act 1875 and the Land Transfer Act 1897, various commentators began to consider whether the system ought to protect the latent rights in the land, leaving the proprietor to claim the state compensation. In 1886, a Bar Subcommittee reported, 'It is clearly more in accordance with equity, to allow the true owner to keep his land and to compensate the defrauded purchaser in money for the loss of his purchase, than to allow a purchaser to evict an innocent owner and to force the latter to accept a money compensation. Such an arrangement would in no way interfere with the efficiency of the registry... It would not, however, be necessary to extend this proposal to dormant claims; and in such cases the title of the purchaser might be allowed to prevail.'[77]

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69 Land Transfer Rules 1908, r.27.

70 *Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners* (1911, Cd. 5483) para. 59.

71 C.F. Brickdale & J.S. Stewart-Wallace, *The Land Registration Act 1925*, 3rd edition (Stevens, 1927) p. 274.

72 J.S. Stewart-Wallace, *Introduction to the Principles of Land Registration* (Stevens, 1937) p. 47.

73 Land Registration Act 1925, s.13(c) (safe holding title) and s.83 (indemnity).

74 See, for example, the commendation of W. Strachan, 'Registration of Title along Business Lines' *LQR* 31 (1915) 404, 407; Law Commission, *Third Report on Land Registration* (Report No.158, 1987), para. 3.23.

75 Land Registration Act 2002, s. 9(2), (3) (safe holding title) and schedule 8 (indemnity). The expanded section on safe holding title overcomes doubts raised by C.T. Emery, 'The Chief Land Registrar's Power to Approve of Good Holding Title' *Conveyancer* 40 (1976) 122.

76 There was provision for discretionary rectification in Land Transfer Act 1875, s. 96, but this power had been available only against estates that had not been warranted by registration.

77 Bar Committee, *Land Transfer* (Butterworths, 1886), p. 86.

Following this line of argument, successive bills proposed a judicial discretion to decide who would get the land and who would get the money: 'the Court is enabled to judge which, under the circumstances, would be most equitable... There are circumstances where it would be a much more just thing that the real owner should receive the money, and the other should keep the land, than *vice versa*. I should be very sorry to see any rigid rule laid down.'[78] When passed as the Land Transfer Act 1897, however, there was no discretion[79] and it was only after further recommendations in 1911[80] that a discretion was given to the court[81] and the current Land Registration Act 2002 requires rectification against the registered proprietor unless there are, thus preserving a limited element of judicial discretion through its 'exceptional circumstances' test.[82]

Because the historical origin shows that rectification is simply an alternative which takes the place of indemnity for holders of latent rights, it must also pursue similar policy objectives to indemnity. In other words, the availability of rectification contributes to the abridgement of the registry's examination of title. This connection was appreciated at an early stage. Brickdale was not too concerned whether it was the land or the compensation which went to the former rightholder when a proprietor was incorrectly registered with full warranted title, because he understood that the effect of the rectification power in either case was to create a secondary protection for rightholders which would give the registry the confidence not to pursue excessive investigations into title.[83] After many years of experience as registrar, he later wrote that rectification and indemnity in combination formed a branch of law that had been 'extremely valuable from the point of view of principle and as giving elasticity to the official procedure'.[84] It is clear, then, that rectification provision of the English registration system was developed as an integral component of the mechanisms that were designed to help the registry to exploit fully its power to accept a safe holding title.[85]

IV. Registry Operations and the Removal of 'Blemishes'

Indemnity and rectification were the central pillars which supported the objective of facilitating the registry's work under a regime of safe holding title and making the registration system more appealing to landowners. But pursuing that objective had a further effect - the curing of blemishes in title - and during the twentieth century it was claimed that this further effect could be regarded as a distinct function of registration.

When a title was examined for first registration and the registrar discovered a possible defect or blemish, he could invoke the power to accept a safe holding title in order to register the applicant without making the extensive inquiries that might be necessary to find the possible holders of these latent rights which were of doubtful existence or enforceability, provided that he believed the landowner was not likely to be disturbed. This abridgement of registry investigations was the intended function of the statutory scheme. By exercising this power, the registrar tended to produce an additional beneficial effect: that is, future dealings would be more straightforward because the title would be released from the stain of possible adverse latent rights of unknown status. Such rights were merely liable to be reinstated

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78 *Report from the Select Committee on the Land Transfer Bill* (1895, HCP xi. 1), paras. 109 and 115.
79 Land Transfer Act 1897, s. 7(1) and (2).
80 *Royal Commission on the Land Transfer Acts: Second and Final Report of the Commissioners* (1911, Cd. 5483) para. 59.
81 Land Registration Act 1925, s. 82(1).
82 Land Registration Act 2002, schedule 4, paras. 3(3) and 6(3).
83 C.F. Brickdale, *Registration of Title to Land* (Stanford, 1886) p. 47.
84 C.F. Brickdale & J.S. Stewart-Wallace, *The Land Registration Act 1925*, 3rd edition (Stevens, 1927) p. 274.
85 The link between rectification and registry acceptance of titles was also made by H. Potter, *The Principles and Practice of Conveyancing under the Land Registration Act 1925* (Sweet & Maxwell, 1934) p. 45.

through discretionary rectification. Awarding a perfect registered title had the effect of making titles simpler and reducing the fragmentation of rights in the land amongst other people, thereby promoting consolidation of ownership rights in the registered proprietor. That undoubtedly had the social advantage of making an easier job for the lawyers on any future transfer of that land. The effect of removing these possible adverse latent rights or 'blemishes' from the title was identified by one registrar, Ruoff, as a distinct function of registration. He explained that the power to accept a safe holding title, supported by indemnity and rectification, not only achieved the objective of facilitating the examination of title at first registration, but also the function of eliminating title blemishes. 'It is, perhaps, not too much to claim that one of the most useful functions of HM Land Registry in England is to cure a multitude of miscellaneous defects in unregistered titles.'[86]

The safe holding criterion was motivated by a policy of limiting the registry's inquiries into doubtful points of title. It appears relatively uncontroversial because the policy could be carried out in a manner which seeks to respect latent rights by imposing a high threshold before they are ruled out by registration of the applicant. To push the safe holding criterion beyond its original function in order to pursue an overt policy of eliminating blemishes, motivated by a desire to 'cure' titles of defects, is far more controversial. The latter approach seems to encourage a deliberate effort to destroy rights encumbering property on the weak justification that inquiring into them would be inconvenient and that their destruction would be make future dealings less troublesome. There is doubt whether it should be seen as an inherent function of English registration or as the effect of the administration's lust for rationalisation. It is accepted that the effect of removing blemishes during the twentieth century administration was highly effective to bring a degree of certainty into titles where an excessively cautious approach in the registry could instead have insisted on the widespread grant of unwarranted titles to preserve any omitted rights. But it must be remembered that despite the registrar's extravagant comments, the registry was far from allowing this alleged function of blemish removal to dominate its administration of the safe holding criterion. Practitioner materials attest the rigorous nature of the evaluation carried out by the registry and it must be recognised that the alleged function of blemish removal was kept within limits. It was constrained by the inherent content of the safe holding criterion which applied only where a title defect was genuinely raised on the application materials and only where genuine and justifiable doubt existed over the existence or enforceability of any adverse right. It was also constrained by the purpose for which the power had been created, namely to abridge inquiries where the benefits in saved time and cost during registry examination would outweighed the likely social costs that would result. In the light of these constraints, it is perhaps more accurate to describe the removal of blemishes not as a *function* of the registration system but rather as an incidental *effect* of its administration which produced a nett social benefit when applied within certain constraining parameters.

V. Interaction of the Blemish Removal Function with the Other Aspects of Registration

If the removal of blemishes in titles is to be accepted as a genuine function of the registration system, then it is necessary to appreciate its location within the web of land registration principles and policies that would be impacted in the event of an intensified pursuit of the removal of blemishes. Any greater liberality by the registry in applying the safe holding criterion, would advance the policy of faster and cheaper examinations, it would promote the policy of certainty by decreasing the usage of the unwarranted grades of title, and it might decrease the need for legal practitioners specialising in unregistered title. But a heightened

[86] T.B.F. Ruoff, *An Englishman Looks at the Torrens System* (Law Book Co, 1957) p. 83.

emphasis on removing blemishes might lead to a greater incidence of people seeking to protect their latent rights that would be extinguished by first registration of another with warranted title and this could interfere with various other policy objectives of registration. Protection for latent rights is achieved in various ways which might be expected to see increased activity: for example, there is the opportunity for a rightholder to request notification of adverse applications for first registration[87] and the rightholder has the right to object to an adverse application for registration[88]; and more challenges to registry decisions by judicial review when the registrar rejects an objection as groundless.[89] Greater pursuit of the removal of blemishes would also raise the number of people coming forward after first registration to seek redress for the loss of their rights. This would be a costly result as their claims could be enforced against the indemnity fund[90], which might necessitate an increase in the contributions from registry users. Most of all, an increased risk of people losing rights would cause an increase in claims to rectification of the register[91] with a counter-productive effect on the principle of reliability of the register.

From amongst these, the power of rectification stands out because of its capacity to upset the expectations of a person who relies on the register and particularly its potential to affect the land market detrimentally by discouraging purchasers. Under the English system of registration, an equilibrium is reached between the expeditious sifting of applications using the safe holding criterion, the protection of latent rightholders through rectification or indemnity, and the safeguarding of other persons who rely on the accuracy of the register. The lack of total reliability of the register is the price that is extracted for having a discretionary power to reinstate latent rights that were overlooked in the registry's process of examining title at first registration. With such a powerful impact on the reliability of the register, the law on rectification of the register should be precise, highly predictable and closely tailored to its policy objective. Unfortunately that is not true of its current legislative embodiment which creates serious interpretative problems and is poorly aligned to advancing the goals of registration, and is therefore not a good template for supplementing the function of blemish removal.

VI. The Contemporary Environment and Pressures

Even if the removal of blemishes could have been recognised as a function of registration during the twentieth century administration, it is less obvious that it should retain this status in the twenty-first century. Various developments in land tenure, law, administration and policy have reduced the incentive to take a vigorous stance towards removing blemishes. There have been changes in the patterns of landholding: titles are no longer fragmented by strict settlements, for example, which have long since fallen out of favour. The acceleration of land registration means that 85% of the country's land has already undergone first registration, so that each year the number of titles submitted for first registration is proportionately lower, leading to less scope for usefully invoking the power to accept a safe holding title. Changes in the law of real property have also contributed to greater simplicity in many unregistered titles. In particular, certain rights in unregistered land must be entered in a central record on pain of unenforceability[92], and statutory trust mechanisms have been

87 Land Registration Act 2002, s. 15.
88 Land Registration Act 2002, s. 73.
89 *R (DeVere) v Land Registry* [2013] EWHC 2477, para. 95 (HHJ Thornton QC).
90 Land Registration Act 2002, schedule 8.
91 Land Registration Act 2002, schedule 4.
92 Land Charges Act 1972, s. 4.

imposed to protect against fragmentation.[93] The enactment of human rights in domestic law[94] has also brought a heightened awareness of the need to respect property rights and it is conceivable that this might encourage a more cautious attitude towards compilation of the register.

On an policy level, the inclination of the registry to use the power to accept a safe holding title in an aggressive way to eliminate blemishes might have waned. The registry's priorities when exercising its powers might well be rebalanced from time to time. There might be new considerations of prudence or finance, for example, which commend themselves to registrars when deciding whether or not to accept a blemished title. For example, the registry might perceive that the payments from the indemnity fund have been excessively high and an appropriate response could be a policy of greater caution in accepting titles. The registry's willingness to accept safe holding titles might also be influenced by its sensitivity towards maintaining public confidence in the registration system, forestalling any administrative law challenges[95], and warding off any concerns over the constitutional implications of consciously taking steps that would expropriate the holders of latent rights. The risk to rightholders of the executive branch of government 'unjustly, illegally, mistakenly or tyrannically depriving them of their land by declaring itself or some other persons to have absolute title to their land'[96] was raised as an objection to the registrar's powers over a century ago[97] and probably has even greater force in the current climate as a brake on the acceptance of safe holding titles. Although Ruoff asserted that it was the registrar's 'prime and justifiable aim to endeavour to cure for all time the greatest possible number of defective titles'[98], perhaps it is indicative of the prevailing mood that this comment has been withdrawn from the leading practitioner textbook.

VII. Conclusion

The English system has a curious heritage stemming from the early problems of enticing landowners to take advantage of registration in the days before it was compulsory. In order to facilitate the registry's examination of title, the process of examining title for compilation of the register was aligned more to the process carried out by buyers; it relies on the proof of title submitted by the applicant himself in the first instance and the registry's role is to see that the standard of proof matches that which would have been accepted by a court of equity in a suit for specific performance or to exercise the power to accept a proof merely to the standard that a willing purchaser might reasonably be advised to accept. This system continues today. One of its practical effects is to remove blemishes from titles but it must remain questionable whether this effect is properly described as a function. Certainly it promotes the acknowledged goals of promoting confidence in ownership and simplicity in

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93 Law of Property Act 1925, s. 2.

94 Human Rights Act 1998, Schedule.

95 The courts have hitherto taken a deferential, unintrusive posture: *Dennis v Malcolm* [1934] Ch 244 (no jurisdiction by way of appeal from rejection); *Diep v Land Registry* [2010] EWHC 3315 (upholding policy of awarding non-guaranteed form of registered title); *R (DeVere) v Land Registry* [2013] EWHC 2477 (refusing permission to launch judicial review).

96 J.S. Stewart-Wallace, *Introduction to the Principles of Land Registration* (Stevens, 1937) p. 44.

97 *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) para. 86; J. Goodeve, *Shall We Transfer our Lands by Register?* (Benning, 1854), p. 38; Bar Committee, *Land Transfer* (Butterworths, 1886), p. 55; T. Key, 'Registration of Title to Land' *LQR* 2 (1886) 324, 335; W. Strachan, 'Land Transfer Registries' *LQR* 15 (1899) 15; C. Sweet, 'The Land Transfer Act' *LQR* 24 (1908) 25, 31.

98 R.B. Roper *et al*., *Ruoff & Roper on The Law and Practice of Registered Conveyancing* (Sweet & Maxwell, 1998) para. 12-47 (omitted from the subsequent edition).

future transactions, following a long-established tradition of English common law doctrines designed to 'quiet' the possession of land by extinguishing dormant rights,[99] but this imports the statistical certainty that it will occasionally damage the property rights of others without adequate warning. That is a consequence which is increasingly controversial as society is more attuned to human rights and the protection of property and more sensitive to control of the Executive's destructive powers; as administrative bodies are more aware of frauds and correspondingly sceptical of lower standards of diligence; and as the prospect of privatised delivery of registry services focusses attention on the financial effects of its policies.[100]

The final question is whether the function of removing blemishes might be suitable as a design for adoption in EU registration schemes. There are three issues of special importance in answering that question. First, to what extent does the context indicate that a nation's titles are afflicted by blemishes whose removal would facilitate future land dealings? The very concept of a blemish presupposes an unregistered system which depends on private proof and examination of title: one which relies heavily on documentary evidence of title, has a tradition of written dispositions, and in which ownership is not traced back to an indefeasible root of title. It presupposes a system which causes trouble for land transactions because it allows concealed rights to prevail against a good faith purchasers, lacks convenient processes for extinguishing such rights by short periods of prescription, notices or judicial actions, or for effectively protecting against them through private insurance. And it also presupposes a system in which lawyers have a sound basis for making an informed prediction whether a latent potential right ever truly existed, has ceased to exist or has ceased to be enforceable. Only in these conditions can one say that there is a concept of title blemish which would be capable of remedy through the registration system.

Second, what is the institutional design for the examination of title? Under the English model, the effect of removing blemishes follows from the use of the safe holding criterion which owes its existence to the historical motivations which forced the registry to align its examination processes with the investigations carried out by willing buyers. On the other hand, if a proposed registration scheme were to involve a full and final judicial inquiry into the validity of all rights affecting the land, then it would be inappropriate to rely predominantly on an applicant's bundle of title deeds without a wider trawl of other sources of information and a thorough inquest into rival claims; under this form of examination, the motivation for abridging the examination processes is clearly superseded and so the justification for accepting a safe holding title, with its effect of blemish removal, is displaced.

Third, would the function of removing blemishes be able to interact satisfactorily with the other policies and doctrines of the proposed registration scheme? It goes without saying that the proposed scheme must be willing to tolerate the extinguishment of latent rights. But that does not mean that they must go without any hope of redress: any proposed scheme would be expected to adopt protective devices for such rights, possibly including opportunities to request notification, opportunities to influence registry decisions and opportunities to seek review of them. A proposed scheme would also have to consider the offer of protection through a compensation plan such as the English indemnity, which would have significant budget implications and require a careful cost-benefit analysis. The option of providing protection through other means, such as overriding interests and rectification, could also be considered. It would be possible to preserve the full effectiveness of latent rights despite their absence from the register, as is seen for the most important and vulnerable rights under the English model[101], but this would require acceptance of a derogation from the

[99] See footnote 17.

[100] Department for Business, Innovation and Skills, *Introduction of a Land Registry Service Delivery Company* (UK Government, 2014).

[101] Land Registration Act 2002, schedule 1.

register's comprehensiveness. It also would be possible to allow latent rights the possibility of discretionary reinstatement, as is seen in the doctrine of rectification under the English model[102], but this would require acceptance of a derogation from the register's reliability. Finally, any proposed scheme would have to consider whether the extensive administrative power under the English model would be an acceptable basis for removing blemishes. 'Safe holding title' is not strictly defined in law but a broad evaluative standard which affords the registrar a substantial freedom to promote efficient administration and enables fluctuations in policy as the registry responds to changing environment. But this particular attribute would not be essential to a system for removing blemishes: any new scheme should consider whether the types of undesirable fragmentation due for removal should be more carefully targetted, and whether the principles for the exercise of the registry power should be more transparent.

[102] Land Registration Act 2002, schedule 4.